Neutral citation [2019] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1285/10/12/18

Victoria House
Bloomsbury Place
London WC1A 2EB

11 February 2019

Before:

HERIOT CURRIE Q.C.
(Chairman)
PAUL LOMAS
SIR IAIN MCMILLAN CBE DL

Sitting as a Tribunal in England and Wales

BETWEEN:

ELECTRO RENT CORPORATION

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 24 and 25 October 2018

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Daniel Beard QC and Mr Alistair Lindsay (instructed by Latham & Watkins (London) LLP) appeared on behalf of the Appellant.

Ms Marie Demetriou QC and Mr David Bailey (instructed by CMA Legal) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. This is the judgment of the Tribunal on an appeal by Electro Rent Corporation ("**Electro Rent**") against a decision of the Competition and Markets Authority (the "**CMA**") dated 11 June 2018 (the "**Decision**") to impose a penalty on Electro Rent pursuant to section 94A of the Enterprise Act 2002 (the "**Act**") for failure to comply with an interim order dated 7 November 2017 (the "**Interim Order**") by issuing on 16 March 2018 a notice to exercise a break option (the "**Break Notice**") terminating the lease for Electro Rent's premises in the UK. The CMA found that Electro Rent had no reasonable excuse for its failure to comply with the Interim Order and imposed a penalty of £100,000.

2. It is common ground that the Interim Order was breached by the conduct of Electro Rent and this does not form part of this Appeal.

3. Rather, the principal issue in the Appeal is whether the CMA erred in its Decision to reject Electro Rent's argument that it had a "*reasonable excuse*" for a breach of the Interim Order in circumstances where Electro Rent had not considered that there was a breach of the Interim Order and it had followed a direction of the CMA to raise with the Monitoring Trustee any doubts about compliance with the Interim Order.

4. The second issue is whether the penalty imposed was excessive.

B. LEGAL FRAMEWORK

5. Unlike the position in many other countries, merger notification in the UK is voluntary, although the CMA can open merger investigations on its own initiative. Due to the voluntary nature of the regime, mergers can be completed before the conclusion of an investigation.

6. The relevant UK law on the control of mergers is contained in Part 3 of the Act. In summary:

(a) Following a "Phase 1" investigation of up to 40 working days, the CMA has a statutory duty to refer completed mergers for an in-depth "Phase 2" investigation if the circumstances set out in section 22 apply (a "**reference**").

(b) Following a Phase 2 investigation of up to 24 weeks, section 35 requires the CMA to decide:

i. whether a relevant merger situation ("**RMS**") has been created, and, if so,

ii. whether the RMS has resulted, or may be expected to result, in a substantial lessening of competition ("**SLC**") within any market in the UK, and if so,

iii. the appropriate action to remedy, mitigate or prevent the SLC and any adverse effects of it, subject to the requirements of reasonableness and practicability and the ability to have regard to any relevant customer benefits arising from the RMS.

(c) If the CMA decides that remedial action should be taken, section 41 requires it to take such action under section 82 or 84 as it considers to be reasonable and practicable to remedy, mitigate or prevent the SLC and any adverse effects of it.

(d) Section 84 allows the CMA to make a final order, which can encompass anything permitted by Schedule 8 to the Act, including the divestment of property.

(e) Section 72 of the Act provides that where (i) the CMA is considering whether to make a reference and (ii) the CMA has reasonable grounds to suspect it is or may be the case that two or more enterprises have ceased to be distinct, the CMA may make an Initial Enforcement Order ("**IEO**") for the purpose of preventing pre-emptive action.

(f) Once a reference for a Phase 2 investigation has been made, section 81 gives the CMA the power to make an interim order to prevent pre-emptive action being taken before that reference is finally determined.

7. Section 81, pursuant to which the CMA made the Interim Order in this case, provides insofar as material:

> "(1) Subsections (2) and (2A)[1] apply where a reference has been made under section 22 or 33 but is not finally determined.
>
> (2) The CMA may by order, for the purpose of preventing pre-emptive action—
>
> (a) prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action;
>
> (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
>
> (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
>
> (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.".

8. Section 80(10) defines "pre-emptive action" as:

> "…action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference.".

9. By section 94A of the Act the CMA has the power to impose financial penalties in the following circumstances:

> "(1) Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate.".

10. Any penalty imposed under section 94A(1) must not exceed 5% of the merging parties' combined global turnover: section 94A(2).

[1] Section 81(2A) provides that, where the CMA has reasonable grounds for suspecting that pre-emptive action has or may have been taken, it may, by order, seek to restore the position to what it would have been had the pre-emptive action not been taken.

11. Section 94A(8) defines "*interim measure*" as including an interim order made under section 81 of the Act.

12. Section 94A(7) states that sections 112-115 of the Act apply in relation to a penalty imposed under subsection (1) as they apply in relation to a penalty of a fixed amount imposed under section 110(1).

13. Section 94B(1) requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty and how it will determine the level of the penalty imposed. The CMA must consult upon any guidance it wishes to publish and the guidance must be approved by the Secretary of State: section 94B(4)-(5).

14. On 10 January 2014, the CMA published its statement of policy regarding its powers under, among other provisions, section 94A of the Act (the "**Statement of Policy**").

15. The concept of reasonable excuse is not defined in the Act. It is, however, discussed in the CMA's Statement of Policy, which states insofar as material:

> "4.4 For the majority of the CMA's Investigatory Requirements and for Merger IMs [interim measures], penalties can only be imposed if a failure to comply is 'without reasonable excuse'. The [Enterprise Act 2002 and Competition Act 1998] do not define the phrase. The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond P's[2] control has caused the failure and the failure would not otherwise have taken place. For example, a significant and demonstrable IT failure (which could not reasonably have been foreseen or avoided) which prevented P from meeting a deadline might, depending on the circumstances, amount to a reasonable excuse.
>
> 4.5 The CMA will expect the person to whom the Investigatory Requirement or Merger IM [interim measures] applies to be responsible for ensuring Investigatory Requirements and Merger IMs are fully understood and that the CMA's powers are complied with, even when, for example, using external advisers to assist them with their response. …".

16. Section 114 of the Act provides insofar as material:

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[2] "P" refers to a person that fails to comply with (*inter alia*) interim measures during a merger inquiry; it includes individuals, bodies corporate and unincorporated associations: Statement of Policy, §1.1.

"(1) This section applies if a person on whom a penalty is imposed under section 110(1) or (3) is aggrieved by –

(a) the imposition or nature of the penalty

(b) the amount or amounts of the penalty; or

(c) or the date by which the penalty is required to be paid...

(2) The person aggrieved may apply to the Competition Appeal Tribunal.

...

(5) On an application under this section, the Competition Appeal Tribunal may –

(a) quash the penalty;

(b) substitute a penalty of a different nature or of such lesser amount or amounts as the Competition Appeal Tribunal considers appropriate; or

(c) in a case falling within subsection (1)(c), substitute for the date or dates imposed by the CMA an alternative date or dates;

if it considers it appropriate to do so.".

C. FACTUAL BACKGROUND

(1) The Parties, the Transaction and the Phase 1 investigation

17. In January 2017, Electro Rent acquired Test Equipment Asset Management Limited (which was referred to in the proceedings as 'Microlease'). Electro Rent also acquired as part of the transaction the US registered Microlease, Inc. Electro Rent and Microlease (the "**Parties**") rent, lease and sell testing and measurement equipment ("**TME**") used to test and measure the performance of electronic devices in various industries, such as defence.

18. Electro Rent acquired the entire issued share capital of Microlease (the "**Transaction**"). This created a relevant merger situation for the purposes of section 22 of the Act. Electro Rent did not seek prior clearance of the Transaction from the CMA, nor was the Transaction conditional upon merger control clearance in the UK.

19. On 1 February 2017, the CMA served an IEO on the Parties (including Electro Rent's UK branch).

20. On 14 June 2017, the CMA announced that it would refer the Transaction for a Phase 2 investigation unless acceptable undertakings in lieu of reference were offered.

21. On 28 June 2017, the CMA announced that Electro Rent had offered undertakings to divest, to an approved purchaser, its UK business, which included a transfer of Electro Rent's lease over its registered place of business which was the office and warehousing premises at Brooklands Close, Sunbury-on-Thames, Middlesex (the "**Premises**" or the **"Sunbury Premises"**). These were the premises that were later subject to the Break Notice and the breach of the Interim Order.

22. On 19 October 2017, the CMA referred the Transaction for a Phase 2 investigation following the proposed purchaser's withdrawal from the acquisition of Electro Rent's UK business.

(2) The Interim Order

23. On 7 November 2017, the CMA made the Interim Order, pursuant to section 81 of the Act. It applied to the Parties. On the same day, the IEO ceased to be in force.

24. Paragraph 4 of the Interim Order imposed a broad and general obligation in relation to the Parties, as follows:

> "4. Except with the prior written consent of the CMA, Electro Rent Corporation, Electro Rent Europe (including its UK branch) or Test Equipment Asset Management Limited shall not, during the specified period, take any action which might prejudice a reference of the Merger under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:
>
> (a) lead to the integration of the Microlease business with the Electro Rent Corporation business;
>
> (b) transfer the ownership or control of the Electro Rent Corporation business or the Microlease business or any of their subsidiaries; or
>
> (c) otherwise impair the ability of the Microlease business or the Electro Rent Corporation business to compete independently in any of the markets affected by the transaction.".

25. The "UK branch" refers to Electro Rent Europe's UK Branch (Registration no. BRO 17750), which has its only place of business in the UK at the Premises.

26. Paragraph 5 of the Interim Order provided that the Parties were required to procure that, except with the prior written consent of the CMA:

> "5. (b) the Microlease business and the Electro Rent Corporation business are maintained as going concerns and sufficient resources are made available for the development of the Microlease business and the Electro Rent Corporation business, on the basis of their respective pre-merger business plans;
>
> …
>
> (e) except in the ordinary course of business for the separate operation of the two businesses:
>
> (i) all of the assets of the Microlease business and the Electro Rent Corporation business are maintained and preserved, including facilities and goodwill;
>
> (ii) none of the assets of the Microlease business or the Electro Rent Corporation business are disposed of …".

27. Paragraph 13 of the Interim Order defines "the ordinary course of business" as:

> "… matters connected to the day-to-day supply of goods and/or services by the Microlease business or Electro Rent Corporation business and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Test Equipment Asset Management Limited and Electro Rent Corporation.".

28. The Interim Order also required Electro Rent to: (i) provide the CMA with a statement of compliance with the Interim Order every two weeks (paragraph 7 of the Interim Order); and (ii) notify the CMA and the monitoring trustee immediately if Electro Rent had any reason to suspect that the Interim Order might have been breached (paragraph 9 of the Interim Order).

29. Under paragraph 10 of the Interim Order, the CMA was empowered to give directions to persons to take specified steps *"for the purpose of…ensuring compliance with this Order"*. The CMA used this power to direct the appointment of a monitoring trustee (see paragraphs 31-35 below).

