Neutral citation [2023] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1586/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

15 May 2023

Before:

HODGE MALEK KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

DYE & DURHAM LIMITED
DYE & DURHAM (UK) LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 15 May 2023

RULING

APPEARANCES

Mr Ben Lewy (instructed by Dentons UK and Middle East LLP) appeared on behalf of the Applicants.

Mr Ben Lask KC (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Mr Robert O'Donoghue KC (instructed by Fieldfisher) appeared on behalf of the Proposed Intervener, TM Group (UK) Limited.

A. INTRODUCTION

1. On 21 April 2023 the Applicants ("**D&D**") filed an application for review pursuant to s.120 of the Enterprise Act 2002 (the "**Act**") of a decision by the Respondent (the "**CMA**") dated 29 March 2023 **("the Decision")**, in which it assessed as non compliant D&D's proposal to pursue the demerger and AIM admission of TM Group (UK) Limited **("TMG")**[1] in parallel to a private sales process ("the **AIM Proposal**"). The AIM Proposal was set out in the Proposal Paper – Twin Track Divestment Process dated 23 February 2023 submitted by D&D to the CMA ("the **Proposal Paper**")

2. The Decision followed the CMA's Final Report of 3 August 2022, in which it concluded that D&D's merger with TMG would result in a substantial lessening of competition in the market for property search report bundles ("**PSRBs**") and required the full divestiture of TMG. The Decision assessed the AIM Proposal against Final Undertakings dated 13 October 2022 ("**the Final Undertakings**"), in which D&D agreed to complete the sale of TMG to an Approved Purchaser within the Divestiture Period.

3. This is the Tribunal's ruling at the case management conference on 15 May 2023 (the "**CMC**"), on the admissibility of two witness statements and an expert report that D&D sought to adduce. Nothing in this ruling regarding the admissibility of evidence prejudges the issues that D&D has raised in its application for review (the "**s.120 Application**").

4. At this CMC the Tribunal has already granted by a separate ruling TMG permission to intervene under Rule 16 of the Tribunal's Rules on the basis that it has a sufficient interest in the outcome of the proceedings. It has a direct interest in the divestiture process and for that process to be carried out without delay. Further, D&D's proposal to pursue an AIM Admission if carried through would result in a significant corporate change to its business. TMG also participated in the administrative process before the CMA. The separate ruling

[1] AIM (formerly the Alternative Investment Market) is a stock market operated by the London Stock Exchange.

deals with the matters on which TMG may make submissions and file limited witness evidence.

B. BACKGROUND

5. D&D is a leading provider of software to legal, financial and business professions with customers in Australia, Canada, the United Kingdom and Ireland. It produces a range of software which (among other things) automates the property searches typically conducted when real estate is conveyed. The results of these searches are provided to conveyancers in the form of PSRBs.

6. On 8 July 2021, D&D acquired TMG. Like D&D, TMG also provides PSRBs to conveyancers across England and Wales. D&D did not seek prior merger clearance for its acquisition of TMG and, after the transaction completed, the CMA opened an investigation into the transaction. On 18 May 2022, the CMA published its provisional findings, in which it provisionally concluded that the merger may be expected to result in a substantial lessening of competition. On the same day, the CMA published a notice of possible remedies which identified divestiture as a potential remedy. D&D engaged with the CMA's investigations and discussed possible remedies. On 3 August 2022, the CMA published its Final Report which required D&D to divest TMG in its entirety. On 13 October 2022, D&D gave (and the CMA accepted) the Final Undertakings. In brief, the effect of the Final Undertakings is that D&D must divest TMG to a purchaser approved by the CMA by a specified date. If D&D does not do so, then the CMA may appoint a Divestiture Trustee to do so on D&D's behalf.

7. Since 13 October 2022, D&D has been engaged in a private sale process to divest TMG by selling it to a third party buyer, in accordance with the Final Undertakings. As at the date of the s120 Application, negotiations with bidders were continuing. However, D&D has been concerned that the originally proposed sales process may not lead to a divestment of TMG on acceptable terms. D&D has therefore, in consultation with its financial advisers and with the CMA, continued to explore other possible methods of divesting TMG in line with the Final Undertakings, including the AIM Proposal.

8. The AIM Proposal as explained in the Notice of Application now envisages D&D entering into a corporate restructuring whereby TMG would be transferred to a new public limited company, known as Dye & Durham Callisto plc ("**Spinco**"), whose shares would be (a) admitted to trading on AIM and (b) transferred to D&D's existing shareholders so that they could be traded on AIM by those shareholders. Spinco would then and thereby, in D&D's view, function as an independent entity, separate from D&D. The Proposal Paper itself made no mention of a Spinco, but instead was on the basis that it would be the shares in TMG itself that would be admitted to trading on AIM.

9. To this end, D&D has been discussing the possibility of pursuing an AIM admission with the CMA and Monitoring Trustee on various occasions in early 2023. As part of this process, D&D filed submissions with the CMA in February 2023 and it filed supplemental submissions on 6 March 2023. The CMA issued its provisional decision on 8 March 2023 indicating that the AIM Proposal would not be acceptable. The CMA gave D&D three working days to make further submissions before the provisional decision became final. D&D filed these submissions on 13 March 2023. From the material drawn to the attention of the Tribunal at the CMC it is only in the submissions dated 13 March 2023 that there is a reference to a possibility that it would not be the shares in TMG that would be admitted to AIM, but of a parent company, Spinco. The possibility was not highlighted or developed in any detail, and there was no development in respect of a concept of having Spinco being admitted, certainly not in the way as now developed in the further evidence that D&D now wishes to have admitted. The CMA issued the Decision on 29 March 2023.

10. In its s.120 Application, D&D submits that, by the Decision, the CMA declined to:

    (1) approve the AIM Proposal the "**AIM Decision**");

    (2) vary D&D's Final Undertakings (if the same were needed) so as to allow D&D to transfer its shareholding in TMG to Spinco (the "**Variation Decision**"); or

(3) approve Spinco as a form of approved purchaser, even if no variation of the Final Undertakings were required (the "**Approval Decision**").

11. D&D contends that the effect of the Decision is:

(1) to prevent D&D from proceeding with the divestiture of TMG through a transfer of D&D's shareholding in TMG to Spinco even though Spinco would (once admitted to AIM) meet the CMA's purchaser approval criteria;

(2) to prevent D&D from divesting TMG in a different manner from a direct sale to a third party purchaser, namely by transferring the shareholding in TMG to Spinco as an independent entity whose shares would be admitted to trading on AIM;

(3) to preclude variation of the Final Undertakings (if the same were needed) to permit a divestment of TMG via an AIM admission of Spinco, even though this would have the significant benefit of improving the competitiveness of the sales process and, if the sales process failed to produce a satisfactory outcome, would result in Spinco operating as a functionally independent entity, capable of competing with D&D in the relevant market; and

(4) to proceed on the narrow basis that a variation to the Final Undertakings would be required, that such a variation should not be permitted, and that the AIM Proposal would not meet certain "suitable purchaser" requirements which the CMA would wish to apply.

