Neutral Citation Number: [2019] EWCA Civ 24

Case No: A3/2017/2924

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Marcus Smith
[2017] CAT 15

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2019

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE NEWEY
and
SIR TIMOTHY LLOYD

- -

Between:

GASCOIGNE HALMAN LIMITED	**Appellant**
- and -	
AGENTS' MUTUAL LIMITED	**Respondent**

- -
- -

Mr Paul Harris QC and Mr Philip Woolfe (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellant**
Mr Alan Maclean QC and Mr Josh Holmes QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Hearing dates: 27-29 November 2018

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Approved Judgment

Lord Justice Newey:

1. Nowadays, estate agents commonly market properties on online property portals as well as in more traditional ways. This case relates to one such portal, "OnTheMarket", which was launched by the respondent, Agents' Mutual Limited ("Agents' Mutual"), on 26 January 2015. At the time, there were only two major portals, Rightmove, which was the market leader, and Zoopla, which traded using the brand "Primelocation" as well as under its own name.

2. Agents' Mutual was established in 2013 by a number of estate agents and at the relevant times had only estate agents as members. The legal relationships between Agents' Mutual and its members are the subject of three documents: Agents' Mutual's articles of association ("the Articles"); membership rules made pursuant to article 25 of those articles ("the Membership Rules"); and a "Listing Agreement" pursuant to which a member agrees to list its properties on OnTheMarket. Until recently, the documents laid down three rules which are at the heart of this appeal: the "One Other Portal Rule", the "Bricks and Mortar Rule" and the "Exclusive Promotion Rule". The first of these, the One Other Portal Rule, stipulated that a member might list its properties on no more than one other portal. The Bricks and Mortar Rule restricted membership to full-service office-based estate or letting agents, as opposed to those operating only an online business model. The Exclusive Promotion Rule required members to promote only OnTheMarket and no other portal.

3. The appellant, Gascoigne Halman Limited ("Gascoigne Halman"), which is an estate agent, agreed to subscribe to OnTheMarket and, to that end, entered into a Listing Agreement with Agents' Mutual in January 2014. The One Other Portal Rule and the Exclusive Promotion Rule were provided for in, respectively, paragraph 6 and paragraphs 7 and 8 of this agreement. Paragraph 6 stated:

> "We confirm our understanding that [Agents' Mutual] will, through its directors, seek to implement the requirement during the Listing Period [viz. a period of five years] that we list our UK residential sales and lettings properties on the Portal [i.e. OnTheMarket] and our website together with a maximum of one other competing portal ('Third Party Portal') in accordance with the terms of this letter (the 'Exclusivity Requirement'). We hereby undertake that we will comply and procure that each member of our Group (as defined in Appendix 4) complies with the Exclusivity Requirement at all times."

Paragraphs 7 and 8 were in these terms:

> "7. We agree that from the Listing Date we will promote the Portal to our registered applicants, vendors and landlords and agree not to promote any other portal (including but not limited to the Third Party Portal save in accordance with and as permitted by this paragraph 7). In addition, we agree to promote consumer usage of the Portal in support of the overriding aim of creating a marketing leadership position for the Portal. Notwithstanding these requirements it is, however, acknowledged between us and [Agents' Mutual] that we are

> permitted to advise prospective vendor/landlord clients that we use the Third Party Portal and to reference the Third Party Portal in our marketing material.
>
> 8. In addition, we hereby acknowledge that from the Listing Date we will be required to co-operate generally in co-branding our business and each member of our Group (as defined in Appendix 4) with [Agents' Mutual]. In particular, we understand that we will be required to include [Agents' Mutual's] branding and that of its website, on all our consumer communications and marketing materials, sales particulars and digital communications (relating to UK residential sales and lettings properties) and in our office windows (using window stickers and/or display cards). We also agree to include a hyperlink to the Portal on our website. We hereby undertake to comply, and to procure that each member of our Group complies, with the co-branding requirements at all times."

4. Unlike the One Other Portal Rule and the Exclusive Promotion Rule, the Bricks and Mortar Rule was not derived from the Listing Agreement but from the Membership Rules. Rule 2 of the Membership Rules provided that a member "must be an Estate or Letting Agent", defined in schedule 1 as:

> "a bona fide office-based estate or letting agent offering a full range of agency services including valuations, attending viewings and liaison between the parties to an agreed sale or letting in pursuance of exchange of contracts".

5. In November 2015, Gascoigne Halman was acquired by Connells, which was one of the largest corporate estate and lettings agency groups and had entered into a strategic relationship with Zoopla. Not long afterwards, Gascoigne Halman told Agents' Mutual in an email that "as a subsidiary company to the Connells Group it was always inevitable that we would appear on Zoopla and this is likely to take effect later this week. As such it is my understanding that we will fall foul of the [OnTheMarket] one other portal ruling and be no longer eligible to appear on your site". From no later than 11 February 2016, Gascoigne Halman listed its properties on both Rightmove and Zoopla as well as on OnTheMarket.

6. On 17 February 2016, Agents' Mutual issued the present proceedings, alleging breach by Gascoigne Halman of the One Other Portal Rule. Amongst the points that Gascoigne Halman raised by way of defence was the contention that its agreement with Agents' Mutual was void because the One Other Portal Rule, the Bricks and Mortar Rule and the Exclusive Promotion Rule infringed competition law and, more specifically, the "Chapter I prohibition" for which the Competition Act 1998 provides.

7. On 5 July 2016, Sir Kenneth Parker made an order under which the competition issues in the litigation were transferred from the Chancery Division to the Competition Appeal Tribunal ("the CAT"). The issues came on for trial before Marcus Smith J (chairman), Mr Peter Freeman QC and Mr Brian Landers in the CAT.

In a judgment dated 5 July 2017, the CAT decided the issues against Gascoigne Halman.

8. On 5 October 2017, Marcus Smith J, this time as a Judge of the Chancery Division, ordered the competition issues in the main (Chancery) proceedings to be determined in accordance with the CAT's judgment as if that judgment had been a judgment in those proceedings. Strictly, the present appeal is from that order. In substance, however, the appeal is against the CAT's conclusions.

9. It is also worth mentioning at this stage that in September 2017 Agents' Mutual demutualised and became a subsidiary of OnTheMarket plc, which was admitted to trading on the AIM market of the London Stock Exchange in February 2018. The Bricks and Mortar Rule no longer applies and estate agents can now opt to enter into listing agreements that do not contain the One Other Portal Rule.

The legislative framework

10. The "Chapter I prohibition" is imposed by section 2 of the Competition Act 1998 ("the 1998 Act"). Section 2(1) of the 1998 Act states:

> "Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part."

Any agreement or decision which is prohibited by section 2(1) is void: see section 2(4).

11. Section 9 of the 1998 Act deals with exempt agreements. It provides:

> "(1) An agreement is exempt from the Chapter I prohibition if it—
>
> (a) contributes to—
>
> (i) improving production or distribution, or
>
> (ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and
>
> (b) does not—
>
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
>
> (2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied."