30. Paragraph 11 of the Interim Order required Electro Rent *"…to comply in so far as they are able with such directions as the CMA may from time to time give to*

take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with this Order.".

(3) Appointment and functions of a Monitoring Trustee

31. On 7 November 2017, the CMA issued directions under paragraph 10 of the Interim Order (the "**Directions**") requiring Electro Rent to appoint a monitoring trustee. Paragraph 1 of the Directions provides that:

> "1. Electro Rent must appoint an [monitoring trustee] in order to:
>
> (a) support the CMA taking any remedial action which may be required to maintain the Electro Rent business and the Microlease business as viable businesses; and
>
> (b) monitor compliance by Electro Rent and Microlease with the Interim Order.".

32. The Directions provided that the monitoring trustee must act on behalf of the CMA and owes an obligation to the CMA to carry out his or her functions to the best of his or her abilities (paragraph 2). The monitoring trustee must also possess appropriate qualifications and experience (paragraph 4) and be free from any conflict of interest (paragraph 5).

33. The functions of the monitoring trustee are contained in paragraph 9 of the Directions, as follows:

> "(a) ascertain the current level of compliance by Electro Rent and Microlease with the Phase 1 Interim Order [the IEO] and the Interim Order;
>
> (b) assess the arrangements made by Electro Rent and Microlease for compliance with the Interim Order and what changes to those arrangements, if any, are necessary to preserve the possibility of the CMA taking any remedial action, if required;
>
> (c) identify and supervise if necessary the arrangements made by Electro Rent and Microlease for ensuring compliance with the Interim Order;
>
> (d) monitor compliance by Electro Rent and Microlease with the Interim Order; and
>
> (e) without prejudice to the right of Electro Rent and Microlease to contact the CMA, respond to any questions which Electro Rent and Microlease may have in relation to compliance with the Interim Order, in consultation with the CMA.".

34. The Parties were required to cooperate fully with the monitoring trustee (paragraph 12). Further:

> "13. If Electro Rent and Microlease is in any doubt as to whether any action or communication would infringe the Interim Order, it is required to contact the [Monitoring Trustee] for clarification.
>
> 14. If Electro Rent and Microlease has any reason to suspect that the Interim Order may have been breached, it must notify the [Monitoring Trustee] and the CMA immediately.".

35. Paragraphs 15-19 of the Directions create detailed reporting obligations for the monitoring trustee. In particular, pursuant to paragraph 18, the monitoring trustee *"must immediately notify the CMA in writing if he or she forms a reasonable suspicion that the Interim Order have [sic] been breached…".*

36. On 14 November 2017, Electro Rent (through its Global CEO, Nigel Brown) entered into a retainer letter agreement with Smith & Williamson and Mr Nasoul Gopal was the named monitoring trustee (the "**Monitoring Trustee**") (the "**Retainer Letter**"). Clause 1.1 states that the services to be provided by the Monitoring Trustee are set out in the Directions and Appendix 1 to the letter. Para. 2.5 of Appendix 1 states:

> "If Electro Rent or Microlease or any of their subsidiaries are in any doubt as to whether any action or communication would infringe the Interim Order, they are required to contact us [i.e. the Monitoring Trustee] for clarification.".

37. On 15 November 2017, the CMA approved the appointment.

(4) Derogations from the IEO and Interim Order

38. Electro Rent has applied to the CMA for derogations from the IEO and Interim Order on at least three separate occasions:

1) On 2 February 2017, Electro Rent requested a derogation from the IEO for certain of Electro Rent's and Microlease's non-UK subsidiaries. This application was partially granted by way of a derogation dated 27 February 2017.

2) On 27 November 2017, Electro Rent requested a derogation from the CMA for the purposes of (i) striking off and liquidating dormant entities, (ii) the development of a new Global Enterprise Resource Programme and (iii) the development and implementation of a new business information tool. The CMA granted the requests on 18 December 2017, subject to conditions in the cases of items (ii) and (iii).

3) On 30 May 2018, Electro Rent requested a derogation from the Interim Order to rebrand certain non-UK Microlease entities to Electro Rent. The CMA granted this request on 31 May 2018.

(5) The site visit

39. On 22 November 2017, several members of the CMA Inquiry Group team (including Mr Simon Polito, Inquiry Group Chairman), participated in a site visit to Microlease's premises in Harrow (Unit 1, Waverly Industrial Park, Hailsham Drive, Harrow, Middlesex, HA1 4TR). There was no site visit to the Sunbury Premises.

(6) The CMA's Provisional Findings and Notice of Possible Remedies

40. On 5 February 2018, the CMA issued a Notice of provisional findings (**"Provisional Findings"**) which noted that the CMA had provisionally found the Transaction has resulted, or may be expected to result, in an SLC in the market for the rental supply of TME in the UK. On the same day, the CMA issued a Notice of possible remedies (the "**Remedies Notice**") which included as a potential remedy the divestment of Electro Rent's UK branch including:

> "(a) Freehold site, or (if leasehold) rights to the lease, for all sites relevant to the business to be divested.
>
> (b) Physical facilities related to the operation of the business at the site. This would include office, warehousing, shelving and sorting, equipment testing, equipment calibration and logistics facilities…".

41. On 19 February 2018, the Parties responded to the Remedies Notice, stating that the divestment of Electro Rent's UK business would "*provide a purchaser with a standalone business that would be fully operational from day one*."

42. On 1 March 2018, Electro Rent attended a hearing on the possible remedies with the CMA Inquiry Group. Electro Rent's CEO, Mr Nigel Brown, attended the hearing along with other employees of Electro Rent, professional advisers and employees of Electro Rent's ultimate owner, Platinum Equity.

43. The divestment package for the UK business was discussed in this hearing. The "*transfer of Electro Rent's lease over its registered place of business in the UK*" was included, as item (a), in the Parties' summary of the remedy proposal dated 7 March 2018. Electro Rent argued that the least intrusive remedy – and the one which it very much wanted – was the divestment of Electro Rent UK.

44. On 13 March 2018, the CMA sent its remedies working paper 2018 (the "**Remedies Working Paper**") to Electro Rent, which included the Premises as part of the proposed divestment package. Mr Brown accepted, under cross-examination, that he was involved in the dialogue with the CMA and he had read the CMA's Provisional Findings and the Remedies Working Paper.

(7) The Lease

45. Electro Rent leased the Sunbury Premises by a lease (the **"Lease"**) which commenced on 14 April 2016 and had a term of 10 years terminating in 2026. Under the terms of clause 2.4 of the Lease, and section 3.5 of the associated Heads of Terms, Electro Rent had the right to terminate it with effect from its third anniversary by serving a break notice at least 6 months before the break date. On 16 March 2018, the date on which the Break Notice was served, however, Mr Brown erroneously believed that at least 12 months' notice was required and that, in order to terminate the lease on 14 April 2019, a break notice was required to be served in March 2018. In fact, the relevant date was 13 October 2018.

(8) The Break Notice

46. On 15 March 2018, Mr Brown emailed the Monitoring Trustee at 09.56 GMT to ask whether it would be possible to have a "*quick chat*" about the Lease. The Monitoring Trustee was working in China at the time. He responded at 10.01

GMT and agreed to speak to Mr Brown in approximately 15 minutes. Accordingly, at 10.17 GMT, Mr Brown and the Monitoring Trustee spoke by telephone. The precise content of that call was in dispute, but it was common ground that Mr Brown informed the Monitoring Trustee that Electro Rent wished to serve a break notice to terminate the Lease with effect from 14 April 2019. After a brief discussion, which included the issue of whether the Break Notice could be reversed, the Monitoring Trustee indicated that serving the Break Notice seemed fine or used words to that effect. Shortly thereafter the Monitoring Trustee emailed Mr Brown and asked whether there was a time limit within which the decision to serve the Break Notice could be reversed. He also asked for a copy of the Lease for his records. Mr Brown responded by email and provided a copy of the Lease.

47. On 16 March 2018, Electro Rent served the Break Notice on the landlord. Mr Brown took the decision to serve the Break Notice. He was also the person responsible for liaison between Electro Rent and the CMA, including certifying compliance with the Interim Order and previous applications for derogations, and closely involved in the merger inquiry process.

48. The Break Notice contained the following:

> "The Lease also requires that this notice be given at least six months prior to the Break Date. This letter is given with 13 months prior notice.".

49. Neither Electro Rent nor the Monitoring Trustee informed or sought the consent of the CMA prior to the Break Notice being issued or at any time prior to the CMA raising the issue with the Monitoring Trustee on 13 April 2018.

50. Electro Rent's compliance statement dated 28 March 2018 for the period 15 - 28 March 2018 did not refer to the Break Notice.

(9) Discussions between the CMA, Electro Rent and the Monitoring Trustee after the Break Notice was served

51. On 13 April 2018, the CMA became aware that the Break Notice had been served and sent an email to the Monitoring Trustee expressing concern that

Electro Rent's action could constitute pre-emptive action which might impede the taking of remedial action and that it might represent a breach of the Interim Order and asking for further information.

52. On 16 April 2018, the Monitoring Trustee responded setting out the inquiries he had undertaken and providing further information as requested by the CMA, including that the Break Notice had been accepted and could not, according to the landlord, now be reversed. The CMA responded, asking the Monitoring Trustee for details of previous discussions with Electro Rent involving the Monitoring Trustee regarding the intention to terminate the lease and whether, in the Monitoring Trustee's view, any part of the Interim Order had been breached.

53. On 17 April 2018, the Monitoring Trustee responded acknowledging that he had discussed the intention to issue the Break Notice with Electro Rent's CEO on 15 March 2018 and gave his account of the discussion. The Monitoring Trustee also forwarded to the CMA an email dated 14 April 2018 from Electro Rent's CEO setting out the reasons for issuing the Break Notice.

54. On 20 April 2018, the CMA wrote to Electro Rent advising that the CMA considered the action of serving the Break Notice without the CMA's prior consent constituted a breach of the Interim Order and that the CMA was considering imposing a penalty. The CMA's letter stated: "*We would like to hear from you how Electro Rent intends to make good this breach by 12pm on Thursday 26 April 2018.*"

55. On 25 April 2018, Electro Rent submitted a compliance statement for the period which noted as a 'material development' that the Break Notice had been issued.

56. On 26 April 2018, Electro Rent's solicitors wrote to the CMA, stating that Electro Rent had agreed to enter into a new lease with the landlord of the Premises and the principal rent would be 14.29% higher than before. This agreement was reached without the CMA's prior written consent.

57. On 2 May 2018, the CMA wrote to Electro Rent directing it to refrain from concluding any further agreement with the landlord regarding the lease over the Premises without its express prior consent.

58. On 4 May 2018, Electro Rent agreed to offer prospective purchasers of Electro Rent UK the option either to sub-lease the Premises on no worse terms than the previous lease or not to take the Premises.