12. D&D challenges the Decisions on the following principal grounds.

(1) The CMA erred in law in finding that the AIM Proposal would require a variation to the Final Undertakings given by D&D to the CMA. No variation was necessary, since the structure envisaged that (once admitted to AIM) Spinco could readily – and should – have been treated as a prospective purchaser of TMG, eligible for approval (**Ground 1**).

(2) The CMA proceeded in the Approval Decision to consider the purchaser approval criteria, but erred in law in applying those criteria on the facts of this case, with the resulting erroneous legal conclusion that the purchaser approval criteria were not met (**Ground 2**). In particular:

(a) The CMA erred in law in considering the purchaser approval criteria in relation to TMG itself, or to the shareholders of TMG/Spinco, rather than to Spinco.

(b) The CMA erred in law in finding that the independence criteria were not met.

(c) The CMA erred in law in finding that the capability and commitment criteria were not met.

(d) The Approval Decision was otherwise *Wednesbury* unreasonable in taking into account irrelevant considerations, failing to take into account material considerations, was vitiated by procedural unfairness and/or was irrational.

(3) Alternatively, to the extent that the Tribunal finds against D&D on Ground 1, but rules in favour on Ground 2, the CMA erred in law in taking the Variation Decision, finding that no variation to the Final Undertakings should be given, since the AIM Proposal brings with it a suitable purchaser mechanism which has the additional advantage of enabling existing shareholder values to be maintained, with no associated risk to the competition concerns that lie behind the divestiture requirement. The Variation Decision was in those circumstances disproportionate, vitiated by other errors of law and/or was *Wednesbury* unreasonable (**Ground 3**).

(4) D&D also challenged the CMA's decision refusing to extend the deadline for divesting TMG until a date after the conclusion of the Application (the "**Extension Decision**"). As D&D's challenge to the AIM Decision would become academic unless the deadline is extended,

D&D contended that the Extension Decision was disproportionate and infringed D&D's statutory right to pursue an effective review of the contested Decision (**Ground 4**). This ground is no longer a live issue as the CMA has agreed to extend time until some date after the decision of this Tribunal on the Application.

13. In support of its s.120 Application, D&D seeks to rely on the following evidence:

(1) an expert report from Mr Walied Soliman of Norton Rose Fulbright Canada LLP dated 20 April 2023 ("**Soliman**");

(2) a witness statement from Mr Matthew Proud, CEO of Dye & Durham Limited, dated 21 April 2023 ("**Proud**"); and

(3) a witness statement from Mr Jonny Franklin-Adams of finnCap Limited ("finnCap") dated 21 April 2023 ("**Franklin-Adams**").

14. None of those statements were before the CMA at the time of its Decision, albeit a letter from finnCap dated 13 March 2023 was provided to the CMA prior to its Decision.

15. In summary, the CMA submits that:

(1) D&D's application to adduce Soliman should be refused; and

(2) Proud and Franklin-Adams should be excluded under Rule 21 (save for the majority of section 2 and section 3 of Proud).

C. LEGAL FRAMEWORK

16. Section 120 of the Act provides that:

> "**120. Review of decisions under Part 3**
>
> (1) Any person aggrieved by a decision of the CMA … under this Part in connection with a reference or possible reference in relation to a relevant

merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.

…

(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.

…"

17. The Tribunal Rules that relate to evidence in applications for a review of a decision under s.120 of the Act are Rules 9(4)(h), 21, 26 and 27.

18. Rule 9(4)(h) (read in conjunction with Rule 26) of the Tribunal Rules requires applicants to identify any new evidence provided in support of their application.

19. Paragraph 7.73 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the "**Guide**") states that:

> "The [2015 Tribunal Rules] refer to 'the substance' to reflect the fact that matters are often put forward at the administrative stage less formally, for example in correspondence or at meetings. The requirement to identify evidence as 'new' therefore does not apply where the substantive material was placed before the Regulator although it was not in the form of a witness statement or expert report that is produced for the purpose of the proceedings in the Tribunal."

20. Paragraph 7.77 of the Guide provides that "*the failure to identify evidence as being 'new' does not of itself render the evidence inadmissible*".

21. Rule 21 of the Tribunal Rules gives the Tribunal the power to admit or exclude evidence. It provides that:

> "**Evidence**
>
> **21.**—(1) The Tribunal may give directions as to—
>
> (a) the provision by the parties of statements of agreed matters;
>
> (b) the issues on which it requires evidence, and the admission or exclusion from the proceedings of particular evidence;
>
> (c) the nature of the evidence which it requires to decide those issues;
>
> (d) whether the parties are permitted to provide expert evidence;

(e) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally; and

(f) the way in which evidence is to be placed before the Tribunal.

(2) In deciding whether to admit or exclude evidence, the Tribunal shall have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following factors—

(a) the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal;

(b) whether or not the substance of the evidence was available to the respondent before the disputed decision was taken;

(c) where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time;

(d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded;

(e) whether the evidence is necessary for the Tribunal to determine the case.

(3) Unless the Tribunal otherwise directs, no witness of fact or expert witness may be heard unless the relevant witness statement or expert report has been submitted in advance of the hearing and in accordance with any directions of the Tribunal.

…"

22. Rule 27 of the Tribunal Rules stipulates that permission from the Tribunal is needed in order to adduce new expert evidence in proceedings for a review under s.120 of the Act:

"**Expert evidence**

27. If the applicant in proceedings for a review under section 120 or section 179 of the 2002 Act wishes to rely upon expert evidence that was not before the decision maker whose decision is the subject of the application, it shall serve with its application for review an application to adduce that evidence, attaching either the statement of expert evidence on which it wishes to rely or a detailed explanation of the nature of the expert evidence that it wishes to adduce."