12. Sections 2 and 8 of the 1998 Act reflect article 101 of the Treaty on the Functioning of the European Union ("the TFEU") (replacing article 81 of the Treaty establishing the European Community ("the TEC")). Article 101 is in these terms:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings,
>
> - any decision or category of decisions by associations of undertakings,
>
> - any concerted practice or category of concerted practices,

> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

13. Section 60 of the 1998 Act seeks to ensure that, so far as possible, questions arising under Part I of the 1998 Act (which includes sections 2 and 8) in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Union law in relation to competition within the EU: see section 60(1). To that end, section 60(2) stipulates that, when the Court determines a question arising under Part I of the Act:

> "it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in EU law."

Further, the Court must have regard to any relevant decision or statement of the European Commission: see section 60(3).

14. Section 2 of the 1998 Act and article 101 of the TFEU both bar agreements which "have as their object or effect the prevention, restriction or distortion of competition". The words "object or effect" are to be read disjunctively, so that an agreement can fall foul of the relevant prohibition *either* because its object is "the prevention, restriction or distortion of competition" *or* because it has that effect. On the other hand, an agreement within the scope of section 2 will be exempt from the Chapter I prohibition if it satisfies the conditions set out in section 9.

15. It is also noteworthy at this stage that a restriction that might otherwise be thought to be within the scope of section 2 of the 1998 Act or, as appropriate, article 101 of the TFEU may be capable of being justified as objectively necessary to a legitimate operation or activity. The Court of Justice of the European Union ("the CJEU") said this on the subject in Case C-382/12 P *MasterCard Inc v European Commission* [2014] 5 CMLR 23:

> "89. It is apparent from the case law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in art.81(1) EC, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other ….
>
> 90. Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with art.81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in art.81(1) EC.
>
> 91. Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in art.81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in art.81(1) EC."

The proceedings before the CAT and this Court

16. It was Gascoigne Halman's case before the CAT that the One Other Portal Rule, the Bricks and Mortar Rule and the Exclusive Promotion Rule all constituted "by object" infringements of the Chapter I prohibition. Gascoigne Halman also alleged that the One Other Portal Rule (but not the Bricks and Mortar Rule or the Exclusive Promotion Rule) involved a "by effect" infringement.

17. The CAT did not accept any of these points. It found that the One Other Portal Rule did not infringe the Chapter 1 prohibition by either object or effect and, further, that the rule was in any event "objectively necessary to the Arrangements as a whole, which are pro-competitive". The CAT also held that neither the Bricks and Mortar Rule nor the Exclusive Promotion Rule infringed the Chapter I prohibition by object. The CAT was not persuaded by a contention advanced by Agents' Mutual that the One Other Portal Rule qualified for exemption under section 9 of the 1998 Act, but, given the CAT's conclusions on other matters, this was unimportant.

18. There is no appeal from the CAT's rejection of the argument that the One Other Portal Rule represented a "by effect" restriction. Gascoigne Halman is no longer pursuing, either, its allegation that the Exclusive Promotion Rule is contrary to the Chapter I prohibition. For its part, Agents' Mutual has not sought to revive its case that the One Other Portal Rule was exempt under section 9 of the 1998 Act.

19. At the heart of the appeal is Gascoigne Halman's contention that the CAT ought to have concluded that the One Other Portal Rule and the Bricks and Mortar Rule constituted infringements "by object". Gascoigne Halman maintains, too, that the CAT was wrong to consider that the One Other Portal Rule was objectively necessary to the operation of OnTheMarket. Gascoigne Halman further takes issue with a finding that the Bricks and Mortar Rule could, if necessary, be severed, and with certain views that the CAT expressed on the construction of parts of the Membership Rules and Listing Agreement.

20. I turn then to the central question of whether the One Other Portal Rule and the Bricks and Mortar Rule breached the Chapter I prohibition as "by object" restrictions.

"By object" infringement

The CAT's judgment

21. The CAT devoted section G of its judgment to its general approach to the question of whether the Chapter I prohibition had been infringed, whether "by object" or "by effect".

22. In section G(2), headed "The relevant markets", the CAT explained that the parties had distinguished between "a property portals market in which portal providers sell to estate agents, and an estate agent services market in which estate agents sell their services to the public" (paragraph 136). The CAT emphasised the "two-sided nature" of the market, noting that the market "not only consists in selling services to estate agents, but also in providing a property viewing service to the property seeking public" (paragraph 137). It also observed that the market is subject to "network effects", saying this in paragraph 140:

> "There is an interactive relationship between the two customer groups. The more customers there are on one side, the more attractive the platform is to the other side. Thus, the more properties a portal lists, the more attractive it will be to the property-buying public, and the more members of the property-buying public it attracts the more attractive it will be to estate agents. This feature, generally referred to as 'network effects', means that a potential new market entrant must consider how best to create demand on one side of the market in order to create demand on the other, so that it may benefit from these network effects."

23. In section G(4), the CAT commented on the law relating to restriction of competition "by object". After quoting from the judgment of the CAT in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11, the CAT said this:

> "149. We draw from this statement of the law the following propositions:
>
> (1) For an agreement to be held to restrict competition 'by object' it must by its very nature reveal a sufficient degree of harm to competition, having regard to its specific legal and economic context. It is not enough for it to be merely capable of resulting in the prevention, restriction or distortion of competition.
>
> (2) In determining whether an agreement reveals a sufficient degree of harm, we must look at the content of its provisions, its objectives and its economic and legal context. In determining that context, we must consider the nature of the services that are the subject of the agreement and the structure and functioning of the market or markets in question. The parties' intentions may be relevant, but we are not obliged to take these as determinative.
>
> (3) This evaluation of harm is not the same as considering the economic effects of the agreement, which is a quite distinct exercise, only necessary if restriction 'by object' is not established. Nevertheless the agreement must be capable of having some impact on the market or markets in question. Assessing this possible impact is a strictly limited exercise not involving a full examination of market effects, or any balancing of pro- or anti-competitive effects.
>
> (4) The concept of restriction 'by object' should be interpreted restrictively in the sense that it should only be applied to those categories of agreement whose harmful nature is easily identifiable in the light of experience and well-established economic analysis.
>
> 150. Accordingly, our approach will be to examine the agreement or provision in question to see whether by its very nature, having regard to the economic and legal context, it clearly and unambiguously reveals a sufficient degree of harm to competition to make any examination of its effects unnecessary."

24. The CAT then made observations on the law relating to restriction of competition "by effect" and objective necessity (in, respectively, sections G(5) and G(6)) and "Factual determinations in a private action commenced without anterior regulatory analysis" (in section G(7)) before asking itself (in section G(8)) whether there was an "overall pro-competitive purpose to the Portal". In paragraph 166, the CAT concluded that, "[l]eaving on one side the provisions and practices that Gascoigne Halman contends are anti-competitive", "the entry of a new property portal is in principle likely to have been pro- rather than anti-competitive" in certain respects. This, the CAT said was "the prism through which the alleged anti-competitive restrictions have to be viewed" (paragraph 175).