59. On 10 May 2018, the CMA gave its consent to Electro Rent to enter into a new lease over the Premises.

(10) The Phase 2 Final Report

60. On 17 May 2018, the CMA published its final report on the Transaction which concluded that the Transaction has resulted or was expected to result in a SLC in the market for supply of TME for rental in the UK. In order to remedy the SLC and any adverse effects arising from it, Electro Rent was required to divest its UK business to a suitable purchaser.

(11) The CMA's provisional decision on administrative penalty

61. On 21 May 2018, the CMA gave Electro Rent notice of its intention to impose a penalty under section 94A of the Act including the reasons, proposed approach and the nature and the level of the proposed penalty.

62. On 29 May 2018, Electro Rent sent a letter to the CMA setting out its representations on the provisional decision. On 31 May 2018, Electro Rent made oral representations to the CMA Inquiry Group on the provisional decision.

(12) The Decision

63. In the Decision (which was dated 11 June 2018), the CMA found that Electro Rent failed to comply with the Interim Order:

"42. In respect of paragraph 4(c) of the Interim Order, the failure to comply by terminating the lease early potentially impeded the ability of Electro Rent to compete independently by depriving Electro Rent Europe's UK branch of premises from which to operate beyond April 2019.

43. In respect of paragraph 5(b) of the Interim Order, the failure to comply by terminating the lease early resulted in Electro Rent's UK branch not having the resources for development of the business in the UK on the basis of its pre-merger plans which included having premises in the UK from which to operate.

44. In respect of paragraph 5(e)(i) and (ii) of the Interim Order, the failure to comply by irrevocably (in the landlord's view) terminating the lease early resulted in the disposal of an asset (the lease over the UK premises) and a facility (the warehouse and offices). This disposal was not in the ordinary course of business or for the separate operation of the businesses as there was no urgency or commercial imperative to issue the Notice on 16 March 2018 and it was a significant operational change.

45. In respect of paragraph 9, the early termination of the lease over the UK premises which was the subject of a potential remedy, ought to have given rise to a suspicion that the Interim Order might have been breached and that both the CMA and [the Monitoring Trustee] should be notified.".

64. The CMA found that Electro Rent did not have a reasonable excuse for its failure to comply with the Interim Order:

"52. …. The CMA does not accept that Electro Rent has a reasonable excuse for failing to comply with the Interim Order for the following reasons:

(a) Addressees of an Interim Order have a statutory duty to comply with it;

(b) The Interim Order required Electro Rent, and not the [Monitoring Trustee], to seek the prior consent of the CMA before issuing the Notice;

(c) Whilst merging parties may discuss queries and questions concerning the Interim Order with the [Monitoring Trustee], the CMA has never told Electro Rent that its obligations under the Interim Order are affected by such discussions, and there is nothing in the Interim Order that suggests they are;

(d) The [Monitoring Trustee] is required to act in accordance with instructions from the CMA, to monitor compliance with the Interim Order, and to report to the CMA. The [Monitoring Trustee] has no delegated authority (express or implied) to give consent to any action not in compliance with the Interim Order on behalf of the CMA and there is nothing in the Interim Order, the Directions or the [Monitoring Trustee's] Mandate that suggests there is;

(e) Electro Rent raised the proposed issuing of the Notice with the [Monitoring Trustee], which suggests that it had formed the view that it was a matter which might have roused the concern of the CMA. Accordingly, Electro Rent ought to have known that the onus was on it to seek the consent of the CMA and/or to seek legal advice;

(f) Electro Rent understood the requirement to seek prior consent from the CMA. It had previously sought consent direct from the CMA before engaging in activities which were potentially in breach of the Interim Order. On those occasions Electro Rent had not notified the [Monitoring Trustee] about its intended course of action and then relied on the [Monitoring Trustee] to notify the CMA. Electro Rent ought to have suspected that by not seeking the CMA's consent before issuing the Notice, it was failing to comply with the Interim Order. Although Electro Rent contacted the [Monitoring Trustee] prior to issuing the Notice, this does not amount to a reasonable excuse for non-compliance with the Interim Order;

(g) Arguments as to whether Electro Rent has complied with the Directions are not relevant because the CMA has not alleged that Electro Rent has failed to comply with the Directions;

(h) Arguments as to whether Electro Rent had a reasonable commercial rationale for wanting to issue the Notice are not relevant to whether it had a reasonable excuse for failing to comply with the Interim Order; and

(i) The Guidance states that the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control has caused the failure to comply (and the failure would not otherwise have taken place). There is nothing to suggest that any such event has occurred here, which would have prevented Electro Rent from being able to comply with its own obligations under the Interim Order.

53. The CMA concludes that Electro Rent has no reasonable excuse under section 94A EA02 for failing to comply with the Interim Order. However, the CMA recognises that the [Monitoring Trustee] was under an obligation to report on Electro Rent's compliance with the Interim Order and failed to do so before Electro Rent issued the Notice. The CMA will therefore consider the role of the [Monitoring Trustee] in determining the appropriate level of penalty.".

65. The CMA imposed a penalty of £100,000 for reasons set out at paragraphs 54 to 73 of the Decision. The CMA's reasoning is summarised at paragraph 72:

"The CMA finds that a penalty at this level: (i) would reflect the significance of the breach and the adverse impact on the CMA's investigation; (ii) would act as a specific and general deterrent; and (iii) is appropriate, reasonable and proportionate in all the circumstances having regard, amongst other things, to the nature of the failure, the role of the [Monitoring Trustee], the submissions put forward by Electro Rent and the financial position of Electro Rent.".

D. LEGAL PRINCIPLES TO BE APPLIED BY THE TRIBUNAL

(a) Standard of review in relation to "reasonable excuse"

66. The standard of review to be applied by the Tribunal in determining this Appeal is not set out in the Act. In the parties' written submissions there was disagreement as to the standard of review. By the time of the parties' closing submissions, however, the issue between the parties had narrowed considerably.

67. Electro Rent's final position was that the Tribunal would be entitled to quash the penalty if it considered that the CMA's decision was wrong. The CMA accepted that the Tribunal would be entitled to do so if it disagreed with the CMA's finding that Electro Rent should have realised that it had to approach the CMA and it was not enough to go to the Monitoring Trustee. It accepted that the Appeal did not turn on questions within the expert assessment of the CMA.

68. Section 114 of the Act is silent as to the standard of review to be applied by the Tribunal in this Appeal. This can be contrasted with challenges to substantive merger decisions under section 120(4) of the Act where it is explicitly stated that any such application to the Tribunal is by way of judicial review. Equally the Act does not use the language of the Competition Act 1998, where appeals against infringement and penalty decisions are on the merits: see Schedule 8, paragraph 3(1) of the Competition Act 1998. Section 114(5) stipulates only that the Tribunal may *inter alia* quash the penalty and substitute a penalty of a different nature or such lesser amount as the Tribunal considers appropriate. In our view, this indicates that the Tribunal is not restricted to a judicial review standard. We consider therefore that, apart from the agreement of the parties, this is the correct approach in view of the terms of section 114(5) of the Act. Accordingly, the Tribunal will proceed on the basis that it is open to it to quash the Decision if it considers that Electro Rent had a reasonable excuse for breaching the Interim Order.

(b) Objective test for assessment of whether there was a reasonable excuse

69. It was common ground that the Tribunal should apply an objective test as to whether the excuse put forward by Electro Rent was reasonable.

(c) Whether the CMA is entitled to defend its decision on new grounds

70. Electro Rent argued the CMA's Decision should stand or fall on its own reasoning. It submitted that the CMA was seeking to introduce new issues in its Defence which were separate, newly articulated, justifications for the Decision which were not present in that Decision and that there was no legal basis upon which it could do so. It accepted at the hearing, however, that the CMA was entitled to lead rebuttal evidence in relation to factual matters that it, Electro Rent, had raised in the Appeal. It appears to the Tribunal that the dispute between the parties relates not so much to the relevant legal principles, but rather to the application of these principles.

(d) Article 6 of the European Convention on Human Rights

71. Electro Rent argued that the quasi-criminal nature of the penalty required the Tribunal to have regard to Article 6 of the European Convention on Human Rights ("**ECHR**"). The practical effect of that submission, according to Electro Rent, was that, while the standard of proof was the balance of probabilities, Electro Rent was, nevertheless, entitled to the benefit of any doubt as to whether the excuse was reasonable. Further, the Tribunal was obliged to observe a high standard of procedural fairness. The CMA was not, therefore, entitled to supplement its reasons for the Decision in the course of the appeal proceedings before the Tribunal and Electro Rent pleaded Article 6 in support of the submissions summarised in (c) above.

72. The CMA accepted that the requirements of procedural fairness had to be observed but disputed that the penalty was quasi-criminal in nature; rather it was an administrative penalty. In any event, there was no separate issue of giving

Electro Rent the benefit of the doubt. The issue was simply whether, on the balance of probabilities, there was a reasonable excuse.

73. We do not consider that it is necessary for us to address further this issue between the parties regarding the benefit of the doubt. In making our findings in fact and in reaching our conclusion on Ground 1, there was no room for any level of doubt that would have required application of any benefit of the doubt principle in favour of Electro Rent. There was no real dispute as to the application of the requirement of procedural fairness.

(e) Legal approach to the appeal against the penalty

74. In relation to the challenge to the amount of the penalty, Electro Rent contends that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, particularly in view of an undertaking's right under Article 6(1) ECHR to have a penalty reviewed afresh by an impartial and independent tribunal.

75. The CMA submits that the Tribunal should have regard to whether it is proportionate to the infringement involved, looking at the matter in the round: *Umbro Ltd v OFT* [2005] CAT 22, [104]. Provided the penalty ultimately arrived at is, in the Tribunal's view, appropriate it will rarely serve much purpose to examine minutely the way in which the CMA interpreted and applied its guidance: *Kier Group plc v OFT* [2011] CAT 3, [76].

E. THE WITNESSES

76. The Tribunal was presented with evidence from four witnesses of fact.

1) Electro Rent adduced evidence from:

    i. Mr Nigel Brown, Electro Rent's Global CEO; and

    ii. Mr Howard Robert Peterman, Director of Petermans Associates Limited, who had been instructed by Electro Rent to carry out a

search for suitable premises following the exercise of the Break Notice.

2) The CMA provided evidence from:

i. Mr Nasoul Gopal of Smith and Williamson, the Monitoring Trustee; and

ii. Mr Simon Polito, Chairman of the Inquiry Group that carried out the Phase 2 investigation of the Transaction and adopted the Decision on behalf of the CMA.

77. Messrs Brown, Gopal and Polito were cross-examined.

78. We accepted the evidence of Mr Polito, which was not undermined in cross-examination in any material respect. For reasons given below we did not regard certain parts of the evidence of the Monitoring Trustee and Mr Brown, which were in conflict, as entirely reliable, although we accept that they were doing their best to assist the Tribunal with their recollection of their discussions.