23. The limited circumstances in which fresh evidence may be admitted in judicial review proceedings were set out by the Court of Appeal in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 ("***Powis***") at page 595:

"(1) that the court can receive evidence to show what material was before the minister or inferior tribunal … (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact or where the question is whether

> essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error … and (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. …"

24. This restrictive approach applies also to the admission of fresh expert evidence, although there is a "very rare" extension beyond *Powis* in respect of expert evidence which assists the court by explaining technical terms. This was set out by Collins J in *R (Lynch) v General Dental Council* [2003] EWHC 2987 (Admin) ("***Lynch***"):

> "19. … In judicial review proceedings, the circumstances in which fresh evidence can be received are very limited. …
>
> …
>
> 22. I have no doubt that fresh evidence involving expert evidence should in general not be admitted unless it falls within the *Powis* guidelines. … If the decision in question is made by an expert tribunal or indeed by anyone dealing in a field involving consideration of matters which would not obviously be fully understood by a layman without some assistance from an expert in that field, it may be necessary at the very least to have some explanation of any technical terms. …
>
> …
>
> 24. It is clear that the Court's function must not be usurped. But it seems to me that the Court must be enabled to carry out its function. To do this it must understand the material which is put before it. There is in my view a real distinction between a report from an expert which seeks to explain what is involved in a particular process … and how complicated that process is and one which goes on to opine that it was irrational for the body to have reached the conclusion it did. … However, it seems to me that in a truly technical field, where the significance of a particular process is in issue expert evidence can be admitted to explain the process and its significance. Cases where this can be permitted will be very rare and what I have said should not be regarded as opening the door to the admissibility of experts' reports in all cases such as this which involve judicial review of an expert tribunal or body. …
>
> 25. This is, I appreciate, some extension beyond that recognised by *Powis* of the possibility of admitting fresh evidence. But its purpose is in reality to explain to the court matters which it needs to understand in order to reach a just conclusion. … But a word of caution is appropriate. Where the tribunal or body is itself composed of experts or has been advised by an expert assessor … it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert. That is something which is inappropriate for a reviewing court."

(1) Factual Evidence

25. The Tribunal's general approach in judicial review cases has been that permission to adduce factual evidence is not granted unless the *Powis* test is met. Where the party seeking to adduce the factual evidence claims that it is not new in substance, the Tribunal has looked at the content and nature of the evidence to determine whether it is necessary, taking into account that it is a specialist Tribunal.

26. If the factual evidence is not new in substance, the Tribunal will consider its content and nature to decide whether it is necessary to determine the application under s.120: *Tobii AB (Publ) v CMA* [2019] CAT 23 **("*Tobii*")** at [23], [68], [76]. Since it is not the function of a factual witness to engage in argument or opinion, evidence containing such matters, or repeating matters already present in other documents, should not be admitted: *Tobii* at [69] – [70], [77]. As explained in paragraph 7.61 of the Guide:

> "As regards witnesses of fact, a witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the case file, to set out quotations from such documents or to engage in matters of argument."

(2) Expert Evidence

27. The Tribunal's general approach in judicial review cases has been that permission to adduce new expert evidence is not granted unless the *Powis* test is met and, given that it is a specialist Tribunal, it is not likely to be common that the *Lynch* principle would apply. Permission to adduce expert evidence is granted only in "*exceptional circumstances*": *Tobii* at [27]. The Tribunal has made clear that expert evidence should be *"strongly discouraged and disallowed other than in very clear cases"*: *BAA Ltd v Competition Commission* [2012] CAT 3 at [80] ("***BAA***"). Any expert evidence needs to satisfy the usual tests for admissibility of such evidence as well as the criteria for its admission as being truly necessary for the fair resolution of the proceedings: *Phipson on Evidence* (20th ed., 2022), paras. 33-43 and 33-78.

28. In *HCA International Limited v Competition and Markets Authority* [2014] CAT 10 ("***HCA***"), the Tribunal considered an application to adduce an expert report on an application for review under s.179 of the Act. It refused the application, applying *Powis* and *Lynch* and endorsing *BAA* and *Lafarge Tarmac Holdings Ltd v CMA* [2014] CAT 5 ("***Lafarge***"). The Tribunal reminded the parties that the admission of expert evidence in judicial review proceedings is "exceptional" and, as the Tribunal is a body which itself has technical expertise and an ability to understand technical economic points without external assistance, "*the sort of situation in which technical assistance is required under the Lynch principle is not likely to be a common one in this Tribunal*" (see [2] and [4(c)]). The Tribunal noted that factors which pointed strongly against the helpfulness of the expert report in question and, therefore, its inadmissibility included: the expert was not coming as a fresh and transparently independent expert but had acted for HCA throughout the Competition Commission's inquiry and his expert report re-argued points already made on HCA's behalf during the inquiry. Some of the points made were opinion more appropriate for an appeal on the merits, rather than the questions that need to be addressed under judicial review principles, and other points were more appropriately made by Counsel based on the facts of the case. (See [6(i)] to [6(iii)].)

29. The Tribunal in *Tobii* explained that the context of Tobii's substantive application brought under s.120 of the Act was important. The Tribunal stated, at [65]:

> "The principles of judicial review [in a merger application] confine the nature and scope of scrutiny by the Tribunal to the process undertaken in – not the merits of – the CMA's decision-making, and the Tribunal is under an obligation to determine merger appeals as expeditiously as possible. These are key factors that impact on the Tribunal's assessment at the case management stage of the proceedings as to what evidence is required to deal with Tobii's s.120 Application justly and at proportionate cost."

D. THE PARTIES' SUBMISSIONS

(1) D&D

30. Whilst D&D's primary case is that the Decision is tainted by an error of law (namely, an incorrect understanding of UK company law), D&D also

contends that the CMA's concerns about common shareholdings by independent institutional investors are an irrelevant consideration and/or *Wednesbury* unreasonable. The essence of D&D's complaint is that the CMA has made a serious error when analysing the relationship between institutional investors and publicly listed companies.

31. In the case of TMG (which would, after being spun out via Spinco, be a company incorporated in England and Wales and listed on a UK stock exchange), those laws and regulations are those of England and Wales – of which the Tribunal can take judicial notice.

32. The Tribunal can therefore assess for itself whether the CMA behaved rationally in finding that common minority shareholdings by institutional shareholders in English companies have the ability to influence management to behave in an anti-competitive manner. D&D contends that the Tribunal should conclude that the CMA's reasoning is erroneous.

33. In the case of Dye & Durham Limited (which is a company incorporated under the laws of Ontario), those laws and regulations are Canadian. The Tribunal cannot take judicial notice of these rules, notwithstanding that they are almost identical to their English counterparts.

34. The Tribunal is not, therefore, in a position to assess the rationality of the CMA's reasoning as regards the influence of minority institutional shareholders on D&D's management without expert evidence of Canadian law. Again, the Tribunal cannot understand D&D's submissions on these points without evidence of Canadian law.

35. D&D has therefore applied for permission under Rule 27 of the Tribunal Rules to rely on Soliman. Soliman sets out various aspects of Canadian company law and gives examples of where spin-offs/spin-outs have been used in Canada: C.f. *Tobii* at [28]-[30].