25. In the final part of section G, the CAT summarised its approach to the alleged breaches of the Chapter I prohibition in these terms (in paragraph 176):

> "Bearing in mind the generally pro-competitive effect of a new market entrant, it is evident that, as regards each provision alleged by Gascoigne Halman to be anti-competitive, the process of inquiry must be as follows:
>
> (1) Is the provision (in the case of the One Other Portal rule, the Bricks and Mortar rule and the Exclusive Promotion Rule) anti-competitive 'by object'?
>
> (2) Is the provision (in the case of the One Other Portal Rule) anticompetitive 'by effect'?
>
> (3) If the provision appears to be anti-competitive is it, in all the circumstances, necessary to achieve an overall neutral or procompetitive goal? This, third, question is the question of objective necessity."

26. The CAT next addressed, in section H, the One Other Portal Rule. Section H(1), comprising paragraphs 178-195, relate to whether the One Other Portal Rule was a "by object" restriction. In paragraph 180(3), the CAT said as regards a submission that Agents' Mutual's members had undertaken "to restrict themselves as regards a significant parameter of competition" in the market for estate agency services:

> "Estate agents do not compete as to the number of portals on which their properties are advertised. They do compete in terms of the provision of the most effective selling service of properties or (which is not the same thing) the provision of what prospective customers perceive as the most effective selling service. We accept that subscription to one or more portals forms a part of that service. We also accept that, given the increasing importance of portals, advertising properties on one of the main portals would be regarded by potential vendor customers of estate agents as important, and so would form part of the service provided by an estate agent even if that estate agent was him- or herself not especially convinced of the efficacy of portals as an advertising medium. We further accept that most estate agents consider property portals to be extremely useful in advertising their properties. Finally, we accept that most vendors would regard an estate agent not signed up to at least one of the major portals (that is, one of Rightmove or Zoopla) as an estate agent not to instruct. Beyond this, we are not prepared to regard portals as a 'significant parameter of competition' as stated by Gascoigne Halman."

27. Turning to "Legal and economic context", the CAT said this in paragraph 181:

"When considering the nature of the One Other Portal Rule, it is important to bear three points in mind:

(1) First, neither Agents' Mutual nor OnTheMarket was alleged to hold any significant degree of market power in either of the two relevant markets we are considering. To the contrary, OnTheMarket was a new entrant to the property portals market, with all the market weakness that that generally implies.

(2) Indeed, secondly, in the case of markets with two-sided platforms, new entrants suffer from a much greater barrier to entry than in the case of products that only need to deal with a single group of customers as opposed to two inter-related groups of customers. It is difficult for a new entrant to establish itself in these circumstances. Because of the two aspects of demand linked by the platform, it is difficult to attract the listings of estate agents without having attractive 'footfall' (that is, visits to the portal) from the property buying public; and it is difficult to attract such 'footfall' without the listings ….

(3) Thirdly, estate agents have an entirely free choice whether or not to join Agents' Mutual and participate in OnTheMarket. It is only if the estate agent chooses to join that that estate agent becomes subject to the One Other Portal Rule. Should an estate agent choose not to join then the status quo is unaffected. That estate agent will, obviously, not be subscribing to OnTheMarket, but there is nothing to prevent an estate agent from purchasing advertising from Rightmove, Zoopla and/or any other portals.

(4) It follows that the One Other Portal Rule is a restriction freely accepted by an estate agent as part of the price of accessing OnTheMarket. The nature of the restriction – which binds the moment the estate agent becomes a Member both in terms of its horizontal and vertical effects – is to impose on all participating estate agents a measure of exclusivity in relation to portals in general. The rule is not one of absolute exclusivity – estate agents are not required to purchase their 'portal' advertising only from OnTheMarket – but is a variant on the exclusivity theme. Participating estate agents must advertise their properties through OnTheMarket and can choose to do so through one other (but only one other) portal.

182. In short, we consider that the one other portal rule is to be characterised, in terms of its nature, as a semi-exclusive purchasing obligation: that is an obligation to purchase advertising from a given portal, not to the exclusion of all other portals, but to the exclusion of all other portals but one, and that its economic and legal context strongly suggest that its nature and purpose are not to harm competition."

28. The CAT proceeded to consider in turn the horizontal and vertical aspects of the One Other Portal Rule. As regards the horizontal position, the CAT said this (in paragraph 184(5)):

> "Turning now to the One Other Portal Rule itself, we do not consider that this can be said to reveal a clear and obvious harm to competition:
>
> (i) In the first place, this is a case where estate agents, through their membership of Agents' Mutual, might be said to be seeking a cheaper and more efficient solution to their portal advertising needs. We do not consider that the limited exclusivity provided by the One Other Portal Rule can be said clearly and unambiguously to have the object of restricting competition. To the contrary, having regard to the economic context in which the provision was intended to operate – that is, in a market having the characteristics we describe in paragraph 181(2) above – the nature of the provision suggests a procompetitive object.
>
> (ii) Secondly, the fact that the One Other Portal Rule is not exclusive but permits Members (if they wish) to use or continue to use one other portal appears to create competition between the two established portals. Whilst we must be careful not to confuse identifying the object of the restriction with assessing its economic effects, we are required to consider the economic context in which it operates and allowed to consider whether it is likely to have any impact on the market. The evidence described in Section E above shows that the One Other Portal Rule was likely to increase competition between Rightmove and Zoopla in that both Rightmove and Zoopla would pay greater attention to the demands of estate agents subscribing or thinking of subscribing to Agents' Mutual because they appreciated that membership of Agents' Mutual entailed one or other of them being dropped.
>
> (iii) Thirdly, we have in mind the need to apply the concept of restriction 'by object' restrictively and not to extend it to hitherto untainted categories of conduct, such as this. The One Other Portal Rule is a provision whose object can be seen as pro-competitive, providing as it does a means of new market entry, and it does not obviously fit any previously established category of object restrictions.
>
> (iv) Finally, whilst we do not regard the parties' intentions as determinative, we note from the evidence in Section E above that the overriding purpose of Agents' Mutual in launching its new Portal was to compete with the established property portals and provide cost reduction benefits to its Members. This is not, in our view, a clearly anti-competitive purpose."

The CAT accordingly concluded (in paragraph 185) that "the One Other Portal Rule, taken by itself, is not a 'by object' restriction on competition by reason of the horizontal Arrangements between estate agents who are Members of Agents' Mutual".

29. The CAT went on to look at the One Other Portal Rule "as a vertical restraint on the ability of each Member to list its properties on more than one property portal" (paragraph 186). It concluded that it could "see nothing that would suggest that the vertical Arrangements between Agents' Mutual and its Members had the object of restricting competition" (paragraph 190). It noted that "vertical agreements are generally presumed to be pro-competitive" (paragraph 188) and continued:

> "As the [EU Commission's 'Guidelines on Vertical Restraints'] state (at paragraph 6):
>
> > 'For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or buyer, or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies.'
>
> In the present case Agents' Mutual does not have market power either in the property portals market, where it is a new entrant, or in the estate agents market, where its Members, though significant in terms of numbers of estate agency branches, account for only a small share of relevant purchase revenues."