F. ELECTRO RENT'S GROUNDS OF APPEAL

79. The grounds of appeal are as follows.

80. **Ground (1)**: The CMA erred in finding that Electro Rent did not have a reasonable excuse for any breach. This ground contains three elements:

(a) Electro Rent followed the proper procedure for dealing with any action in respect of which there might be a doubt about compliance with the Interim Order by raising the matter with the Monitoring Trustee and acting consistently with the Monitoring Trustee's advice, the Monitoring Trustee was properly briefed and he had no objections.

(b) There were good reasons for the Monitoring Trustee and Electro Rent to conclude that the service of the Break Notice would not

breach the Interim Order on the basis that service of the Break Notice did not adversely affect Electro Rent's UK business's ability to compete effectively. In fact, it was likely to enhance it. (Further the Break Notice was served in the normal course of business[3].)

(c) The reasons given by the CMA for concluding that Electro Rent had no reasonable excuse are an inadequate basis for its conclusion and/or the reasoning of the CMA was inadequate and/or wrong.

81. **Ground (2):** The penalty imposed by the CMA was excessive. This ground consists of six parts:

(a) Electro Rent's conduct had no adverse effects, in fact, on the merger investigation or any remedies.

(b) There is no need for deterrence.

(c) Any breach of the Interim Order by Electro Rent was not significant or flagrant.

(d) The CMA has relied on irrelevant considerations.

(e) Electro Rent should be judged on the basis of its honest beliefs.

(f) Electro Rent has been put to significant financial expense.

[3] This proposition was withdrawn by Electro Rent in the course of the hearing.

(1) Grounds 1(a) and (b) There were good reasons for the Monitoring Trustee and Electro Rent to conclude that service of the Break Notice would not breach the Interim Order and Electro Rent followed the correct procedure

Introduction

82. In Ground 1(a), Electro Rent focuses on the procedural elements of the matter. In Ground 1(b), Electro Rent addresses the reasonableness of the view held by Electro Rent and, it contends, the Monitoring Trustee, that service of the Break Notice would not breach the Interim Order.

83. Clearly these matters are inter-related, because, if Electro Rent ought to have suspected that serving the Break Notice would constitute a breach, that, in our view, would have a material effect on the correct procedure to be followed. The facts are also intertwined.

84. Accordingly, we propose to deal with Grounds 1(a) and 1(b) together. We will first consider the issues raised by Ground 1(b) – whether there were good reasons for the Monitoring Trustee and Electro Rent to conclude that the service of the Break Notice would not breach the Interim Order. We will then consider the issues that arise under Ground 1(a).

The parties' submissions on Grounds 1(a) and 1(b)

Electro Rent

85. Electro Rent submitted as follows. There were good reasons for the Monitoring Trustee and Electro Rent to conclude that the service of the Break Notice would not breach the Interim Order. The service of the Break Notice was in the commercial interests of the UK branch and was not incompatible with the contemplated remedy of divestment of the UK business. In particular, it could make the business more attractive to purchasers who did not wish to take on the Premises.

86. The Premises were not at the time the lease was entered into, in 2016, or when the Break Notice was served suitable because, as explained in Mr Brown's witness statement:

(a) The leased premises were too large: the business was paying for space it did not need.

(b) The mix of space in the premises was wrong at 50% office space / 50% warehousing; an optimal mix would be 20% office space and 80% warehousing.

(c) The Premises were in the wrong location with relatively poor access to the motorway network.

(d) The rental costs were too high.

87. Mr Peterman's witness statement shows that more suitable other premises were readily available in the market. Alternatively, if, despite the service of the Break Notice, a purchaser of Electro Rent wished to continue the lease of the Premises or wanted a fresh lease, there was likely to be scope for negotiation with the lessor assuming that the Premises had not been let to a new tenant.

88. Mr Brown considered that the Break Notice was being served in the ordinary course of business because it is routine for businesses to consider whether to rely on their contractual rights as they become available and to optimise their property commitments as their businesses change. However, at the hearing Electro Rent's position was, on legal advice, that as a generality, for a company to issue a break notice would be in the ordinary course of business, but to do so in the course of a merger investigation, for the purpose of making the business more attractive to potential purchasers, would not be.

89. Mr Brown believed, at the relevant time, albeit wrongly, that the break option had to be invoked 12 months before the third anniversary of the commencement of the Lease in April 2019. He also believed that it was in the best interests of Electro Rent to serve the Break Notice.

90. Mr Brown reasonably interpreted the proposed remedy as requiring that the divestment package include the company's lease, if any. It did not specifically require that the Lease, itself, be retained.

91. It is clear, from paragraph 13 of the Directions, that if there were any doubt as to whether any proposed action would breach the Interim Order, Electro Rent was *required* to raise the issue with the Monitoring Trustee. Moreover, during the course of a site visit and in response to a direct question on the point, Simon Polito (the CMA Inquiry Group Chairman) confirmed to Mr Brown that should he have any questions regarding the Interim Order, he should direct these queries to the Monitoring Trustee. Electro Rent submitted that these prescribed processes were highly relevant to how its behaviour should be evaluated and that they had been followed.

92. Electro Rent was aware that it required the written consent of the CMA for any action which would otherwise breach the Interim Order. Electro Rent's evidence was that it did not believe that service of the Break Notice would be a breach of the Interim Order but that it, nevertheless, raised the matter with the Monitoring Trustee out of an abundance of caution.

93. Electro Rent disclosed all material facts to the Monitoring Trustee when seeking his view. The information provided to the Monitoring Trustee regarding "reversibility" of the Break Notice was correct.

94. The Monitoring Trustee had confirmed by telephone to Mr Brown that Electro Rent could proceed with serving the Break Notice. Although he sought further information from Mr Brown about "reversibility" in an email shortly after the telephone conversation, he did not change his view on receipt of that information. The Monitoring Trustee subsequently signed off the draft compliance statement for the period in which the Break Notice had been served.

95. The function of the Monitoring Trustee in relation to possible breaches of an interim order would be of no meaningful value if a party could not rely on the Monitoring Trustee's view. The CMA chose, through the Directions, to give a

particular role to the Monitoring Trustee which involved answering questions of the type raised by Electro Rent in relation to the Break Notice.

CMA

96. The CMA questioned Mr Brown's evidence that taking on the Lease in 2016 had been a mistake and that the Premises were not suitable for Electro Rent's requirements since, at no point prior to serving the Break Notice, which was in breach of the Interim Order, did Electro Rent inform the CMA that, in its view, the Premises were no longer fit for purpose. Further, the real reason that the Premises were under-utilised was that, pre-merger, Electro Rent had decided to service its UK customers from Belgium.

97. In any event, neither the fact that Electro Rent considered that terminating the Lease was in the commercial interests of Electro Rent UK and would make the UK business more attractive to potential purchasers nor the fact, if it were the case, that this was indeed so, was relevant to the issue of whether serving the Break Notice was a breach of the Interim Order. If that were Electro Rent's view, it should have raised the matter with the CMA in an application for a derogation.

98. The Break Notice constituted a clear breach of paragraph 5(e) of the Interim Order.

99. Mr Brown's belief that the Break Notice did not breach the Interim Order because it was done in the "ordinary course of business" was clearly wrong. The termination of the Lease was plainly not in the ordinary course of business as defined in paragraph 13 of the Interim Order.

100. Electro Rent did not have reasonable grounds to believe that service of the Break Notice would not breach the Interim Order. On the contrary, it should have been obvious to Electro Rent or, at the very least, Electro Rent ought to have suspected, that termination of the Lease would breach the Interim Order, and would therefore require the CMA's consent.

101. The communications between the CMA and Electro Rent in relation to remedies – including the Remedies Notice, the Parties' Response to the Remedies Notice, the Hearing on Possible Remedies and the Remedies Working Paper - all proceeded on the clear premise that any divestment package would include the existing Lease of Electro Rent's Sunbury Premises.

102. The issue was not resolved by the fact that Electro Rent consulted the Monitoring Trustee and that the Monitoring Trustee stated that serving the Break Notice would be fine.

103. Insofar as these factors were relevant, the CMA submits that Electro Rent's reliance on the Monitoring Trustee's views and its failure to seek the CMA's consent to issuing the Break Notice were, in any event, unreasonable given the circumstances in which it approached the Monitoring Trustee.

104. Electro Rent sought an urgent view from the Monitoring Trustee on the basis that the Break Notice had to be served imminently, because, so it thought, 12 months' notice was required. In fact, only six months' notice was required and so there was no need to terminate the lease urgently or before, as it then seemed, the CMA's investigation had been completed and any likely disposals negotiated or completed. Mr Brown failed to read the Lease, or the draft Break Notice which used the correct notice period and Electro Rent presented the position to the Monitoring Trustee on the wrong factual basis.

105. Mr Brown also led the Monitoring Trustee wrongly to believe that the Break Notice was "reversible", by which, the CMA allege, the Monitoring Trustee was intended to understand the Break Notice could, in effect, be withdrawn so that the Lease continued on its same terms, including as to rent. This was a point on which the Monitoring Trustee sought specific assurance both during the telephone discussion and in his email on 15 March, and was one of the main reasons why he took the view that there was little downside in the issuing of the Break Notice. However, this was not correct: the Break Notice was not simply "reversible".

106. Mr Brown did not tell the Monitoring Trustee that Electro Rent was being advised by Mr Colley (a former director of Microlease, who, in 2014, was appointed as a consultant to provide property advice and has provided advice on property matters to Microlease and then the Electro Rent group (following the Transaction) consistently since 2014) in relation to the Sunbury Premises or indeed that Mr Colley had an apparent conflict of interest as he was the Chairman of a company, […][✂], that had expressed an interest to the CMA in acquiring Electro Rent's UK business.

107. Mr Brown also failed to tell the Monitoring Trustee that breaking the Lease could have a 'destabilising effect' on Electro Rent UK's staff.

108. The Monitoring Trustee was not put in a position, either as to facts or timing, in which he could reach an informed view as to whether service of the Break Notice would breach the Interim Order.

109. Had the Monitoring Trustee known the true position, he would have not given Mr Brown the response that he gave on 15 March. Instead, he would have taken additional steps, such as recommending that Electro Rent (or its legal advisers) contact the CMA before serving the Break Notice.

110. Electro Rent's reliance on the Monitoring Trustee's views in these circumstances does not provide it with a reasonable excuse for the breach of the Interim Order.

111. Electro Rent accepts that the Monitoring Trustee has no delegated authority, express or implied, to give consent to any action not in compliance with the Interim Order on behalf of the CMA and there is nothing in the Interim Order to suggest that he has. Electro Rent submits, however, that the role of the Monitoring Trustee does cover providing parties with informed confirmation, following "conscientious engagement", as to whether their actions breach an interim order.

