



Neutral Citation [2008] CAT 34

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1107/4/10/08

Victoria House
Bloomsbury Place
London WC1A 2EB

Wednesday, 3rd December 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

MICHAEL BLAIR QC
PROFESSOR PETER GRINYER

Sitting as a Tribunal in Scotland

BETWEEN:

MERGER ACTION GROUP

Applicant

and

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

Respondent

- supported by -

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

Interveners

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

**JUDGMENT
(VENUE AND FORUM)**

APPEARANCES

Mr. Ian Forrester QC and Mr. Andrew Bowen (instructed by White & Case and Mr. Walter Semple) appeared for the Applicants.

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

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

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

THE PRESIDENT:

- 1 Two issues have arisen in this case management conference which it has not been possible to resolve by agreement. The first relates to the venue for the substantive hearing of the application for review, and the second relates to the forum or jurisdiction of this dispute. We have already indicated that given the truncated nature of the procedure which it has been necessary to adopt in this case and the urgency of reaching a decision prior to the proposed general meeting of the target company, HBOS plc, a week on Friday, it is necessary for logistical reasons for the actual hearing to take place where the Tribunal is based. This is a purely a practical decision and is not based on expense or the effort that might be involved in sitting elsewhere. It is purely dependent upon the fact that in the Tribunal's estimation there would not be time to have a hearing and reach a decision if valuable time were taken up by travelling and setting up elsewhere. In an ideal world we would wish to sit where the appropriate forum is in respect of any dispute.

- 2 So much for the practicalities of venue. The other dispute, as I have indicated, relates to the appropriate jurisdiction or forum. This is a more knotty problem, and is governed also by Rule 18 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) ("the Tribunal Rules"). Sub-rule (1) of that Rule states: "The Tribunal, after taking into account the observations of the parties, may at any time determine whether its proceedings are to be treated, for purposes connected with ..." – I paraphrase here – any matter connected with those proceedings: "... as proceedings in England and Wales, in Scotland or in Northern Ireland and shall instruct the Registrar to notify the parties of its determination." Sub-rule (3) goes on to say:

"In making a determination under sub-rule (1) the Tribunal may have regard to all matters which appear to it to be relevant and in particular the part of the United Kingdom where –

 - (a) any individual party to the proceedings is habitually resident or has his head office or principal place of business;
 - (b) the majority of the parties are habitually resident or have their head offices or principal places of business;
 - (c) any agreement, decision or concerted practice to which the proceedings relate was made or implemented or intended to be implemented;
 - (d) any conduct to which the proceedings relate took place."

- 3 The dispute that has arisen in relation to the forum in this case is effectively between the Applicants who argue that the appropriate forum should be in Scotland, and the Secretary of State (the Respondent) and both Interveners (HBOS and Lloyds TSB) who all submit that the appropriate forum should be in England and Wales. The significance of the choice of forum is twofold. First, it determines what law is to be applied by the Tribunal in relation to the dispute; and, secondly, it will have a bearing on whether any appeal would go to the Court of Appeal in England or to the Court of Session in Scotland. There may be other matters dependent upon forum but those are the two which matter the most and, in particular, the matter which may affect this case relates to the appropriate appeal court because it has been put to us that this if the forum is anything other than England and Wales this will cause difficulties for the legal teams of the Respondent and Interveners, who are all qualified in England and Wales. It is not so important for the Applicant's legal team because Mr. Forrester QC, who represents the Applicants, is dual qualified.
- 4 We have received very helpful written submissions prior to today's hearing, and those have been expanded in oral submissions on the question of forum by all the parties this afternoon. We have been asked to give a decision on this matter now so that the parties may make plans or may generally have more time to consider the implications of our decision. We do so and we give our reasons in this judgment *ex tempore*; the reasons may therefore not be as full as they might have been in other circumstances. However, we have reached a clear decision in the light of the submissions we have heard and the provisions of Rule 18 of the Tribunal Rules, and that unanimous decision is that the forum should be in Scotland.
- 5 I will explain why we have reached that view: the test for forum has been put in various ways. It is suggested we should have regard to where the centre of gravity of the dispute is or, alternatively, we may ask what is the proper law on the dispute? A number of factors have been urged upon us as being relevant to those considerations. Mr. Forrester, on behalf of the Applicants, really put forward four main points. He said the scheme of arrangement which governs the merger is something which will be supervised by the Court of Session in Scotland. As to that point the other parties said it was irrelevant, and we are inclined to agree. If the merger goes ahead then the location of the governing court does seem to us to be a peripheral matter. He also referred to the fact that both these banks are companies

registered in Scotland and, in the case of the HBOS, includes one of Scotland's oldest companies which has "a unique role", as he put it, in Scottish life and an ability to issue its own bank notes. He emphasised that these and other similar factors are not trivial.