30. At that point, the CAT "provisionally" concluded the One Other Portal Rule, whether viewed from the horizontal or the vertical perspective, "does not (taken by itself) constitute a restriction 'by object' of the Chapter I prohibition" (paragraph 191). However, the CAT considered it necessary to review that conclusion in the light of, among other things, attacks that Gascoigne Halman had mounted on the duration and variability of the rule.

31. In that regard, the CAT explained that Gascoigne Halman "contended that both the duration of the One Other Portal Rule and the fact that it could not be varied were factors that needed to be taken into account when considering whether the One Other Portal Rule was a 'by object' infringement of the Chapter I prohibition" (paragraph 194). The CAT, however, remained of the view that the One Other Portal Rule was not a 'by object' infringement (paragraph 195). It gave these reasons (in paragraph 195):

> "(1) Whilst there may be cases where the duration of a provision is a factor that affects whether or not that provision is or is not anti-competitive, this is not such a case. We accept that were the OnTheMarket Portal to achieve success on the scale of Rightmove – ie, dominance – then that might render the One Other Portal Rule anti-competitive, whether 'by object' or 'by effect'. We express no view, because the fact is

that OnTheMarket is very far from achieving a status of dominance or anything like it.

(2) We appreciate, of course, that it is Mr Springett's [i.e. Agents Mutual's chief executive's] and Agents' Mutual's aim to get to 'tipping point 2', where OnTheMarket rivaled Rightmove as the 'number 1' portal. But we are not obliged to take the parties' intentions as determinative of our assessment: these are mere aspirations, and with all due respect to Mr Springett, that is how we must regard such statements. We consider that the provisions that Gascoigne Halman contends to be anti-competitive must be assessed in light of the facts as they stand now. Should the situation change, and (for example) Agents' Mutual both achieves dominance in the market for its Portal and persists in maintaining the One Other Portal Rule, then the potential for that rule to offend the Chapter I (or indeed the Chapter II prohibition) would have to be considered. But that is not a matter for this Judgment. We consider that it would be entirely wrong to assess the anti-competitive object of the One Other Portal Rule by reference to the parties' aspirations against an uncertain future.

(3) What is more, as the communications in Section E demonstrate, Agents' Mutual was careful to take legal advice, and we would be surprised if Agents' Mutual were to persist with a provision that was anti-competitive (because, say, of the dominance of the Portal).

(4) Gascoigne Halman contended that there was no evidence that Agents' Mutual in general, or Mr Springett in particular, had given any serious consideration to or undertaken any analysis of the minimum period needed for OnTheMarket successfully to enter the property portals market. This contrasted with the extensive market analysis carried out by the new entrant in the case of *BAGS v AMRAC* ('*BAGS*') (a case which Agents' Mutual had cited in support of its market entry argument) to find out the least restrictive justifiable entry level. Instead, so Gascoigne Halman contended, Mr Springett, working on a small budget without support, had essentially relied on his own judgment in the matter.

(5) On the facts, it is no doubt correct that Mr Springett simply exercised his commercial judgment, without undertaking extensive analysis. We proceed on this basis. In our judgment, the suggestion that, before introducing the One Other Portal Rule, Agents' Mutual was obliged to carry out a detailed assessment in order to determine what the duration of the rule should be, is misconceived. Whilst the steps taken by the new entrant in the *BAGS* case were no doubt professional and impressive, that was a quite different industry with different characteristics. The case does not establish, in our view, that

> such steps must be taken by every new entrant to every market. Instead, what is needed is a serious and professional assessment that is appropriate to the context. In this case, we are satisfied, from Mr Springett's evidence, that he believed, on the basis of his experience and professional judgment, that a duration of five years was appropriate, and that the need for the One Other Portal rule to continue in its original form would be reviewed as OnTheMarket's business developed. That, we conclude, was all that was appropriate or necessary in the present case.
>
> (6) As to the ability to vary the One Other Portal Rule, Gascoigne Halman contended that Agents' Mutual was actually unable to vary the rule without its (Gascoigne Halman's) consent. Whilst it is ironic to consider a case where the very party alleging a provision is anticompetitive is also refusing to alter it, we do not consider Gascoigne Halman's contention to be correct …."

32. Turning (in section I) to whether the Bricks and Mortar Rule was a "by object" infringement, the CAT observed that Gascoigne Halman's closing submissions were "remarkably silent" on this, "simply assert[ing] that this is a restriction by object" (paragraph 252). The CAT disagreed, considering that Gascoigne Halman had not demonstrated that the rule was, by its very nature, sufficiently harmful to competition as to obviate any need for an effect-based examination of the provision (paragraph 253). The CAT observed that the rule was "intended to enable like-minded undertakings to combine to provide a service ancillary to their business that they all need in order to do their business" (paragraph 253(3)) and then said this:

> "(4) In our view, the Bricks and Mortar Rule has the purpose of defining the nature and scope of the business created by Agents' Mutual, rather than clearly having the object of harming competition from or as between those undertakings not covered by its terms. It might possibly have such an effect, but this has not been alleged by Gascoigne Halman, whose allegation is confined to saying this is a restriction 'by object', and we make no finding in this regard.
>
> (5) We decline to regard such a provision – particularly when contained in the rules of an undertaking that clearly has little or no market power – as anti-competitive 'by object'. Viewing the rule as a vertical restraint (ie, as between each Member and Agents' Mutual) leads to the same conclusion."

33. It is also to be noted that the CAT found that the One Other Portal Rule was necessary to facilitate Agents' Mutual's entry into the market. The CAT stated in paragraph 233, for example, that the One Other Portal Rule "was an essential part of OnTheMarket's entry strategy and central to its chances of success". In a similar vein, the CAT said in paragraph 245:

> "we consider that the only viable way Agents' Mutual could succeed in establishing itself as a portal was to attract estate

> agents and to encourage them to put their properties onto the new (rival) platform in a manner that was not altogether duplicative of listings on other portals. We do not consider that Agents' Mutual could simply hope that estate agents would shift their properties away from their existing portals: without some form of obligation to that effect, estate agents would simply duplicate their listings."