36. D&D has also adduced witness statements from Proud and Franklin-Adams. Proud provides a concise summary of the events leading up to the Decision,

whilst Franklin-Adams outlines his understanding of how TMG would operate as an independent listed company.

37. D&D submits that, given the history of D&D's interactions with the CMA and the nature of its challenge to the Decision, it would be the victim of manifest procedural unfairness were it not allowed to rely on the evidence it has filed for the following reasons.

(1) The CMA's core objections to the AIM Proposal were set out for the first time in the Decision. D&D therefore had no ability to challenge the CMA's objections prior to the making of its Decision. Even if the CMA's concerns had been set out, the CMA gave D&D only three working days to comment on its provisional decision, which is insufficient time to produce expert evidence. The short timetable offered to D&D is to be contrasted with the much longer periods taken by the CMA to adopt both its provisional decision, and the Decision (responding to the points which D&D had very rapidly submitted in response to the provisional decision).

(2) The essence of D&D's challenge is that the CMA's concerns about common ownership by independent institutional investors are manifestly erroneous and *Wednesbury* unreasonable. D&D considers that it cannot effectively challenge these concerns without evidence (including Canadian law evidence) about the respective roles of shareholders and directors, including how institutional shareholders interact with company management.

(3) If the Tribunal refuses to allow D&D to present its evidence, D&D will have been denied the opportunity to challenge the CMA's reasoning and present its evidence *at any point* in this process.

(4) If the Tribunal refuses D&D permission to rely on its expert and witness evidence, D&D will apply for permission to amend its grounds so as to raise procedural unfairness as a separate ground of review.

(a) Witness Statements

Proud

38. According to D&D, the overwhelming majority of these sections of Proud contain material that previously appeared in D&D's communications with the CMA prior to the Decision. They are therefore not new, but merely repeat the substance of material placed before the CMA prior to its Decision:

(1) **Paragraphs 2.18 and 4.2** - D&D's concerns about conditions in the UK property market were previously expressed in D&D's supplemental submissions of 6 March 2023 (at paragraph 2.4). Its concerns about the bidders' low-ball offers were also previously expressed in D&D's supplemental submissions (at paragraph 2.7.4). Indeed, the last third of paragraph 4.2 has been copied word for word from paragraph 2.1 of the supplemental submissions.

(2) **Paragraph 4.4** - This paragraph has been copied word for word from paragraph 2.3 of D&D's supplemental submission of 6 March 2023.

(3) **Paragraph 4.7** - This paragraph is a reformulation of paragraph 2.1 of D&D's supplemental submission of 6 March 2023. It is not in substance new material.

(4) **Paragraph 4.14 -** This paragraph has been copied more or less word for word from the letter sent by CMS on behalf of D&D to the CMA on 2 March 2023.

(5) **Paragraph 4.22** - Mr Proud's comments about the AIM admission being pursued in parallel with a sales process merely repeat points made by CMS on behalf of D&D in its letter to the CMA of 2 March 2023. Mr Proud's comments about TMG operating separately from D&D are a description of the Final Undertakings. The CMA's complaint appears to relate solely to the last clause of the final sentence.

(6) **Paragraphs 4.23 to 4.39 -** These paragraphs have been mostly copied word for word from sections 4.2 to 4.14 of D&D's original proposal of 23 February 2023.

(7) **Paragraph 4.42 -** This paragraph merely reformulates shareholder information that was provided to the CMA in D&D's original proposal of 23 February 2023. It is not new material.

(8) **Paragraphs 5.1(a) and 5.2** - These paragraphs merely repeat points made by finnCap in its letter of 13 March 2023. They are not new material.

39. D&D submits that none of the material above is new and the Tribunal has no reason to exclude it under Rule 21. Given the extent (and, in some cases, relative informality) of D&D's communications with the CMA prior to the Decision, D&D argues that Proud serves a useful purpose in knitting together the points made in these various documents.

Franklin-Adams

40. D&D accepts that at least part of Mr Franklin-Adams's evidence is expert evidence and that D&D must apply for permission under Rule 27 of the Tribunal Rules. D&D applies for permission to rely on Franklin-Adams in part as an expert report of market practice pursuant to Rule 27. In reality, Franklin-Adams wears two hats in his evidence. In part, he is describing his role in the proposals to proceed with the Twin Track Proposal that D&D has proposed to the CMA, but which has been rejected. He gives evidence of fact, for example at paragraph 9, as to what the intention would be for the specific arrangements for the spin-off should it be allowed to proceed. Secondly, his evidence confirms what is standard practice in the market. To the extent that it is seen as opinion evidence of a technical nature (rather than evidence of fact as to finnCap's previous transaction experience), it would require permission from the Tribunal.

41. The basis of D&D's application is that the CMA had not indicated (prior to making its Decision) that it believed there was a risk that common shareholdings by institutional investors might facilitate collusion. Further,

D&D considers that Mr Franklin-Adams's evidence is reasonably required to resolve these proceedings. Taking each paragraph of Mr Franklin Adams's short (two and a half page) report in turn D&D contend that:

(1) **Paragraphs 1-4** are introductory, factual in nature and D&D does not understand the CMA to raise any objections to them.

(2) **Paragraph 5** provides statistics as to the number of spin-offs accomplished by way of listing on the London Stock Exchange since 2006. This evidence is a response to the CMA's finding (at paragraph 40) that a demerger and AIM admission are "novel"[2] and is relevant to D&D's argument that the CMA has acted irrationally and/or taken into account an irrelevant consideration. To the extent that this gives expert evidence of industry practice, rather than evidence of fact as to the previous transactional experiences on the AIM of either finnCap or others, it is recognised to be opinion evidence.

(3) **Paragraphs 6 and 7** explain as a matter of fact how the proposed board of Spinco would operate and outlines (i) the disclosure regime applicable to AIM listed companies and (ii) the typical approach of institutional investors based on his own experience. This evidence is a response to the CMA's findings that common ownership by institutional investors can lead to collusion. This is, again, relevant to D&D's argument that the CMA has acted irrationally and/or taken into account an irrelevant consideration.

(4) **Paragraph 8** addresses the CMA's concern (raised for the first time at paragraph 57 of the Decision) that TMG's institutional shareholders might vote against a fund-raising by TMG in an attempt to prefer the interests of D&D. It is mixed factual and opinion evidence, but is, again, highly relevant to D&D's argument that the CMA has acted irrationally and/or taken into account an irrelevant consideration.

[2] In its Proposal paper of 23 February 2023, D&D acknowledged that the CMA had not previously accepted a share dividend and AIM Admission as a method of divestiture and that the proposal was – to that extent – novel. D&D did not understand the CMA to believe that the spin-off process itself was novel. That concern was only raised in the Decision.