The Tribunal's analysis of Grounds1(a) and 1(b)

112. We propose first to deal with Electro Rent's submission that it had good reasons to believe that service of the Break Notice would not breach the Interim Order. We do so by examining objectively what a reasonable person would have believed.

113. The question for the Tribunal is whether Electro Rent had a reasonable excuse for breaching the Interim Order and not whether Electro Rent or Mr Brown acted reasonably in a broader sense in relation to the decision to serve the Break Notice. However, in assessing whether Electro Rent had a reasonable excuse, it is necessary for us to consider whether the beliefs on which Mr Brown's decision was based were reasonable.

114. For reasons which we set out below, we do not consider that it is relevant, to the question that we have to decide, that there were good commercial reasons for serving the Break Notice or that, arguably, serving the Break Notice would ease the process of divestment because it would be attractive to potential purchasers that had no use for the Sunbury Premises.

115. The provisions of sections 80 and 81 of the Act, which set out the purpose of an interim order are an important part of the context.

116. Section 81, pursuant to which the CMA made the Interim Order in this case, provides insofar as material:

> "(1) Subsections (2) and (2A) apply where a reference has been made under section 22 or 33 but is not finally determined.
>
> (2) The CMA may by order, for the purpose of preventing pre-emptive action—
>
> (a) prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action;
>
> (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
>
> (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
>
> (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.".

117. Section 80(10) defines "pre-emptive action" as:

> "…action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference.".

118. In *Intercontinental Exchange Inc v CMA and Nasdaq Stockholm AB* [2017] CAT 6 *("**ICE/Trayport**")* the Tribunal held, at paragraph [220], that:

> "[…] "pre-emptive action" is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. … The word "might" means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The [interim order] catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the [interim order] to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment.".

119. *ICE/Trayport* is not directly on point because (a) it was concerned with whether there had been a breach of the interim order imposed in that case; and (b) ICE did not inform the monitoring trustee in advance (or the CMA) and, in consequence, there were no statements or observations by the monitoring trustee. Further, the order in *ICE/Trayport* did not directly address a provision in the same or similar terms as paragraph 5(e) of the Interim Order. We are persuaded, however, that the same considerations support applying a broad interpretation to the obligation imposed by paragraph 5(e).

120. We also agree with the CMA's submission that interim orders serve a particularly important function where, as in this case, the merger was completed before it was examined by the CMA. Their function is to prevent conduct that might prejudice a reference or inhibit action required by the CMA's final decision or limit the scope of what the CMA might be able to order. The CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance.

121. Accordingly, we proceed on the basis that, on the facts of this case, it was incumbent on Electro Rent to consider whether there was a possibility that serving the Break Notice would contravene paragraph 5(e) and to recognise that, if so, the onus was on it to seek consent from the CMA.

122. In paragraph 33 of his first witness statement, Mr Brown stated:

> "I did not regard the service of the Break Notice as a matter which required the CMA's written consent because:
>
> (a) Serving the Break Notice would not harm the ability of Electro Rent's UK business to compete independently and develop and in fact Electro Rent UK would benefit […].
>
> (b) It seemed to me a normal course of business action to consider exercising potentially valuable contractual rights enjoyed by the business as they became available, to the benefit of both Electro Rent UK itself and any future purchaser or owner […].".

123. We proceed on the basis that Mr Brown did, in fact, apply his mind to paragraph 5(e) and the definition of *"ordinary course of business"* in paragraph 13 of the Interim Order, before speaking to the Monitoring Trustee on 15 March 2018. There is no contemporaneous record that he did so, but that part of his evidence was not challenged. However, Mr Brown did not canvas with the Monitoring Trustee the specific issue of whether service of the notice was compatible with paragraph 5(e) read with paragraph 13. We return to this issue below.

124. Paragraph 13 of the Interim Order defines the ordinary course of business, as follows:

> "[…] matters connected to the day-to-day supply of goods and/or services by the Microlease business or Electro Rent Corporation business and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Test Equipment Asset Management Limited and Electro Rent Corporation.".

125. It is worth noting the basis upon which, during the hearing, Electro Rent conceded that service of the Break Notice was not, in fact, in the ordinary course of business. In his opening submissions, Mr Beard QC, counsel for Electro Rent, submitted that, as a generality, issuing a break notice for a company would be in the ordinary course of business but that to do so in the course of a merger investigation for the purpose of making the business more attractive to potential purchasers would not. In making that submission Electro Rent did not deal specifically with the definition set out in paragraph 13. At the hearing Mr Beard QC said this:

> "We recognise that if you are disposing of a lease in the course of this merger investigation, in circumstances where that is being done for maintaining the

> viability, we can see that there can be a breach of [paragraph 5 of the Interim Order], which is why we are not bringing the challenge in relation to it. But we say precisely because that was the thinking, and as we will come on to in the other factual context, we say that does give rise to a reasonable excuse in these cases." (Hearing transcript, Day 1, pages 17-18).

126. We do not accept Electro Rent's submission that issuing a break notice in relation to a business's only premises would be in the ordinary course of business, as the term is defined in paragraph 13, even if a merger investigation were not underway.

127. In our view, simply as a matter of the language of the definition, a reasonable person reading the definition "*matters connected to the day-to-day supply of goods and/or services by the … Electro Rent Corporation business"* would have concluded, at the very least, that it was possible that the proper view was that the definition was restricted to Electro Rent's trading operations and did not extend to the disposal of its only UK premises.

128. In cross examination, Mr Brown explained that he considered that termination of the Lease was in the ordinary course of business because the Premises would be a burden on a potential purchaser and operation of the UK business as a standalone business. Termination was in the best interests of the business moving forward. Even if that were so as a matter of fact, we do not accept that that was a reasonable, or even tenable, view to hold of "ordinary course of business" as defined. It is also inconsistent with Mr Brown's acceptance in cross examination that one of the purposes of the obligations in paragraphs 4 and 5 of the Interim Order was to preserve the status quo before the merger. A given course of action being in the best interest of a business, does not mean that it is, thereby, in the ordinary course of business, and certainly not as defined in paragraph 13.

129. This conclusion is fortified by the context in which Mr Brown had to consider the position. The CMA made the point that Electro Rent had received the Notice of Possible Remedies, had attended the hearing on 1 March 2018, and on 7 March made their formal written remedies proposal. The CMA had issued its Remedies Working Paper on 13 March (which Mr Brown admitted that he had reviewed) only two days before Mr Brown decided to serve the Break Notice.

These all made it clear that the Premises were an integral part of the divestment package.

130. Mr Brown's evidence in relation to these documents was that he understood the divestment package that was envisaged did not necessarily include, specifically, Electro Rent's Sunbury Premises, but rather such premises, if any, as Electro Rent had at the time of the divestment. He considered that it would be compatible with the objectives of the divestment package that it might not include any lease at all. We do not consider that that is a reasonable interpretation of the documents.

131. The formulation *"(a) Freehold site, or (if leasehold) rights to the lease, for all sites relevant to the business to be divested."* has the appearance of a standard form provision. It was put to Mr Polito, and he agreed, that this was a "boiler-plate" provision. We accept that, in isolation, the language might be capable of being construed as meaning *"such leasehold rights if any at the time of the divestment"*. We do not, however, consider that this is a reasonable interpretation in the context of all of the discussion and documents referring specifically to the Sunbury Premises.

132. This context was dealt with by Mr Polito, in his witness statements, and was the subject of cross-examination. In his evidence relating to the hearing on 1 March 2018, Mr Polito stated, at paragraph 40 of his witness statement, that *"During the hearing, Mr Brown showed a clear understanding that the UK premises was part of the proposed divestment package …"*

133. In cross examination Mr Polito said in relation to the hearing *"[…] we had been proceeding on the assumption the whole time that we were talking about Sunbury. I am not suggesting it could not, in another world, have been another site. But we were clearly looking at Sunbury site as the premises that would form part of the package."* (Hearing transcript, Day 1, page 213).

134. In view of the importance of adherence to the Interim Order, we consider that a reasonable person would not have decided to serve the Break Notice without first having consulted the CMA, or, at least, obtained a considered view from

the company's legal advisers as to whether the CMA's consent was required. It is notable that Electro Rent's solicitors were instructed to sit in on certain telephone calls between Electro Rent and the Monitoring Trustee relating to the merger investigation and were involved in all requests by Electro Rent for derogations from the Interim Order. As the CMA submitted, Electro Rent is a well-resourced company which engaged lawyers who had previously been involved in seeking derogations from the CMA.

135. Electro Rent sought to defend the service of the Break Notice on the ground that the Lease was no longer fit for purpose; that it had been a mistake on the part of Electro Rent to enter into the Lease; that serving the Break Notice was in the commercial interests of the UK branch; and that to do so was compatible with and would promote the underlying objective of the proposed divestment by making the divestment package more attractive to potential purchasers who might not want the Sunbury Premises.

136. We accept that it was a tenable view that service of the Break Notice could suit Electro Rent's commercial interests on the basis that it would put the company in a position to obtain a more suitable property or a lease on more suitable terms. We also accept that service of the Break Notice might have rendered the divestment package more attractive to potential purchasers who did not need the Sunbury Premises.

137. We have some reservations, however, about Mr Brown's evidence on these matters. It is notable that at no stage did Mr Brown tell the CMA that the Lease was not fit for purpose and that it had been a mistake for Electro Rent to enter into it. He sought to argue that he had implied as much by showing the CMA photographs of the Sunbury Premises during the site visit. We do not accept that would convey to a reasonable party in the position of the CMA that Mr Brown held that view. Further, we do not accept that the Lease had always been unfit for purpose, as Mr Brown suggested. The evidence demonstrated that its utility had been reduced by the decision pre-merger to continue servicing the UK from Electro Rent's operation in Belgium. As Mr Polito explained when cross examined by Mr Beard QC during the hearing:

> "Q. That accurately describes the phenomenon that you are talking about. But if you go to (ii), the answer, this is Electro Rent explaining the position: "The operation of the UK office is more limited than originally envisaged, as organic expansion plans were put on hold. Electro Rent continues to supply UK customers with equipment stored in Belgium, [so no warehouse use]…." So although it was launched with optimism in 2015, for whatever reason that project did not develop and the premises were not used as warehousing. If we could just go back to your statement at paragraph --
> A. I could, but could I just comment on what you have said?
> Q. Of course.
> A. You said "for whatever reason". The reason was that Electro Rent and Microlease were considering a merger. It therefore made no sense to continue to promote the Electro Rent UK premises and develop its local business there. I think there was a very clear reason why that happened.
> Q. So you are saying that essentially when a purchaser was coming forward for Electro Rent, in those circumstances those premises would not potentially be as useful.
> A. Sorry, you have taken me a long way from where I was. You will have to help me with the logic. What I was looking at was where the two parties, Electro Rent and Microlease, might merge, which they were considering doing back in 2016, it was agreed that Electro Rent UK would not promote its business and therefore would not expand it in the way that had originally been envisaged." (Hearing transcript, Day 1, Pages 208-209).