Gascoigne Halman's case in outline

34. It is Gascoigne Halman's case that the approach that the CAT adopted was wrong. The CAT's "major error", it is suggested, was that it "wrongly focussed on the fact that [Agents' Mutual's] *portal* was a new entrant to the market and failed to have any, or any proper, regard to the *actual contractual restrictions* on the Member estate agents". According to Mr Paul Harris QC, who appeared for Gascoigne Halman with Mr Philip Woolfe, it was incumbent on the CAT to ask itself whether the specific contractual provisions at issue revealed a sufficient degree of harm to competition. Save where restrictions are properly objectively necessary, Mr Harris argued, questions of whether restrictions are permissible in the light of wider competitive purposes or effects (such as market entry) arise only at a subsequent and conceptually distinct stage of analysis, namely, exemption under section 9 of the 1998 Act. The CAT nevertheless, so Mr Harris said, considered that the One Other Portal Rule and the Bricks and Mortar Rule had to be viewed through the "prism" of the pro-competitive purpose that the OnTheMarket portal was alleged to have overall and also had regard to effects that the former rule had in the event had. Mr Harris submitted that the CAT ought to have concluded that the One Other Portal Rule had as its object the restriction, in the market for the provision of estate agency services, of the number and identity of portals on which agents would list (which the CAT ought to have recognised as a significant parameter of competition) and, in the portals market, of the property content available to OnTheMarket's rivals. The CAT should have found too, Mr Harris suggested, that the Bricks and Mortar Rule had the "naked anti-competitive 'object' of excluding from [Agents' Mutual's] portal a significant group of estate agents using lower cost and differentiated business models". In fact, Mr Harris maintained, the purpose of the One Other Portal Rule over its five-year plus term could be seen to have been to "knock over" one competitor (Zoopla) and then to displace the other (Rightmove); the CAT was wrong to dismiss such aims as "mere aspirations". Mr Harris contended that the CAT was further wrong to disregard the duration of the rule on the footing that it could be dispensed with if it proved to be anti-competitive; to hold that the "object" test should not "extend … to hitherto untainted categories of conduct"; and to have regard to the absence of a regulatory decision or investigation, to the fact that the One Other Portal Rule was "freely accepted" by members and to the fact that Agents' Mutual "was careful to take legal advice".

Authorities

35. The leading case on "object" infringement is Case C-67/13P *Groupement des Cartes Bancaires (CB) v European Commission* [2014] 5 CMLR 22. The CJEU there said this in its judgment:

> "49. In that regard, it is apparent from the Court's case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects ….
>
> 50. That case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition ….
>
> 51. Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying art.81(1) EC, to prove that they have actual effects on the market …. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
>
> 52. Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent ….
>
> 53. According to the case law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of art.81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question …."

In a similar vein, the CJEU said (at paragraph 57 of its judgment) that:

> "the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition".

36. It can be seen from these passages that, for an agreement to restrict competition "by object", it must reveal a sufficient degree of harm to competition that it is unnecessary

to examine its effects. That will be the case if it involves a form of coordination that can be regarded, by its very nature, as harmful to the proper functioning of normal competition. In deciding whether a "sufficient degree of harm" is apparent, regard must be had to, among other things, the provision's objectives, the economic and legal context and the "real conditions of the functioning and structure of the market or markets in question".

37. At paragraph 58 of its judgment in the *Cartes Bancaires* case, the CJEU commented on an observation by the General Court that "the concept of infringement by object should not be given a strict interpretation". As to that, the CJEU said:

> "the General Court erred in finding … that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by art.81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant."

38. The General Court had thus been wrong to consider that the concept of restriction of competition "by object" should not be interpreted "restrictively". In other words, the concept *is* to be interpreted restrictively. Whish and Bailey, "Competition Law", 9th ed., comments (at 125):

> "the clear statement [in *Cartes Bancaires*] that the concept of an object restriction should be interpreted restrictively is a very significant one and means, at the very least, that the size of the object box should not be expanded unduly".

39. The other cases to which we were taken seem to me to add relatively little of significance to this part of the case. One of them was Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2009] 4 CMLR 6. That case concerned an attempt by processors to reduce overcapacity in the Irish beef processing industry by means of agreements under which processors remaining in the industry would fund payments to processors willing to cease production. Unsurprisingly, it was held that such agreements had as their object the restriction of competition. Mr Harris emphasised that the Court noted that "the types of agreement covered by Article 81(1)(a) to (e) [of the TEC] [now, article 101(1)(a) to (e) of the TFEU] do not constitute an exhaustive list of prohibited collusion" (paragraph 23 of the judgment) and that the Court referred to the fact that the object of the arrangements was "to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors" (paragraph 31). Mr Harris submitted that the decision shows that "object" restrictions do not have to be interpreted narrowly and that changing the structure of the market appreciably is of great significance in an "object" case.

40. However, it does not follow from the fact that an agreement can involve an "object" restriction without being of a type specified in article 101(1)(a) to (e) of the TFEU that the concept of restriction of competition "by object" ought not to be interpreted "restrictively", a point confirmed by the CJEU in the *Cartes Bancaires* case (see paragraph 37 above). Further, Mr Harris himself accepted that an attempt to change the structure of the market need not be objectionable. That must be right. Were the position otherwise, an agreement designed, for instance, to interfere with a monopoly would necessarily represent a restriction "by object".

41. In the *Beef Industry Development Society* case, Advocate General Trstenjak identified "three categories in which the assumption of a restriction of competition may be rejected or at least doubtful on the basis of the factual or legal context" (AG51). She said this about one of the categories (in AG53):

> "The second category concerns cases in which an agreement is ambivalent in terms of its effects on competition. If the object of an agreement is to promote competition, for example by strengthening competition on a market, opening up a market or allowing a new competitor access to a market, the necessary restriction of the requirement of independence can, when matters are viewed as a whole, give way to the aim of promoting competition."

42. Lloyd LJ (with whom Mummery and Moore-Bick LJJ agreed) cited this passage in his judgment in *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2009] EWCA Civ 750 (see paragraph 84), where interests aligned with racecourses had set up "Turf TV" to rival a broadcast service provided by interests aligned with bookmakers. Lloyd LJ continued:

> "85. It seems to me that … the object of the arrangements … was to establish a second broadcaster which would be able to act as a rival to BAGS/SIS both in the upstream and in the downstream markets. To achieve that, it is agreed, the broadcaster would have to acquire LBO [i.e. licensed betting office] media rights for a minimum number of racecourses on an exclusive basis. It is not something that any racecourse could have achieved by itself. Given that the incumbent operator was dominated by the interests of the purchasers in the downstream market, given the high cost of entry, and given the very long period in which no other operator had shown any interest in entry to these markets, it seems to me that it was obviously necessary that the new entrant would have to be promoted by or in association with a number of racecourses, and that it would need to be protected, at the stage of its establishment, from competition from the incumbent, since otherwise it would never get off the ground.
>
> 86. The proposition that the arrangements were designed to improve the profitability of the racecourses is correct, but I cannot agree with the submission that this was to be done by restricting competition. On the contrary, it was to be done by

> introducing competition into the previously monopsonistic upstream market. Nor is increasing profitability objectionable in itself. It is, after all, the motive of most commercial activity.

43. Mr Harris also took us to the recent decision of the Court of Appeal in *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2018] EWCA Civ 1536, [2018] 5 CMLR 9. As, however, can be seen from paragraph 37 of the Court's judgment, by the time the matter reached the Court of Appeal it was no longer contended that there was a restriction "by object". That being so, the Court did not need to discuss "object" restrictions, and did not do so. Mr Harris said that the case demonstrates the need to focus on "the measures in question", but, as was observed by Mr Alan Maclean QC, who appeared for Agents' Mutual with Mr Josh Holmes QC, that proposition is uncontroversial.