(5) **Paragraph 9** contains evidence of fact concerning the proposed course of conduct which would be followed by finnCap and others if divestment through an AIM listing is permitted. This is not opinion evidence, but evidence of what steps would be taken if the Decision approved the Twin Track Proposal and the likelihood of success for the proposed method of divestment.

(6) **Paragraph 10** contains mixed evidence of fact (the witness's experience) and opinion (the market practice of institutional investors) but addresses the CMA's concern (raised for the first time at paragraph 58 of the Decision) that the day to day rights and influence of investors are lower for private equity buyers than for those in listed entities. This is, again, highly relevant to D&D's argument that the CMA has acted irrationally and/or taken into account an irrelevant consideration.

42. D&D therefore requests that Franklin-Adams be admitted as expert evidence to the extent that it contains evidence of his opinion rather than fact. If (contrary to the above), the Tribunal is minded to refuse permission on the basis that Mr Franklin-Adams has given evidence as a factual witness, then D&D respectfully applies for permission under Rule 27 of the Tribunal Rules to provide alternative expert evidence in the subject of market practice and for those factual parts of his evidence to stand as evidence of fact (in a re-submitted witness statement).

(b) Expert Report

43. Soliman is a brief (13 page) document which opines on (a) various aspects of Canadian company law and (b) how spin-offs/spin-outs divestitures have been used in Canada.

44. In the case of Dye & Durham Limited (which is a company incorporated under the laws of Ontario), those laws and regulations are Canadian. The Tribunal cannot take judicial notice of these rules, notwithstanding that they are almost identical to their English analogues. Nor can the Tribunal apply Canadian law

as law. Instead, the content and effect of a foreign law is treated as a matter of fact which must be established by reference to expert evidence.

45. The Tribunal is not in a position to assess the rationality of the CMA's reasoning as regards the influence of minority institutional shareholders on D&D's management without expert evidence of Canadian law. The Tribunal simply cannot evaluate D&D's submissions on these points without evidence of Canadian law. The Courts can and do admit expert evidence of foreign law where it is necessary to resolve judicial review proceedings fairly: see, for example, *R (Hassan) v SSHD* [2019] EWHC 1288 (Admin) at [21].

46. D&D submits that the CMA was concerned about the impact of common shareholders on both TMG's management and D&D's management, as it is impossible to reduce competition between the two companies without some influence over both. One cannot collude on one's own. Canadian law is therefore clearly in issue, since D&D is a Canadian company, and its directors and management are subject to Canadian corporate and securities laws.

47. Further, it is highly relevant to D&D's rationality challenge if several other leading competition authorities (including the European Commission, Canadian Bureau of Competition and the US agencies) have accepted and used spin-offs to bring about divestitures following merger reviews.

(2) The CMA

(a) Witness Statements

Proud

48. The CMA submitted that Proud contains a mixture of opinion and factual evidence, some of which is new, with no clear demarcation between the different categories. The CMA objects to its admission, save for the majority of section 2 and section 3. These sections deal with the factual background to D&D's s.120 Application and the sales process for the divestiture of TMG. The CMA does not object to those sections.

49. The CMA objects to sections 4 and 5 for the following reasons.

50. First: they contain a significant amount of opinion and argument, reflecting Mr Proud's views on the benefits of the AIM Proposal and the merits of the CMA's concerns about it: see e.g. paragraphs 4.1, 4.2, 4.4, 4.7, 4.14, 4.22, 4.23 – 4.39, 4.42, 5.1 – 5.2. As to that material:

(1) insofar as D&D contends that the CMA failed to take account of the alleged benefits of its AIM Proposal, it can and must rely on the material concerning those benefits that was presented to the CMA before it took the Decision;

(2) insofar as Proud simply repeats or summarises that material, it is unnecessary for such arguments to be set out in a witness statement. The Tribunal can decide the s.120 Application by reference to the contemporaneous documents, e.g. the proposal paper of 23 February 2023 and the supplementary submission of 6 March 2023;

(3) insofar as Proud goes beyond the material presented to the CMA and contains fresh argument on the merits of the proposal, it is new in substance and does not satisfy the *Powis* test.

51. Either way, these sections of Proud go beyond the proper function of a factual witness statement and should not be admitted.

52. Second: paragraphs 4.8 – 4.22 of Proud purport to outline the steps involved in the AIM Proposal. The steps outlined in Proud do not, however, match the proposal as presented to the CMA. For example, the original proposal paper explained that, prior to AIM admission, TMG would become *"directly"* owned by the ultimate D&D shareholders: proposal paper, paragraphs 3.2 – 3.3. As explained above, this was a source of concern for the CMA. By contrast, the process described in Proud would involve the transfer of TMG to a newly incorporated "Spinco" prior to AIM admission: Proud, paragraph 4.9. The involvement of Spinco is a significant focus of D&D's Application, e.g. NoA at paragraphs 55 – 59.

53. The CMA does not consider that the Spinco aspect of the proposal was properly explained to it prior to the Decision. Insofar as the proposal outlined by Proud differs from that presented to the CMA, it is inappropriate and unnecessary for the determination of D&D's Application. It is important that the lawfulness of the Decision is assessed by reference to the proposal as presented to the CMA before it took the Decision.

54. Equally, if it is D&D's case that the Spinco aspect of the proposal was properly explained to the CMA, it can and must rely on the material that was in fact provided to the CMA at the time.

55. Third: Proud purports to summarise certain legal advice received from D&D's solicitors on the powers and obligations of shareholders, including under the City Code on Takeovers and Mergers: Proud, paragraphs 4.29, 4.31. This too is unnecessary and inappropriate content for a witness statement.

Franklin-Adams

56. The CMA submits that (i) on the information currently before the Tribunal, Franklin-Adams does not qualify as expert evidence; or (ii) to the extent that Franklin-Adams qualifies as expert evidence and D&D seeks permission to adduce it as such, that permission should be refused.

57. The CMA refers to *Barings Plc v Coopers & Lybrand (No. 2)* [2001] PNLR 22, where the Court considered the circumstances in which evidence could qualify as expert evidence so as to be admissible under s.3 of the Civil Evidence Act 1972. Based on a review of the authorities, it held, at [45], that evidence would be admissible as expert evidence where:

> "…the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."

58. In the CMA's submission, it is for D&D to persuade the Tribunal, if so advised, that Franklin-Adams satisfies that test. To date, it has not sought to do so. In particular, D&D has not sought to argue that:

(1) the matters addressed by Franklin-Adams fall within a recognised expertise governed by recognised standards and rules of conduct;

(2) any such expertise would be capable of influencing the Tribunal's decision on any of the issues it has to decide; or that

(3) Mr Franklin-Adams has a sufficient familiarity with and knowledge of the expertise in question (e.g. there is no CV appended to Franklin-Adams).