138. Further, and more fundamentally, we do not consider that these issues are relevant to the question whether Electro Rent had a reasonable excuse for breaching the Interim Order. The question that Mr Brown was required to address was whether service of the Break Notice would contravene paragraph 4 or 5 of the Interim Order. Whether serving the Break Notice would promote the commercial interests of the UK branch was a different question. The decision as to whether to do so would promote the divestment was not his to make. Serving the Break Notice could deprive a potential purchaser of Electro Rent's UK business of an established UK presence, which the CMA had provisionally found on 5 February 2018 to be important for TME manufacturers competing to supply UK customers. We accept the CMA's submission that, even if Mr Brown believed that serving the Break Notice would promote Electro Rent's commercial interests, he should have consulted the CMA and sought a derogation from the Interim Order.

139. For these reasons, we reject Electro Rent's submission that there were good reasons for Electro Rent to conclude that service of the Break Notice would not breach the Interim Order.

140. Although Electro Rent, in its Grounds of Appeal, referred, in the heading for this ground, to both the Monitoring Trustee and Electro Rent considering that service of the Break Notice would not breach the Interim Order, the Tribunal did not find the addition of the Monitoring Trustee to this head of the Appeal to be particularly helpful either as a matter of law or in light of the analysis of the facts, and we consider this aspect of the Appeal under the analysis of Ground 1(a) below.

141. Accordingly, we reject Ground 1(b).

142. We now turn to consider the issues that arise under Ground 1(a) which puts forward the proposition that Electro Rent followed the proper procedure and the Monitoring Trustee was properly briefed but had no objections.

143. The material before the Tribunal on this issue comprises the witness statements of Mr Brown and the Monitoring Trustee; the Monitoring Trustee's rough notes of the telephone conversation on 15 March 2018 and the email exchange between Mr Brown and the Monitoring Trustee on that date; an exchange of text messages between the Monitoring Trustee and Mr Brown on 13 April 2018; and an email exchange between the Monitoring Trustee and Mr Brown between 13 and 15 April both triggered by the CMA's request for a report from the Monitoring Trustee by 16 April; and the Monitoring Trustee's email to the CMA dated 17 April. The Tribunal also heard cross examination of both Mr Brown and the Monitoring Trustee on these documents and their recollections of the discussions.

144. The witness statements of the Monitoring Trustee and Mr Brown deal in detail with the discussions on 15 March 2018. However, there is significant disagreement between these witness statements as to that detail, for example: (i) whether the Break Notice could be reversed; (ii) how quickly the Break Notice needed to be served on the Landlord; (iii) what information was provided to the Monitoring Trustee; and (iv) whether Electro Rent's lawyers had been or were going to be informed. This is not surprising given the circumstances in which the discussions took place. The Monitoring Trustee was in China, on other

business. He had no prior notice of the points that Mr Brown wished to discuss. The telephone conversation was very brief and neither party took detailed notes.

145. For the most part, the detailed evidence contained in the witness statements is not supported by contemporaneous records. It is not clear whether, and to what extent, the Monitoring Trustee was relying on what he believed Mr Brown actually said or whether he is relying on impression and inference. The matter is further complicated by the fact that when the CMA asked the Monitoring Trustee for a report on 13 April 2018, the Monitoring Trustee did not respond in reliance only on his own recollection and the documents dated 15 March 2018 but sought explanations of certain key issues from Mr Brown. The Monitoring Trustee, when cross examined, departed from a number of the propositions set out in his report to the CMA dated 17 April 2018. The Tribunal did not find that the cross-examination of either individual materially clarified the details of what had happened some eight months earlier.

146. For these reasons, the Tribunal considers that the most reliable basis for its findings of fact in relation to the contentious aspects of content of the discussions on 15 March 2018 is the contemporaneous documentation.

147. We do not consider that we can rely on the text and email exchanges between the Monitoring Trustee and Mr Brown between 13 and 15 April 2018 or the Monitoring Trustee's report to the CMA on 17 April 2018 as providing a wholly reliable account of what was said on 15 March 2018. By that stage both the Monitoring Trustee and Mr Brown had to justify their actions and they were, for understandable reasons, seeking to reconstruct their discussions.

148. The contemporaneous documentation comprises the Monitoring Trustee's rough handwritten notes taken during the telephone call, which are incomplete and require interpretation, and the two emails sent on 15 March 2018.

149. The notes as transcribed stated:

> "Statutory Deadline – 4/4/18
>
> March – Final Report

> Provisional Findings 6/2/18
>
> Long term lease – likely the lease will not be required
>
> Break laws [sic]
>
> Can be stopped during Break period – Spring 2019
>
> > 1 year
>
> Serve Notice
>
> If don't serve notice …
>
> Can reverse".

150. From the Monitoring Trustee's rough notes, it can be inferred that Mr Brown explained that it was likely that the Lease would not be required after the divestment; that there was a break clause; and that break clause could, by some means, be reversed once served.

151. In his email sent at 10.47 on 15 March 2018, very shortly after the telephone discussion, the Monitoring Trustee stated:

> "Nigel, Many thanks again for the call earlier. You mentioned the break period remains in force until Spring 2019 with one-year notice and that the decision can be reversed. Is there a time limit within which the decision can be reversed?
>
> Can you please send us the page of the lease which states these conditions for our records?".

152. Mr Brown replied at 12.09. The terms of his reply are instructive. He stated

> "[…] The break clause is effective in April 2019 provided we comply with the conditions of termination. If we do not comply with any of the termination provisions then the break notice is not effective. So if we choose not to vacate the premises we merely have to not comply or serve a notice stating that we will not comply with the break notice for the lease so [sic] continue. This is all standard stuff, it is always more onerous to terminate than to continue the agreement.".

153. In our view, Mr Brown's email would convey to the Monitoring Trustee that Electro Rent would, in effect, have the option unilaterally to reverse the operation of the Break Notice. That, of course, was not, in fact, correct. It is common ground that Electro Rent could not compel the landlord to re-instate the Lease.

154. In his second witness statement, Mr Brown said, in relation to his telephone discussion with the Monitoring Trustee "I believe that Mr Gopal understood me to be saying that (i) there was no certainty that the Break Notice could be reversed and (ii) any reversal may involve either the granting of a fresh lease or the continuation of the existing Lease." We do not accept this evidence. We do not consider that it is consistent with his email to the Monitoring Trustee on 15 March (and it also conflicts with the evidence of the Monitoring Trustee).

155. Reversibility was clearly an important issue for the Monitoring Trustee. Additionally, the timing as presented to the Monitoring Trustee excluded the possibility of postponing a decision to see, in six months' time what seemed appropriate – the matter was presented as having to be decided within the next few weeks. In indicating, in the telephone call, that serving the Break Notice would be fine (and when maintaining that position following the email exchange), the Monitoring Trustee was under a material misunderstanding as to the true position. We hold that the Monitoring Trustee was not put in a position by Mr Brown in which he could reach a properly informed view as to whether or not the service of the Break Notice ran the risk of breaching the Interim Order.

156. The CMA relied on a number of additional matters including whether Electro Rent failed to make open and honest disclosure to the Monitoring Trustee of all relevant matters in respect of the provision of advice by Mr Colley and of the likely effect of serving the Break Notice in terms of destabilising staff to argue that Electro Rent did not have a reasonable excuse for the breach of the Interim Order. In the light of our findings above, we do not consider it necessary to deal with these matters.

157. We therefore reject the proposition that the Monitoring Trustee was properly briefed.

158. We now address the issue, in the circumstances, of whether Electro Rent followed the correct procedure and whether that was or could be sufficient to constitute a reasonable excuse.

159. Electro Rent accepted at the hearing (and Mr Brown accepted that he was aware in March 2018) that:

(1) the Monitoring Trustee could not, himself, grant a derogation from the Interim Order, or grant consent to something that required the consent of the CMA; and

(2) the Monitoring Trustee could not decide what was not a breach of the Interim Order requiring a consent or derogation.

160. Mr Brown maintained that he had followed the correct procedure having regard to Paragraph 13 of the Directions, and this was reinforced by the fact that Mr Polito had, at the site visit at Microlease's premises on 22 November 2017, confirmed that he should address any questions about the Interim Order to the Monitoring Trustee. In cross-examination, his evidence was that Mr Polito had advised him that the Monitoring Trustee should be the first port of call if he had any questions about the Interim Order.

161. Mr Brown maintained that he was not in doubt that the service of the Break Notice would not contravene the Interim Order and consulted the Monitoring Trustee only out of an abundance of caution. However, he said in cross-examination that if he had been in any doubt, he would still have gone first to the Monitoring Trustee, and would only have gone to the CMA if the Monitoring Trustee had raised a concern.

162. In our view, even if Mr Brown had fully complied with paragraph 13 of the Directions this would not of itself be sufficient to provide Electro Rent with a reasonable excuse. Moreover, in the light of the findings above, we do not consider that the way in which Electro Rent in these circumstances sought and obtained a degree of comfort from the Monitoring Trustee was sufficient to constitute a reasonable excuse. We have already rejected the proposition that Electro Rent had good reasons to conclude that service of the Break Notice would not breach the Interim Order.

163. In addition, although this is not necessary for our decision, we consider that paragraph 13 has a different underlying rationale. It appears in a procedural section of the Directions and appears to be intended to promote transparency on the part of Electro Rent towards the Monitoring Trustee, in order to enable him better to understand any actual or potential compliance issues; to give him a better understanding of the business; and enable him to perform his role on an informed basis. In essence, it imposes on Electro Rent a self-reporting obligation towards the Monitoring Trustee to aid, with a high degree of transparency, the management of Electro Rent's responsibilities under the Interim Order.

164. There is no suggestion in the Directions that disclosure to the Monitoring Trustee, even if adequate, removed the need to seek the consent of the CMA; nor is that result necessary to give a purpose to paragraph 13.

The "new case" issue

165. Electro Rent submitted that, in certain material respects, the CMA had sought to support its Decision with a new case, or new arguments, that did not feature in the reasons it gave for its decision. These new grounds were said to be: (a) the CMA's submission that it was *obvious* that the break notice was a contravention of the interim order, (b) Electro Rent had misled the Monitoring Trustee in relation to the notice period for the service of the Break Notice and on reversibility, (c) Electro Rent had failed to disclose that it had taken advice on matters relating to the lease from Mr Colley who was conflicted, and (d) Electro Rent had failed to disclose that serving the Break Notice could destabilise staff.

166. As we have not found it necessary to rely on points (c) and (d) in our decision, we say no more about them.

167. As regards point (a), we accept the submission of the CMA that it has not departed from the proposition found in paragraph 52 of the Decision that Electro Rent ought to have suspected that, by not seeking the CMA's consent before issuing the Break Notice, it was failing to comply with the Interim Order. That

is the test that the CMA applied in its Decision. That does not prevent it from inviting the Tribunal to find that it was, in fact, obvious.