44. For his part, Mr Maclean referred us to the decision of the CJEU in Case C-32/11 *Allianz Hungaria Biztosito Zrt v Gazdasagi Versenyhivatal* [2013] 4 CMLR 25 to show that market power can matter. The Court said in paragraph 48 of its judgment:

> "Furthermore, those agreements would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance *and the market power of the companies concerned*" (emphasis added).

45. Mr Maclean took us, too, to the EU Commission's "Guidelines on Horizontal Restraints", to which the Court is directed to have regard by section 60(3) of the 1998 Act. Chapter 5 of the Guidelines "focuses on agreements concerning the joint purchase of products" (see paragraph 194). The Guidelines explain that, while such agreements "usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers", "buying power may, under certain circumstances, also give rise to competition concerns" (paragraph 194), although "[i]n general … joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets" (paragraph 204). Under the heading "Restrictions of competition by object", this is said:

> "205.
>
> Joint purchasing arrangements restrict competition by object if they do not truly concern joint purchasing, but serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price fixing, output limitation or market allocation.
>
> 206.

> Agreements which involve the fixing of purchase prices can have the object of restricting competition within the meaning of Article 101(1). However, this does not apply where the parties to a joint purchasing arrangement agree on the purchasing prices the joint purchasing arrangement may pay to its suppliers for the products subject to the supply contract. In that case an assessment is required as to whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1). In both scenarios the agreement on purchase prices will not be assessed separately, but in the light of the overall effects of the purchasing agreement on the market."

46. One point illustrated by these extracts is that, in the words of Whish and Bailey, "Competition Law" (at 120), "a contractual restriction does not necessarily result in a restriction of competition". The same message emerges from the EU Commission's "Guidelines on Vertical Restraints", paragraph 6 of which states:

> "For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies."

While, moreover, it is not unknown for vertical agreements to be held to be "by object" restrictions (as to which, see footnote 20 to Advocate General Wahl's opinion in the *Cartes Bancaires* case), this is uncommon. In Case C-214/99 *Neste Markkinointi Oy v Yotuuli Ky* [2001] 4 CMLR 27, Advocate General Fennelly observed (at paragraph 18 of his opinion) that the CJEU "has never formally held that [exclusive purchasing agreements] have as their 'object' the restriction of competition, but, rather, has focused on whether, viewed in the totality of their economic and legal context, their effect is to restrict competition".

The One Other Portal Rule

47. I have not been persuaded by the criticisms Gascoigne Halman has advanced of the CAT's conclusion that the One Other Portal Rule did not represent a "by object" restriction.

48. In the *first* place, it seems to me that the CAT focused appropriately on the One Other Portal Rule as the relevant restriction. The CAT recorded in paragraph 150 of its judgment that it would be examining "the agreement or provision in question" and, in paragraph 176, that the first stage of inquiry would be as to whether "the provision" was anti-competitive "by object". It subsequently devoted section H(1) to a detailed consideration of whether the One Other Portal Rule was a "by object" restriction. In the course of this, it observed that the starting point must "self-evidently" be the nature of the rule in question and explained why it considered that the rule should be "characterised, in terms of its nature, as a semi-exclusive purchasing obligation" (paragraph 182).

49. A *second* point relates to legal and economic context. The CAT addressed this specifically in paragraph 181 of the judgment, noting, among other things, Agents' Mutual's and OnTheMarket's lack of market power, the fact that a new entrant suffers a much greater barrier to entry in the case of a market with a two-sided platform and the fact that the One Other Portal Rule provided for limited rather than absolute exclusivity. The CAT was clearly correct to take account of such matters. The CJEU has said that "regard must be had to … the economic and legal context" (*Cartes Bancaires*, paragraph 53) and has drawn attention to the significance of "the market power of the companies concerned" (*Allianz Hungaria*, paragraph 48). The relevance of market power also emerges from the Commission's "Guidelines on Horizontal Restraints" (see paragraph 45 above). Mr Harris said that the CAT was "focusing on the wrong unit of analysis", on the basis that it was looking at the portal as a whole rather than the One Other Portal Rule, but it appears to me that the absence of market power was directly relevant to whether the One Other Portal Rule was itself harmful to competition.

50. That leads to a *third* issue which lies at the heart of Gascoigne Halman's case before us: whether, more generally, the CAT can be seen to have based its decision on the fact that it considered the OnTheMarket *portal* to be pro-competitive rather than on the merits of the One Other Portal Rule itself. In this connection, Mr Harris pointed out that, before considering the One Other Portal Rule in section H of its judgment, the CAT had said in section G that the alleged anti-competitive restrictions had to be viewed through the "prism" of an "overall pro-competitive purpose to the Portal" (paragraph 175) and that paragraph 176, in which the CAT identified its "process of inquiry", opened with the words, "Bearing in mind the generally pro-competitive effect of a new market entrant". The significance that the CAT attached to the "overall pro-competitive purpose" is also, Mr Harris said, evident in paragraph 184(5), a fair reading of which "is that the CAT considered that the [One Other Portal] Rule could not have the object of restricting competition because it was there to assist the entry of [OnTheMarket]".

51. On the other hand, the CAT's discussion of "overall pro-competitive purpose to the Portal" in section G of its judgment preceded its consideration, not only of whether the impugned provisions were restrictions "by object", but also of whether the One Other Portal Rule was a "by effect" restriction, "Objective necessity" and the applicability of section 9 of the 1998 Act. Moreover, Marcus Smith J himself, when asked for permission to appeal, commented that this complaint by Gascoigne Halman "betrays a misunderstanding of the structure of the Judgment and the logical sequence in which it approaches the issues in contention". With regard to paragraph 184(5) of the judgment, it is true that the CAT referred to the "overriding purpose of Agents' Mutual in launching its new Portal" being "to compete with the established property portals and provide cost reduction benefits to its Members". Even so, I do not agree that a "fair reading of that paragraph is that the CAT considered that the [One Other Portal] Rule could not have the object of restricting competition because it was there to assist the entry of [OnTheMarket]". The CAT began paragraph 184(5) by saying that it did not consider that "the One Other Portal Rule itself" could be said to reveal a clear and obvious harm to competition, and concluded in paragraph 185 that the rule, "taken by itself", was not a "by object" restriction by reason of the horizontal arrangements. Further, the CAT made a variety of points in paragraph 184(5) (about limited exclusivity, the market, the increased competition between Rightmove and

Zoopla to which the particular provision was likely to give rise, and the need to apply the concept of restriction "by object" restrictively) which did not depend on its assessment of the desirability from a competition point of OnTheMarket's arrival. On top of that, the reference to Agents' Mutual's "overriding purpose … in launching its new Portal" in paragraph 184(5)(iv) was made in relation to "the parties' intentions", which the CAT said in terms that it did "not regard … as determinative".