59. Indeed, in contrast to the approach taken in relation to Soliman, D&D has not sought to characterise Franklin-Adams as expert evidence and has not made any application to adduce it under Rule 27 of the Tribunal Rules. Nor was Mr Franklin-Adams instructed to give expert evidence

60. Alternatively, to the extent that the Franklin-Adams qualifies as expert evidence, permission to adduce it should be refused:

(1) First: Franklin-Adams does not satisfy the *Powis* test or the very rare *Lynch* extension.

(2) Second: for the most part, the statement concerns the reasons why Mr Franklin-Adams disagrees with the conclusions reached by the CMA. As such, it is directed at the merits of the Decision and is irrelevant to D&D's s.120 Application: see e.g. *HCA International* at [6(ii)].

(3) Third: the statement does not comply with the requirements set out in paragraphs 7.65-7.68 of the Guide. For example:

(a) it does not set out the substance of any instructions on the basis of which it was written;

(b) it does not contain any statement that Mr Franklin-Adams understands an expert's overriding duty to the Tribunal; and

(c) there has been no application to adduce it under Rule 27.

(4) Fourth: expert evidence should of course be, and be seen to be, the independent product of the expert uninfluenced by the pressures of the proceedings: see Guide, paragraph 7.67. It is at least doubtful that Mr Franklin-Adams' evidence can qualify as independent in circumstances where his company, finnCap Ltd, is engaged to act as financial adviser, broker and nominated adviser to TMG in connection with the proposed AIM admission (i.e. the very thing that D&D ultimately seeks to obtain approval for if its s.120 Application is successful): Franklin-Adams, paragraph 4. Neither D&D nor the witness himself have claimed that he is independent.

61. Finally, to the extent that Franklin-Adams does not qualify as expert evidence, it should be excluded.

62. Franklin-Adams is comprised almost entirely of opinion and argument as to why *"I disagree"* with the CMA's conclusions and/or why the Decision was, in the witness's opinion, *"incorrect"*.

(b) Expert Report

63. The CMA argues that D&D's application fails to disclose any good reason why Soliman should be admitted.

64. According to the CMA, Soliman does not satisfy the *Powis* test or the very rare *Lynch* extension:

(1) it does not purport to show what material was before the CMA at the time of the Decision. On the contrary, the matters addressed by Soliman (Canadian law and practice) were only raised for the first time in D&D's s.120 Application;

(2) it does not purport to demonstrate the absence of any jurisdictional fact, or any failure to observe an essential procedural requirement;

(3) there is no allegation that the CMA's decision-making process was tainted by misconduct;

(4) it is not adduced (or necessary) in order to explain any technical terms used in the Decision.

65. The CMA relies on the *Tobii* case where the Tribunal made clear that expert evidence should be strongly discouraged and disallowed other than in very clear cases.

66. The CMA contends that D&D has made no attempt to contend that Soliman satisfies the relevant tests, arguing instead that the evidence is "*reasonably required to resolve the proceedings*": paragraph 96 of D&D's NoA.

67. The first substantive part of Soliman (section B) purports to address the CMA's independence concerns. Those concerns arose from the fact that, under the AIM Proposal, D&D and TMG would have identical shareholders with identical shareholdings at the time of AIM admission. The CMA found that the common shareholders would have the incentive and ability to reduce competition between D&D and TMG, for example by exercising influence over TMG management: Decision, paragraphs 52 – 61.

68. Section B of Soliman outlines the rights and duties of directors, officers and shareholders under Canadian law, in an effort to argue that the CMA's concerns *"are not plausible"*: Soliman, paragraph 15. D&D then relies on this evidence to contend that the CMA's Decision was premised on an *"incorrect appreciation"* of Canadian law: paragraph 79 of D&D's NoA.

69. The CMA submits that the principal flaw in D&D's position is that the CMA's Decision was not premised on Canadian law at all. The CMA did not address Canadian law because it was not relevant to the Decision (and D&D did not raise it with the CMA prior to the Decision). The focus of the CMA's concerns

was on how the common shareholders might act vis-à-vis TMG, an English company to which Canadian law would not apply (as D&D acknowledges): Decision, paragraphs 57, 65. As such, Soliman simply misses the mark.

70. Moreover:

(1) insofar as Mr Soliman disagrees with the CMA's independence concerns, his evidence is directed at the merits of the Decision and is irrelevant to D&D's Application under s.120: e.g. *HCA International* at [6(ii)]; and

(2) insofar as Mr Soliman seeks to argue that the CMA acted irrationally ("*not plausible"*), he is usurping the function of the Tribunal. Irrationality is a matter for the Tribunal, not expert opinion: *Lynch* at [19]; *Lafarge* at [13].

71. The second substantive part of Soliman (section C) seeks to demonstrate that transactions such as D&D's AIM proposal *"are neither complex nor novel in the Canadian market"*: Soliman, paragraph 55. This is said to be relevant to paragraph 40 of the Decision, where the CMA observed that, given the novelty of D&D's proposal, it would be important to consult before making any variation to the Final Undertakings: NoA fn 35.

72. In referring to the novelty of D&D's proposal, the CMA was obviously referring to its own experience of UK merger control. It was not purporting to express a view on the prevalence of such arrangements in other jurisdictions. As such, the position as regards these arrangements in Canada is of no relevance to the Decision or D&D's Application.

73. The following additional points further militate against allowing Soliman to be adduced.

74. First: D&D has failed to justify its failure to provide this evidence to the CMA before the Decision was taken. The only argument it advances is that, prior to the Decision, the CMA had not expressed its concern that *"there is a*

risk that the institutional shareholders would exercise influence over TMG management either via formal or informal means which might compromise their incentive or ability to compete with D&D". D&D emphasises the position of institutional shareholders: NoA, paragraph 97.

75. That argument is demonstrably incorrect. In its Provisional Decision of 8 March 2023, the CMA expressed the concern that "*there is a risk that the shareholders holding stakes in both companies might have both the ability and an economic incentive to favour D&D over TMG or to seek to reduce competition between the companies. It would be very difficult for the CMA to assess the ability and incentive of the institutional shareholders to be confident that they would meet the criterion of independence together with all the other aspects of Purchaser Approval Criteria in the time available*" (emphasis added): Provisional Decision, paragraph 2.

76. Thus, D&D had every opportunity to provide evidence on this issue prior to the Decision.

77. Second: D&D will not suffer any prejudice through the exclusion of Soliman. For the reasons given above, the evidence is not necessary for the fair resolution of its Application.