168. That leaves the issue of whether in adducing evidence that Electro Rent misinformed the Monitoring Trustee on two important matters, the CMA sought to introduce a new reason for its Decision.

169. The parties cited a number of authorities in relation to this submission.[4] We do not consider it necessary to analyse the judgments in these cases, because ultimately there was no dispute as to the principles to be drawn from them. The issue is whether, as Electro Rent contends, the CMA has sought to introduce a new justification for its Decision or whether it is merely seeking to rebut factual material relied on by Electro Rent in its appeal.

170. We reject Electro Rent's argument. In its submissions to the CMA, Electro Rent relied on the fact that it had consulted the Monitoring Trustee and received oral confirmation that it might proceed to serve the Break Notice. The CMA's response to that submission in the Decision was that it ought to have suspected that to do so would constitute a failure to comply with the Interim Order. Neither party provided significant detail about the discussions between Mr Brown and the Monitoring Trustee.

171. With the Notice of Appeal, however, Electro Rent served a witness statement from Mr Brown. In paragraphs 36 to 47, Mr Brown provided a detailed account of his discussion with the Monitoring Trustee and quoted from the email exchange on 15 March 2018. The purpose of this evidence, and the emails, was to provide detailed support for the proposition advanced in the Notice of Appeal that Electro Rent was entitled to rely on the response by the Monitoring Trustee to Mr Brown's question.

172. We conclude that in seeking to rebut that evidence, the CMA is not seeking to advance a new justification for its Decision. Its primary position remains that,

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[4] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1; *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17; and *Imperial Tobacco Group PLC v Office of Fair Trading* [2011] CAT 41.

irrespective of the discussion between the Monitoring Trustee and Mr Brown, Electro Rent ought, itself, to have suspected that serving the Break Notice would breach the Interim Order. In addressing the content of the discussions between the Monitoring Trustee and Mr Brown, it was rebutting a development of Electro Rent's case, which it was entitled to do.

173. For these reasons, we reject Grounds 1(a) and 1(b).

(2) Ground 1(c) The reasoning of the CMA was inadequate and/or wrong.

174. The Tribunal rejects Electro Rent's criticisms of paragraph 52 of the Decision for the following reasons.

Paragraphs 52(a) and (b)

175. Electro Rent attacks paragraphs 52(a) and 52(b) of the Decision on the basis that it is irrelevant to the issue of reasonable excuse that addressees of an Interim Order, such as Electro Rent, had a statutory duty to comply with the Interim Order; and that the Order required Electro Rent, and not the Monitoring Trustee to seek the prior consent of the CMA before issuing the Break Notice.

176. We consider that in these paragraphs, the CMA is merely setting out part of the context in which reasonable excuse has to be considered. We do not accept that the CMA was taking into account matters that were irrelevant to the issue of reasonable excuse.

Paragraph 52(c)

177. In relation to paragraph 52(c), Electro Rent attacks the CMA's proposition that Electro Rent's obligations under the Interim Order were not affected by the discussions between it and the Monitoring Trustee. Electro Rent argues that any assertion that steps taken by the Monitoring Trustee were irrelevant to the position of the merging parties is wrong; in any event, the issue in the present case is *not* whether any interaction with the Monitoring Trustee formally altered

the scope and terms of the Interim Order; the issue is whether there was reasonable excuse for the contended breach.

178. We consider that the CMA in this paragraph correctly points out that, irrespective of discussions between Electro Rent and the Monitoring Trustee, the onus rested with Electro Rent to seek the consent of the CMA, where, as here, it ought to have suspected that the Break Notice would constitute a breach.

Paragraph 52(d)

179. In relation to paragraph 52(d) of the Decision, Electro Rent submits that it is no part of Electro Rent's case that the Monitoring Trustee has delegated authority to grant consent to action which would otherwise be in breach of the Interim Order: the point is irrelevant in circumstances where the question is whether Electro Rent had reasonable excuse for the putative breach.

180. We consider that the fact that, as Mr Brown was aware, the Monitoring Trustee has no delegated authority to grant consent is relevant to the issue of whether it was reasonable for Electro Rent to rely only on the view expressed by the Monitoring Trustee without consulting the CMA itself.

Paragraph 52(e)

181. Electro Rent argues that it was under no obligation to raise the issue with the CMA if it simply had a doubt about an action complying with the Interim Order. That would be contrary to the explicit terms of paragraph 13 of the Directions which imposed an obligation to contact the Monitoring Trustee *"for clarification"* where it had any doubt about compliance. Further, Electro Rent submits that the terms of Directions paragraph 13 are strikingly different from paragraph 14 which states that where the merging parties have any reason to suspect that the Interim Order has been breached (by action already undertaken), there is an obligation to notify *both* the Monitoring Trustee and the CMA immediately.

182. We consider that it was reasonable to infer from the fact that Electro Rent decided to consult the Monitoring Trustee that Electro Rent considered that it was possible that serving the Break Notice would breach the Interim Order. In any event, we consider that, objectively speaking, Electro Rent should at least have suspected that it was possible that it did. In that situation, the onus was on Electro Rent to seek legal advice or seek the consent of the CMA, irrespective of any discussions with the Monitoring Trustee. Moreover, as set out in paragraphs 163-164 above, we consider that there are other good explanations for the terms of both paragraphs 13 and 14 which are not inconsistent and which do not support the submissions made by Electro Rent.

Paragraph 52(f)

183. In relation to paragraph 52(f) of the Decision, Electro Rent observes that the first three sentences are concerned with the fact that, in other circumstances, where Electro Rent considered that actions would otherwise breach the Interim Order, it sought consent from the CMA. The fourth sentence then states that "*Electro Rent ought to have suspected that by not seeking the CMA's consent before issuing the Notice, it was failing to comply with the interim Order.*" Electro Rent submits that this is irrelevant to the question of whether there is a reasonable excuse in the present case that in other instances Electro Rent had sought the consent of the CMA.

184. We consider that the main proposition advanced by the CMA in paragraph 52(f) is that Electro Rent ought to have suspected that by not seeking the CMA's consent before issuing the Break Notice, it was failing to comply with the Interim Order. We consider that that proposition is well founded. The first three sentences are not critical to that proposition. They add no more than that Electro Rent understood that where there was a possibility of a breach it was required to consult the CMA.

185. Electro Rent argues that the final sentence of paragraph 52(f) reveals a gross failure in the reasoning of the CMA. It states: "*[a]lthough Electro Rent contacted the [Monitoring Trustee] prior to issuing the Notice, this does not amount to a reasonable excuse for non-compliance with the Interim Order.*"

This sentence fails to recognise that the Monitoring Trustee gave a clear and unambiguous statement to Electro Rent that he did not consider any concern relating to compliance arose. This fact is absolutely critical to any assessment of the reasonable excuse consideration and the CMA has failed to take it into account in its reasons.

186. Electro Rent's argument in relation to the final sentence of paragraph 52(f) is predicated on an assertion of fact that the Monitoring Trustee gave, on a properly founded basis, a clear and unambiguous statement to Electro Rent that he did not consider any concern relating to compliance arose in circumstances in which Electro Rent could be entitled to rely on (not least because the position had been fairly and accurately put to the Monitoring Trustee). For reasons already given, we reject that assertion.

Paragraph 52(g)

187. At paragraph 52(g) of the Decision, the CMA states that "*the CMA has not alleged that Electro Rent has failed to comply with the Directions*". According to Electro Rent, this statement misses the point. The Directions are of central relevance to this case because they explain why Electro Rent acted reasonably and responsibly in consulting in advance the Monitoring Trustee about its proposal to serve the Break Notice and relying on the Monitoring Trustee's response.

188. In our view, the CMA is correct in its view that compliance with the Directions is not the point here. Electro Rent complied with paragraph 13 of the Directions in that it consulted the Monitoring Trustee. However, we do not consider the fact that Mr Brown followed the correct procedure, on these facts, is sufficient to provide Electro Rent with a reasonable excuse: Electro Rent ought to have suspected that by serving the Break Notice without the prior consent of the CMA it was failing to comply with the Interim Order. In any event, it did not adequately consult the Monitoring Trustee.

Paragraph 52(h)

189. Electro Rent forcefully made a submission that it was untenable to hold that its reasonable commercial rationale was irrelevant to whether it had a reasonable excuse for breaching the Interim Order. We disagree. To rely on a reasonable commercial rationale is to address the wrong question. The right question was whether it was possible that termination of the Lease was incompatible with paragraph 5(e) of the Interim Order.

Paragraph 52(i)

190. Paragraph 52(i) states that this case does not involve a genuinely unforeseeable or unusual event and/or an event beyond the company's control. Electro Rent does not challenge this proposition. However, the categories of reasonable excuse are not limited to this list.

191. We do not consider that the CMA regarded the possible range of reasonable excuses to be limited to the list. In our view, the CMA addressed all of the relevant circumstances.

Electro Rent's concluding remarks in relation to the CMA's reasons

192. Finally, Electro Rent asserts that, contrary to paragraph 50 of the Decision, there is no analogy with the Tribunal's judgment in *ICE/Trayport*. In that case, ICE did not inform the monitoring trustee in advance (or the CMA) and, in consequence, there were no statements or observations by the Monitoring Trustee.

193. We reject this submission under reference to paragraph 118 et seq above, where we set our view as to the relevance of the *ICE/Trayport* case.

194. For these reasons, we reject Ground 1(c).

195. Grounds 1(a), 1(b) and 1(c) constitute the basis upon which Electro Rent submits that the CMA erred in finding that Electro Rent did not have a reasonable excuse for breaching the Interim Order. By rejecting Grounds 1(a), 1(b) and 1(c), we reject Electro Rent's submission that the CMA erred in finding

that Electro Rent did not have a reasonable excuse for breaching the Interim Order. In reaching that conclusion we were not in any doubt as to whether Electro Rent had a reasonable excuse for breaching the Interim Order, or in relation to any of the underlying facts. Accordingly, the issue of the benefit of the doubt did not arise.

(3) Ground 2(a) Electro Rent's conduct had no adverse effects on the merger investigation or any remedies.

196. By its second Ground of Appeal, Electro Rent contends that the penalty of £100,000 imposed by the Decision is excessive and should be reduced to nil or a nominal sum.

197. Electro Rent contends that the CMA was wrong at Decision paragraphs 5(a), 55 and 72 to find that any failure by Electro Rent was "*significant and had a potentially adverse effect on the merger investigation*" through its impact on the remedial divestment package. Electro Rent's UK business needed a lease of suitable premises – of which there are many available in the market – and did not need the lease of the Premises specifically.