52. In all the circumstances, it seems to me that the CAT considered that the One Other Portal Rule did not *itself* reveal a sufficient degree of harm to competition as to make it unnecessary to examine its effects and, hence, to render it a restriction "by object". Neither section G of the judgment nor paragraph 184(5) shows it to have based its decision in this respect on the "overall pro-competitive purpose" that it perceived OnTheMarket to have.

53. *Fourthly*, I do not accept Gascoigne Halman's contention that the CAT conflated analysis of the object of the One Other Portal Rule with analysis of the effects it had proved to have. In this connection, Mr Harris relied on a passage in paragraph 195(1) of the judgment in which the CAT said that it "accept[ed] that were the OnTheMarket Portal to achieve success on the scale of Rightmove – i.e. dominance – then that might render the One Other Portal Rule anti-competitive, whether 'by object' or 'by effect'". Mr Harris argued that this sub-paragraph involved "an analysis of facts as they stand and whether or not certain things are being achieved" and said that the CAT had gone "flatly" and "completely" wrong. To my mind, however, it is quite impossible to infer that the CAT's decision on whether the One Other Portal Rule represented a "by object" restriction was founded on how matters had turned out. All the CAT was doing was recognising that the One Other Portal Rule could possibly have *become* anti-competitive if circumstances had changed, which they had not.

54. *Fifthly*, I do not consider that it is open to us to go behind the conclusions that the CAT reached as to the significance of portals as a "parameter of competition". The CAT accepted that portals mattered in the ways that it explained in paragraph 180(3) of the judgment, but said that, "[b]eyond this", it was not prepared to regard portals as a "significant parameter of competition". The CAT made these findings as a specialist tribunal and having heard evidence. Mr Harris complained that it had been "*uncontested* on the evidence … that portals are an important feature of the competitive dynamic between estate agents", but the CAT did not say otherwise.

55. *Sixthly*, the CAT was right to think that the concept of restriction of competition "by object" should be construed restrictively (see paragraph 38 above). Had the CAT proceeded on the basis that there was an absolute bar to "hitherto untainted categories of conduct" being considered restrictions "by object", that would have been wrong, but I do not read the CAT's judgment in that way. Had that been the CAT's understanding, it could have dismissed Gascoigne Halman's challenge to the One Other Portal Rule much more shortly. The true position, as I see it, is that the CAT considered that it should be cautious about extending "by object" restrictions to "hitherto untainted categories of conduct".

56. *Seventhly*, the CAT was, in my view, entitled to treat Agents' Mutual's aspirations in the manner it did. As Mr Harris stressed, an Agents' Mutual business plan dating from January 2014 projected OnTheMarket taking over from Zoopla as the second largest portal by January of the following year and rivalling Rightmove by January 2017.

Such aspirations are also apparent in other documents, including an October 2015 email in which Mr Springett (Agents' Mutual's chief executive) said that "anything that encourages Simon to think we are going to get to the Tipping Point and knock [Zoopla] over would be helpful". While, however, evidence as to the parties' subjective intentions can potentially be taken into account (see e.g. the *Cartes Bancaires* case, at paragraph 54 of the judgment), the CAT was correct that it was "not obliged to take the parties' intentions as determinative of [its] assessment".

57. Turning, *eighthly*, to Gascoigne Halman's complaint that the CAT was wrong to disregard the five-year term for which the One Other Portal Rule provided, I agree with Mr Maclean that the CAT did not uphold the One Other Portal Rule on the basis that the rule could be altered. That was indeed the CAT's view, as can be seen from paragraph 195(6) of the judgment, but its decision did not depend on this. It had already said, in paragraph 195(1) and paragraph 195(2), that this was not a case in which duration mattered and that it regarded Agents' Mutual's aspirations as no more than that. As Mr Maclean said in a skeleton argument, the CAT's view was that, however long the One Other Portal Rule applied for, "it would not reveal the requisite degree of harm so long as the economic context remained the same – a concentrated duopoly in which [Agents' Mutual] was a minor player".

58. Nor, *ninthly*, do I consider that the CAT's decision can be impugned on the basis that it wrongly had regard to the absence of a regulatory decision or investigation, to the fact that the One Other Portal Rule was "freely accepted" by members or to the fact that Agents' Mutual "was careful to take legal advice". The CAT referred to the first of these matters (absence of regulatory decision or investigation) when making general observations in section G of its judgment; it did not feature in the CAT's analysis of restriction "by object". On a fair reading of the judgment, it is apparent that the other two points were not material to the CAT's decision, either. It is of course the case that an agreement can constitute a restriction "by object" despite being freely entered into, but it was nonetheless unobjectionable to include the fact that estate agents had "freely accepted" the One Other Portal Rule (as the CAT did) in a list of observations about "Legal and economic context". As for the reference to taking legal advice (in paragraph 195(3)), this represents little more than a throwaway remark.

59. Coming, *finally*, to the CAT's overall assessment of the One Other Portal Rule, it seems to me that it was fully justified in concluding that the rule was not a restriction "by object". Given the rule's nature and the specific legal and economic context, including in particular Agents' Mutual's lack of market power, it was entirely legitimate for the CAT to consider that the rule did not reveal a sufficient degree of harm to competition that it was unnecessary to consider its effects and that the rule could not be regarded, by its very nature, as harmful to the proper functioning of normal competition. The rule was properly seen as falling into Advocate General Trstenjak's category of "cases in which an agreement is ambivalent in terms of its effects on competition" (as to which, see paragraph 41 above). As I have indicated (in paragraph 46 above), it is by no means every contractual restriction that infringes the Chapter I prohibition, let alone amounting to a restriction "by object".

The Bricks and Mortar Rule

60. Some of what I have said in relation to the One Other Portal Rule applies to Gascoigne Halman's challenge to the Bricks and Mortar Rule as well. The only additional matter that I need to address in the context of the latter rule is the contention that the CAT ought, overall, to have found that the rule amounted to a restriction "by object". As I indicated earlier (paragraph 34 above), Mr Harris described the Bricks and Mortar Rule as having the "naked anti-competitive 'object' of excluding from [Agents' Mutual's] portal a significant group of estate agents using lower cost and differentiated business models". This, Mr Harris said, was "competitors … being excluded from a means of competing".

61. As the CAT explained (in paragraph 252 of the judgment), Gascoigne Halman's closing submissions did no more than assert that the Bricks and Mortar Rule was a restriction "by object" (see paragraph 32 above). It is therefore unsurprising that the CAT dealt with the issue relatively briefly. It concluded that the rule had "the purpose of defining the nature and scope of the business created by Agents' Mutual, rather than clearly having the object of harming competition from or between those undertakings not covered by its terms" and stressed the absence of market power.