78. Third: if Soliman were to be admitted, it would be necessary, as a matter of fairness, to allow the CMA an opportunity to adduce its own expert evidence in response (if so advised). This would inevitably create additional costs and delay, both to the filing of the Defence (for which an extension of time would be needed) and to when the Application can be heard. It would, moreover, risk creating a distraction from the matters actually decided by the CMA and the applicable legal principles governing D&D's challenge. This would be contrary to the governing principles in Rule 4 of the Tribunal Rules.

E. THE TRIBUNAL'S ANALYSIS

79. Applications for review of merger decisions usually need to be dealt with promptly by the Tribunal. Ordinarily the Tribunal aims to have the substantive

hearing within 3 months of the filing of applications. Additional experts' reports and witness statements filed in support of an application require some scrutiny and it should not be assumed that they will be unopposed or admitted by the Tribunal. Whilst in some cases it may be convenient to leave questions of admissibility of such material to the substantive hearing, it is often preferable to deal with it at the CMC, so the respondent knows whether or not it needs to respond to it. Unnecessary further expert and factual witness evidence can lead to additional costs and delay in the process. Whilst D&D has stated that there is no need for urgency in the Tribunal resolving its Application now that the CMA has agreed to extend time until some date after the Tribunal has issued its decision, both the CMA and TMG have submitted that the Application should be determined as soon as reasonably practicable. Indeed TMG submits that in the circumstances where TMG must be divested, it is in its interest that such process is completed as soon as possible as delay risks adversely affecting TMG, including as a competitor to D&D. The Tribunal has already indicated to the parties that it is minded to list the substantive hearing in the second half of June 2023.

80. The Tribunal takes a hands on approach to case management. It also appreciates an approach to evidence and to presentation of material that is conducive to it resolving disputes efficiently and fairly. The addition of evidence that was not before the respondent at the time of the decision under challenge should not be the opportunity to place before the Tribunal material that is repetitive or duplicative of what has already been submitted (or ought to have been submitted if it was to be relied upon) to the decision maker.

Soliman expert report

81. By way of preliminary observation, the Tribunal usually does not admit new expert evidence in a judicial review of a CMA merger decision, but such evidence can be admitted where appropriate and necessary for the fair resolution of the application for review.

82. The Tribunal is satisfied that Mr Soliman is qualified to give expert evidence on Canadian law, he is independent and understands his duties to the Tribunal.

Foreign law needs to be proved as a matter of fact and in general it is for an expert to set out the relevant principles and legal provisions of the relevant foreign law, but not to give opinion evidence on the application of the foreign law to the facts of the case, nor give his opinion on the issues which the court or tribunal has to decide: *Phipson* at 33-94. Paragraph 15 of Soliman is clearly inadmissible on that basis alone.

83. The Tribunal gives D&D permission to rely on Soliman paragraphs 1 to 5 and 16 to 37. These set out basic propositions of Canadian law as to the roles, powers and duties of directors and officers, and the role and rights of shareholders. None of this is likely to be controversial and appear to reflect both case law and statute. The CMA contends that this evidence is irrelevant and misses the point. D&D should at least be given the opportunity to argue its relevance at the substantive hearing. It should not be a burden on the CMA to obtain expert evidence on these points if it wishes to contest any of these propositions. Whilst this evidence may be regarded as not meeting the *Powis* test, it does fall within the *Lynch* extension as such principles of Canadian law need to be proved as a matter of fact. Whilst these are very similar to English law, D&D do not want to be met with an argument that the Tribunal cannot recognise them as they are matters of foreign law. That said at the substantive hearing it will be open to the CMA to argue that Canadian law is not relevant at all for the reasons set out in its submissions referred to above.

84. The Tribunal refuses permission to rely on paragraphs 38 to 40 as these appear to apply the principles of Canadian law on the facts, provide argument and comment and are likely to be contentious. The Tribunal will not be assisted in its task by such evidence.

85. The remainder of Section B of Soliman (paras. 41 to 53) is also excluded as such evidence is not necessary for fairly resolving these proceedings. This Tribunal does not need to get into Securities Law of Canada in dealing with the divestiture of shares in an English company by way of a spinoff into another English company to be admitted on AIM. The relevant securities laws' restrictions on D&D, whose shareholders are intended to be the shareholders (at least initially) in the entity that will hold the shares in TMG, will not be central

to these proceedings. D&D has failed to demonstrate that such evidence is truly necessary or that the circumstances are sufficiently exceptional to justify their admission. Further as regards the evidence as to spinoffs in Canada, the use of a spinoff as part of the process of divestiture does not feature at all in the Proposal Paper and was not developed in any detailed way in the submissions before the CMA. The term spinoff does not appear to have been referred to, the only indication that a spinoff might be used as an alternative to the admission of TMG's shares comes in the final reply submissions and the finnCap letter dated 13 March 2023.

86. Section C which relates to the use of spinoffs and plans of arrangement in Canada is also excluded. This case relates to a divestiture involving admission of shares on AIM in the UK, not Canada. Such evidence will not assist the Tribunal in resolving the Application. When the CMA was referring to the novelty of D&D's Proposal, it is manifest that it was referring to its own experience of UK merger control. If D&D wished to rely on the use of spinoffs and listings as a means of divestiture in other jurisdictions, it could have raised these points, for what it may be worth, prior to the Decision. Further as noted above, the Proposal Paper itself made no reference to any spinoff, and the possibility of shares in a newly formed parent company being admitted in place of TMG's shares was only raised for the first time very late in the process in the final reply submissions on 13 March 2023, but was not developed in any detail.

87. For the reasons set out above and paragraph 97 below, Soliman is excluded save for paragraphs 1 to 5, and 16 to 37. D&D may include in the final hearing bundle the documents referred to at footnotes 39 to 42 to paragraph 61. It is not suggested that the CMA or the Tribunal is bound by the decisions referred to, but D&D may wish to argue that they reflect an approach consistent with their case.

Proud witness statement

88. The Proud witness statement does contain a helpful summary of the background leading up to the Decision and sections 2 and 3 present this in a fairly neutral way. This type of summary, although not necessary, is not objected to by the

CMA save for paragraph 2.18. Paragraph 2.18 is unlikely to be controversial as being a representation of D&D's position, and indeed the point is referred to in summary form at paragraph 3.5(a), which is not objected to by the CMA. Whilst the evidence may not strictly fall within matters of which judicial notice may be given without the calling of evidence, the Tribunal is well aware of the changes in interest rates and the impact on the mortgage market. Therefore sections 1 to 3 are to remain and may be relied upon at the substantive hearing.