198. Moreover, Electro Rent submits that the CMA erred in Decision paragraph 60 in stating that Mr Brown's commercial assessment was "*irrelevant*". Contrary to the CMA's approach, the fact that the "*premises were part of a divestment package*" was not the end of the matter: the CMA could not sensibly reach a view about the impact of the service of the Break Notice on the merger investigation without considering whether alternative suitable sites were readily available and the *benefits* to any purchaser of serving the Break Notice that Mr Brown identified.

199. The CMA disagrees with Electro Rent's assertion that issuing the Break Notice had no adverse effects on possible remedies, for the following reasons.

(1) First, the whole point of interim measures is to ensure merger parties seek the CMA's consent *before* making significant changes to the merged businesses that might prejudice the outcome of the CMA's

investigation. Electro Rent's conduct in this case ran precisely the risks that interim orders are designed to avoid.

(2) Second, it is not for merger parties unilaterally to determine the suitability of assets to be included in any divestiture package. Rather, it is for the CMA to choose effective remedies that are reasonable and practicable, having consulted interested parties. Issuing the Break Notice potentially altered one of the divestiture packages being considered by the CMA.

(3) Third, when it contacted the Monitoring Trustee on 15 March, Electro Rent had not identified alternative sites that would suit Electro Rent's UK business and would be on equivalent terms to the Lease. There was therefore a *risk* that suitable premises for the UK divestment business might not be available or would only be available on inferior terms.

200. We consider that the CMA was correct in its view that service of the Break Notice had a potentially adverse effect on the merger investigation and remedies and that, in the context of the public importance of a clear and enforced merger control process, that effect was material. As we have held above, Electro Rent ought to have understood that the CMA intended that the divestment package would include the Lease of the Sunbury Premises. As Mr Polito stated during cross examination, the CMA Inquiry Group *"were clearly looking at the Sunbury site as premises that would form part of the package"*. By serving the Break Notice, Electro Rent brought about a situation in which the inclusion of the Lease, and therefore the integrity of the divestment package, could depend on the actions of a third party, the owner of the Sunbury Premises or of such other premises as Electro Rent might consider leasing. It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed. We do not accept the criticism that the CMA ignored the fact that there were no actual adverse effects and was wrong to focus only on potential adverse effects. The CMA did not suggest that there were in fact adverse effects and as we observe above we consider that its view that there was a risk of adverse effects was correct.

201. We do not regard it as a mitigating factor that Electro Rent considered that there were good commercial reasons for terminating the Lease or that termination would make the UK business more attractive to purchasers who did not want the Lease. That was not a judgement for Electro Rent to make and, in any event, was not relevant to the issue of whether the consent of the CMA was required.

(4) Ground 2(b) There is no need for deterrence

202. In Electro Rent's submission, the CMA was wrong to find, in Decision paragraphs 5(g) and (h), 63 and 72, that the penalty needed to be fixed at a level to ensure specific and general deterrence. As set out in Ground 1 above, the CMA appointed the Monitoring Trustee to act on behalf of the CMA and mandated him to operate as a point of contact for queries about compliance with the Interim Order. Electro Rent properly and prudently approached the Monitoring Trustee in advance, explained what it intended to do and why and relied on the Monitoring Trustee's response. There is no need to deter Electro Rent or anyone else from pursuing such an approach.

203. Moreover, this was the first case of its kind, there was lack of clarity about the role and significance of the Monitoring Trustee, the breach was inadvertent, Electro Rent had no incentive to breach the Interim Order, it took prompt action to rectify the breach and incurred significant costs in doing so. All of these factors indicate that there was no need for a deterrent signal.

204. The CMA contends that Electro Rent's argument is misconceived. The CMA was not seeking to deter Electro Rent or anyone else from approaching a monitoring trustee. The fact that a company approached and relied on a monitoring trustee does not negate the need for deterrence if, as the CMA found to be the case, the company should have sought consent from the CMA. In these circumstances, a penalty deters merger parties from failing to comply with interim measures.

205. In our view, Electro Rent ought to have known that serving the Break Notice without the CMA's consent was a clear breach of the Interim Order, regardless of Mr Brown's "quick chat" with the Monitoring Trustee on 15 March.

206. We agree with the CMA that it was appropriate to set the penalty at a level that would bring home to Electro Rent, and to other parties involved in a merger investigation, that it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA. This is so, whatever the intentions or incentives of the party involved.

207. We do not regard the factors summarised above as mitigating circumstances that the CMA failed to take into account. We consider that Electro Rent could not reasonably conclude that consulting the Monitoring Trustee, on the facts of this case, was sufficient to discharge its obligations.

208. The CMA has not argued that Electro Rent had an incentive to breach the Interim Order or that the breach was deliberate. It did not base its penalty decision on any such assumption.

(5) Ground 2(c) Any breach of the Interim Order by Electro Rent was not significant or flagrant

209. Electro Rent submits that the CMA was wrong to describe any breach as "*a flagrant breach*" at paragraphs 5(c) and 61 for the reasons given in paragraph 202 above.

210. The CMA argues that Electro Rent's objection is unfounded for the reasons set out at paragraph 55 of the Decision and at paragraph 204 above.

211. In characterising the breach as significant and flagrant, the CMA points to the fact that the breach was committed by the CEO, who was aware of the terms of the Interim Order, and who was responsible for signing the fortnightly compliance statement. Electro Rent had previously sought the consent of the CMA for derogations from the Interim Order. The CEO, Mr Brown, accepted that he was aware that the Monitoring Trustee could not grant derogations, or give a definitive ruling on whether the Break Notice would contravene the Interim Order.

212. We agree that the breach in this case was both significant and flagrant. It undermined, until remedied, the integrity of the divestment package. The breach was perpetrated by the CEO of a well-resourced company that had access to legal advice. As we have held above, a reasonable person could not have concluded that it was sufficient for Electro Rent to consult the Monitoring Trustee before serving the Break Notice. In so far as Electro Rent considered that the matter was urgent, that was based on a failure on the part of Mr Brown to read the relevant provisions of the Lease or of the Break Notice itself, which narrated that 6 months' notice was required. Further, in consulting the Monitoring Trustee, it failed to put him in a position to express a fully informed view on whether serving the Break Notice would breach the Interim Order.

(6) Ground 2(d) The CMA has relied on irrelevant considerations

213. The CMA found at paragraphs 5(d) and 56 of the Decision that Electro Rent did not bring the failure to comply to the CMA's attention. However, Electro Rent contends that it notified the Monitoring Trustee in advance of the proposed service of the Break Notice. The Monitoring Trustee was appointed to act on behalf of the CMA.

214. Moreover, the CMA was wrong to place weight at paras 5(e) and 61 of the Decision on the fact that Electro Rent had previously sought a derogation from its obligations under the Interim Order. The matters in respect of which Electro Rent had sought a derogation earlier in the CMA's investigation concerned very different facts from the Break Notice and Electro Rent correctly considered that prior written consent from the CMA was required.

215. The CMA submits that the fact that Electro Rent: (i) did not notify the CMA of its breach; and (ii) had previously sought the CMA's consent for derogations were relevant to the imposition and size of the penalty, because: (i) Electro Rent's failure to notify the CMA was the gravamen of the breach; and (ii) Electro Rent's previous conduct showed that it knew and understood its obligations under the Interim Order and should have known that serving the Break Notice required the prior consent of the CMA.

216. We consider that it is relevant to the assessment of penalty that Electro Rent understood that where a proposed course of action might be inconsistent with the provisions of the Interim Order, it was required to seek a derogation from the CMA. We have held that Electro Rent ought to have suspected that the Break Notice would breach the Interim Order.

(7) Ground 2(e) Electro Rent should be judged on the basis of its honest beliefs

217. According to Electro Rent, the CMA was wrong to find at Decision paragraph 60 that "*the right to exercise the option to terminate the lease early lay with the acquirer not Electro Rent*" and at paragraph 61 that there was "*no urgency*" as to the issue because six months' notice was sufficient. On the facts, as Mr Brown honestly believed them (namely that notice was required to be served in March 2018), there would have been no scope for any purchaser to exercise the break clause to take effect on 14 April 2019 and the matter was urgent.

218. The CMA submits that Mr Brown's beliefs neither justified Electro Rent's failure to comply with the Interim Order nor rendered that failure any less serious nor allowed the future acquirer of the UK divestment business to decide whether or not to terminate the Lease.

219. We reject the submission that, in this case, Electro Rent's conduct should be judged on the basis of Mr Brown's subjective beliefs because we have held that his subjective beliefs were not reasonable.

(8) Ground 2(f) Electro Rent has been put to significant financial expense

220. Electro Rent submits that the penalty is manifestly excessive bearing in mind the costs the CMA has already effectively imposed: Electro Rent was a forced buyer in the negotiations with the lessor (see paragraph 56 above) and the lessor increased the rent. This will increase Electro Rent's costs whilst it leases the Premises. Those costs will continue to be incurred until Electro Rent is able to negotiate an assignment or surrender of the lease.

221. The CMA argues that the Decision *did* take account of the fact that Electro Rent sought to remedy its breach as one of the mitigating factors that reduced the overall penalty. Moreover, the fact that the company in breach subsequently adopted remedial measures is no answer to the policy objective of incentivising compliance. The effectiveness of a penalty in deterring other companies is to a large extent likely to depend on the degree to which the penalty figure is one that will be perceived by third parties as illustrating the serious consequences of violating interim measures. Other firms should not be given the impression that they could substantially escape the impact of any penalty on themselves if, upon discovery of a breach of an interim order, they then seek to mitigate the breach.

222. We consider that the CMA was correct that the fact that Electro Rent had incurred significant cost in remedying the breach was only one factor in the overall assessment of penalty. It took that factor into account. The CMA was entitled to proceed on the basis of furthering a policy objective of deterring non-compliance, or of incentivising compliance. We also consider that it was reasonable for the CMA to conclude that a penalty additional to the cost of remedying the breach was necessary to meet that policy objective.

223. For the reasons set out above, we do not accept Electro Rent's criticisms of the grounds on which the CMA arrived at its conclusion that a penalty of £100,000 was appropriate in the circumstances. The CMA, rightly, had regard to the actions of the Monitoring Trustee which were a *"significant factor"* in reducing the level of penalty. The penalty of £100,000 is well below the statutory maximum of £11.7 million. Moreover, we note that the penalty was not anomalous in the context of the size of the acquisition of Microlease by Electro Rent or of the fees and other costs that would, undoubtedly, have been incurred in a transaction of this size.

224. Further, looking broadly at the whole circumstances, we do not consider the amount of the penalty to be unreasonable or disproportionate. Electro Rent does not dispute the CMA's findings in paragraph 71 of the Decision as to Electro Rent's financial resources or the CMA's conclusion that they would not be materially affected by a penalty of £100,000.

G. CONCLUSION

225. For the reasons set out above, we unanimously dismiss the Appeal.

Heriot Currie Q.C. Paul Lomas Sir Iain McMillan CBE DL
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 11 February 2019
Registrar