62. The reference to market power chimes with a comment made by the Competition and Markets Authority in a letter to Agents' Mutual dated 27 March 2015. That letter included this:

> "We have received information that online only estate agents are prohibited from listing on OnTheMarket.com. Although, at present they have a choice of other portals on which to list their properties, the CMA may have concerns about their exclusion should OnTheMarket.com establish a position of market power – such that it is able to behave independently of the normal constraints imposed by competitors, suppliers and customers – in any market(s)."

63. To my mind, this makes sense. The Bricks and Mortar Rule could possibly *become* a threat to competition if OnTheMarket acquired market power, but, as things stood, it was not. That being so, the CAT was right to consider that it did not reveal a sufficient degree of harm to competition for it to be deemed a restriction "by object".

Other matters

64. The conclusions I have arrived at thus far mean that I do not need to address grounds 2 and 3 of Gascoigne Halman's grounds of appeal (dealing respectively with objective necessity and the severability of the Bricks and Mortar Rule). The remaining grounds of appeal (grounds 4 and 5) both relate to remarks that the CAT made in section D of its judgment, comprising paragraphs 41 to 63 and headed "The nature of the legal relationship between Agents' Mutual and the estate agents who subscribed to Agents' Mutual".

65. Ground 4 concerns termination of membership of Agents' Mutual and, specifically, the implications of rule 2.4 of the Membership Rules and paragraphs 1 and 4 of the Listing Agreement. In paragraph 54(3) of its judgment, the CAT said that, "[a]lthough

Rule 2.4.1 [of the Membership Rules] provides for automatic termination of membership if a Member confirms that it no longer wishes to use the services of Agents' Mutual, that is subject to the terms of the Listing Agreement". The CAT went on, after quoting from the Listing Agreement, to say this:

> "The Gascoigne Halman Listing Agreement thus tied Gascoigne Halman into listing with the Portal for a period of five years from the Listing Date. We understand that similar – and sometimes effectively even longer – periods applied to other Members."

66. It is understandable that the CAT felt it appropriate to express these views since Gascoigne Halman was relying on the duration of the One Other Portal Rule in support of its arguments on the competition issues. The point had not, however, been the subject of any oral submissions. In fact, when Mr Harris was asked during closing submissions how someone ceased to be a member, he merely referred to the terms of rule 2.4.1 of the Membership Rules and added:

> "And incidentally, although not relevant terribly to this part of the case, in the other part of the case that's currently stayed and may or may not ever be reached, we have pleaded that Gascoigne Halman's membership has terminated as a result of 2.4.1 and it has been denied."

67. Gascoigne Halman returned to the subject of termination of membership in some post-trial written submissions on contractual arrangements. These included this (at paragraph 4.2):

> "as identified in closings, there are, of course, methods of terminating membership (by either party) – but none of the methods set out in Membership Rule 2.4 is relevant for the purposes of the present competition trial. This trial proceeded on the basis that [Gascoigne Halman] was still a Member of [Agents' Mutual] and continues to be bound by the Membership/Listing Agreement (but without prejudice to the further contentions that [Gascoigne Halman] makes about these matters in its Amended Defence)".

Agents' Mutual put in brief written submissions in response, but they did not engage to any real extent with the question of whether Gascoigne Halman was "tied … into listing with Portal for a period of five years from the Listing Date" even if it said that it no longer wished to use Agents' Mutual's services.

68. In the event, the views that the CAT voiced in paragraph 54(3) of its judgment were of no significance in the context of the competition issues it was charged with deciding because, as I said earlier, it concluded that the duration of the One Other Portal Rule did not matter. The subject might, however, be of importance in the continuing Chancery proceedings. That being so, Mr Harris is concerned that Gascoigne Halman should not be taken to be bound by the opinion expressed by the CAT.

69. It is also relevant to note at this stage paragraph 17 of the reasons that Marcus Smith J gave for refusing permission to appeal. The paragraph reads:

> "For the avoidance of doubt, it is recognised that the points of construction of the Arrangements, informing Grounds 3, 4 and 5, may be relevant to the non-Competition Issues. Nothing in either the Judgment or this order is intended to or has the effect of limiting any future appeal of the non-Competition Issues, if and when these come to be determined and permission to appeal such a determination is sought."

70. This passage may well indicate that Marcus Smith J anticipated that the correctness of paragraph 54(3) of the CAT judgment could be ventilated in the main, Chancery proceedings. In any event, it seems to me that that must in fact be the case. In circumstances where the paragraph 54(3) point did not affect the CAT's decision on the competition issues before it, there had been no proper submissions on the subject, and there had been reference to matters relating to termination being relevant, rather, to the Chancery proceedings, the CAT is, I think, to be taken to have expressed no more than a provisional view in paragraph 54(3). That is borne out all the more clearly by Mr Harris' submission, which may well be correct, that this is not an issue that was within the scope of the transfer to the CAT, so that the CAT had no jurisdiction to rule on it. The parties will be free to argue the question in the Chancery proceedings.

71. As for ground 5 of the grounds of appeal, this concerns paragraph 6 of the Listing Agreement, which is quoted in paragraph 3 above. It will be seen that paragraph 6 requires Gascoigne Halman to "procure" that "each member of our Group" complies with the One Other Portal Rule, and "Group" is defined in such a way as to extend to Connells, after the latter's acquisition of Gascoigne Halman.

72. In paragraph 63 of its judgment, the CAT observed that "'Procure' means 'to see to it': it denotes a personal obligation to ensure a particular outcome". In paragraph 193, it said this:

> "In paragraphs 57 to 63 above, we held that Gascoigne Halman was obliged to procure that each member of its Group comply with the One Other Portal Rule. In other words, the One Other Portal Rule had a wide legal effect. Our assessment of the competitive effects of the One Other Portal Rule takes this wide legal effect into account. It is our conclusion that, notwithstanding the wide effect of the rule, it was not a 'by object' infringement. The purpose of the procure obligation was simply to ensure that an entire 'Group', as it existed from time-to-time, was covered so as to avoid possible attempts to evade the effect of the One Other Portal Rule."

73. What the CAT did not address was whether the "procure" obligation was limited to Gascoigne Halman's *own* properties or applied more widely. Mr Harris argued that the former is the case, among other things because the first sentence of paragraph 6 of the Listing Agreement provides for Gascoigne Halman to "list *our* … properties on the Portal" (emphasis added). He submitted, moreover, that we should so hold. In

contrast, Mr Maclean submitted that the debate is for another day: Mr Harris would be free to pursue his contention in the Chancery proceedings.

74. On balance, I agree with Mr Maclean. This point does not appear to have been fully argued before the CAT and so it is unsurprising that it said nothing about it. At all events, there is no finding with which Gascoigne Halman needs to (or can) take issue or which could prejudice it in the future conduct of the Chancery litigation. Further, the point is of importance only to that litigation, not to the competition issues with which we are otherwise concerned. In all the circumstances, the matter remains to be determined in the Chancery proceedings.

Conclusion

75. I would dismiss the appeal.

Sir Timothy Lloyd:

76. I agree.

Lord Justice Longmore:

77. I agree also.