89. Sections 4 and 5 are objected to by the CMA. It is not the function of a witness statement filed for the purposes of a challenge to a merger decision on judicial review grounds to use it as an opportunity to set out submissions, comment, argument or to repeat points and material already submitted to the decision maker. Opinion evidence is largely inadmissible, unless it falls within one of the exceptions such as expert evidence. To the extent that Proud amounts to the opinion of Proud it is inadmissible. It is clear that Proud does disagree with the CMA Decision and assessment, but the proper place for much of his evidence is by way of submission in the Application or counsel's submissions at the substantive hearing. These paragraphs have references to what Proud "considers" (eg. paras 4.2 and 4.7) and Proud's "view" (e.g. para. 5.1). It is the type of evidence that was excluded in *Tobii* at [70].

90. Large portions of Proud repeat or at least are largely duplicative of the submissions and material put before the CMA in the Proposal Paper, the supplemental submissions dated 6 March 2023, finnCap's letter dated 13 March 2023 or other correspondence sent to the CMA (paragraphs 4.2, 4.4, 4.7. 4.14, 4.22 to 4.39 and 4.42 are submitted by D&D to fall within this category). It is said on that basis the evidence meets the *Powis* test as it was material before the CMA. However that does not really address why this type of material is objectionable. It is not necessary to repeat what is already in the papers and material provided to the CMA in a contentious witness statement. The Tribunal for itself can look at what was submitted in the light of the submissions being made in the Application and by counsel at the substantive hearing. If admitted, no doubt the CMA may be tempted to file witness evidence in reply, which leads to delay and unnecessary evidence from both sides. Also there is a risk of the distinction between what is new and what was submitted before the CMA being

blurred. It is far better to work from the underlying materials. Examples of this are the references to Spinco and how a process involving a spinco rather than an admission of TMG's shares would work (eg paras. 4.14, 4.17, 4.26 and 4.27). As noted above this was not in the Proposal Paper at all, and the possibility of shares in "TMG (or its parent)" being admitted to AIM was not mentioned until the final round of submissions on 13 March 2023. On judicial review applications where there is a challenge to a decision it is important to focus on primarily on what was submitted to the decision maker rather than additional material, explanations and expansions after the event.

91. Paragraph 5 is inadmissible and not helpful to the Tribunal. It is essentially Proud's view to the effect that he considers that the CMA reached the wrong decision.

92. For the reasons set out above and in paragraph 97 below, the Tribunal excludes sections 4 and 5 of Proud.

Franklin-Adams witness statement

93. A significant portion of the Franklin-Adams statement amounts to opinion evidence based upon Franklin-Adams' experience as a broker in corporate finance. Such evidence could in theory be admissible as expert opinion and D&D appears to concede that his statement is a mixture of expert opinion and factual evidence, and for the opinion evidence permission for expert evidence is required. No application for expert evidence from Franklin-Adams was made in the Application and the application is made for the first time in the Skeleton Argument for the CMC. It is not satisfactory to file a statement such as this without clearly indicating what is fact and what is expert opinion, and a statement without the usual declarations as to qualifications, conflicts of interest, expertise, independence and an express reference to the overriding duty to the Tribunal. Here Franklin-Adams cannot be described as independent as his firm is the Nominated Advisor and broker to D&D. That said the lack of independence is not necessarily a bar to him giving expert evidence in circumstances where the Tribunal is satisfied that he can give objective evidence

on the basis of an overriding duty to the Tribunal irrespective of his relationship with D&D: *Phipson* at 33-31.

94. The Tribunal is a specialist Tribunal and is familiar with how AIM works and the processes involved. A significant portion of Franklin-Adams covers matters already made in his letter dated 13 March 2023, which was before the CMA, or are matters on which the Tribunal does not need the assistance of an expert to understand. There is no need for evidence in the form of a witness statement which covers ground already covered in the letter dated 13 March 2023, which was before the CMA. Further the proposal is developed in a way not in his letter dated 13 March 2023, which is directed at the proposal to have the shares in TMG admitted to AIM. To the extent that Franklin-Adams raises new points, then they fail to meet the *Powis* test or the *Lynch* extension and could have been made before the CMA made its Decision.

95. For the reasons set out above and in paragraph 97 below, the Tribunal will not admit the Franklin-Adams evidence.

96. The Tribunal would like to make clear that in excluding the evidence of Franklin-Adams it is not doubting the professionalism and ability of Franklin-Adams. However it is not necessary for the fair resolution of the Application for this statement to be admitted. Many of the points made are already in his letter dated 13 March 2023, but not necessarily in precisely the same terms. In respect of such points it is better for the Tribunal to work from the letter which clearly sets out the arguments on behalf of D&D.

97. As regards the evidence to be excluded, the Tribunal has taken into consideration the factors set out in Rule 21(2) in determining that it is just and proportionate to exclude it. In particular:

(1) The standard of review is not a merits based rehearing, but a judicial review of the CMA Decision.

(2) The substance of the evidence that the Tribunal has excluded from the two witness statements was to a large extent both available and

submitted to the CMA. It is not appropriate or necessary to elaborate and repeat that in contentious witness statements, which contain a significant amount of argument, submission and comment.

(3) The substance of Soliman was not before the CMA. This was no doubt because D&D was not relying on Canadian law principles and practice in relation to rights and duties of directors and shareholders, or the approach to spinoffs and divestments in Canada or other jurisdictions. Had D&D wished to run these points they could have done so. In reality these points are not really central to the question of whether the CMA's Decision should be set aside.

(4) D&D is not prejudiced by the exclusion of the evidence. As regards the witness statements, much of what has been excluded repeats or is a reformulation or an explanation of what was put to the CMA and to the extent they consist of submission, the place for submissions is in the Application and the submissions by counsel. The admission of the evidence would prejudice the CMA as they would no doubt feel a need to respond to it by their evidence. Further, it is important to distinguish between what was before the CMA and the new material, which is blurred in these statements. If D&D is correct in its fundamental submissions as regards the CMA Decision, this additional material will not make any difference. If D&D is not correct on its key points, this material will also not make it a good case.

(5) All the material excluded is not necessary for the Tribunal to determine this case.

F. CONCLUSION

98. For the reasons set out in this ruling, the Tribunal orders as follows:

(1) Soliman paragraphs 1 to 5 and 16 to 37 are to be admitted as expert evidence of Canadian law, the remainder is excluded. The CMA has permission to adduce expert evidence in reply.

(2) Proud sections 4 and 5 are excluded and are to be struck out.

(3) Franklin-Adams is excluded.

Hodge Malek KC
Chair

Charles Dhanowa O.B.E, KC (*Hon*)
Registrar

Date: 15 May 2023