- 6 Mr. Forrester also referred to the fact that the Applicants, who are now to some extent identified (which they were not until this afternoon), are all resident in Scotland. We have been supplied with a list of six of the Applicants who are members of the Merger Action Group, and we have their details and an indication of their interest in the dispute. As far as I can tell none of the six are actually shareholders in either of the two companies; some of them are customers, but all of them are said to have a significant and personal interest in reliance upon the availability of banking services in Scotland, and each of them is concerned with the reduction of choice and undesirable effects which are said to flow from the merger of HBOS and Lloyds TSB. We are not at this stage, I hasten to say, dealing with the question of the Applicant's standing to bring this dispute. As to that we have indicated already, without objection from any party that we propose to stand that question over to be dealt with, if necessary, as part and parcel of the substantive hearing. There may well still be an issue as to the standing of the Merger Action Group; we say no more about that. We refer to the six Applicants simply on the basis that it is not in dispute that they are indeed all Scotland based. We also take account of the fact that the Merger Action Group is open to anyone and is not restricted to recruitment in Scotland. It may well be that there are other members who are not Scottish (we have not been told) but certainly the active ones are.
- 7 Mr. Forrester also relies upon the fact that according to the findings of the OFT, who produced a report for the Secretary of State prior to the latter's disputed decision, one of the major markets that is at risk in terms of adverse competition effects, namely the small and medium size enterprise banking services market, is particularly vulnerable in Scotland rather than in the rest of Great Britain and Northern Ireland. It is also fair to say that in regard to the other banking markets identified by the OFT as being the subject of competition concerns in respect of the proposed merger, a specific Scottish problem (as opposed to one affecting the United Kingdom as a whole) is not singled out. That is only so in respect of the one market to which I have just referred.

- 8 The Secretary of State, represented by Mr. Paul Harris, HBOS, represented by Mr. Nicholas Green QC, and Lloyds TSB, represented by Miss Helen Davies QC, argue against those submissions of Mr. Forrester. They say that the scheme of arrangement has nothing to do with this case, which is a judicial review of the Secretary of State's decision. I have already said that we are inclined to think that that is right. The registration of the banks in Scotland is also said not to be so important as the substance of the banks' business is largely outside Scotland, and they all referred to the details in Mr. Harris's skeleton argument which indicate that in a number of respects the Scottish element in both banks' business is relatively small. I will not set them all out here; they are at paragraph 21 of the skeleton argument. The Respondent and Interveners also refer to the fact that other markets are affected by the possibility of substantial lessening of competition – other markets which are not just related to Scotland, and the burden of what they put to us is that really this is a nationwide issue; it is an issue which affects the whole of the United Kingdom, both in relation to the competition aspects, save in some small respects, and also in relation to the burden of the Secretary of State's decision which was to secure the financial stability of the nation as a whole – again, not singling out Scotland. That is something which is not in dispute, and which is recognised by the Merger Action Group themselves.
- 9 Another point that was urged by Mr. Harris, Mr. Green and Miss Davies was that the legal teams and counsel involved for the Respondent and Interveners are all qualified in England and Wales and not Scotland, and that this also had a bearing on the appropriate forum as if there were to be an appeal and Scotland had been chosen as the forum then the legal team would have a problem appearing in Scotland, and it may be that there would have to be a change of legal team. Given the urgency of this matter, and the possibility of an urgent appeal from our decision, that was a factor which should have a bearing on where forum should be. Mr. Forrester argued that that was not a relevant factor and we tend to agree. The problems which may arise after a judgment in having to change a legal team for an appeal, however inconvenient it may be, do not really seem to us to be of assistance when looking at what the centre of gravity of a dispute is, and we therefore discount that, although we accept that it is or may be a real problem, and I shall say something more about that in a moment.
- 10 After careful consideration we have come to the view that Mr. Forrester is right in saying that if one is going to single out a forum in the United Kingdom, it is difficult to single out

a forum other than Scotland, although we acknowledge that there may be logistical problems at some point in the light of it, particularly the question of rights of audience on any appeal. We do not have a federal system; if we did we would unhesitatingly say that because this is a nationwide issue relating to the financial stability of the United Kingdom as a whole that would be the appropriate forum, but we do have to choose a specific forum for the reasons I have indicated, and the factors that have been most persuasive in making us select Scotland are as follows: the identity of the known Applicants being all residents in Scotland, the fact that it is not really in dispute that the head of steam generated by this case has related largely to Scotland in the sense that there has been, as has been mentioned, considerable feeling on the part of various interests in Scotland that (a) the competition effects, including the lack of choice, will be felt particularly there in some respects; and (b) that a well known and well respected Scottish banking institution will be affected. Also relevant (although perhaps less so) is the fact that these are Scottish companies with registered offices there. We have not found it at all easy to determine the appropriate forum for this dispute but in the end it seems to us that, as one has to select one, it is Scotland.

- 11 As far as the problems which may arise on appeal in relation to the qualifications of the legal teams, there is not a great deal we can do about that, except to say that we would wholeheartedly encourage any and all concerned in any formalities which are required in order to permit existing legal teams to continue to represent their respective clients (if that is what is desired) to do everything in their power to achieve that, in the interests of both speed and expediency. I do not think there is much more that we can do other than to express our encouragement in that way. I hope that is sufficient for present purposes.

MR. HARRIS: Sir, thank you for that judgment, the Secretary of State seeks permission to appeal the decision on forum, pursuant to Rule 58. I will do this very briefly because you have already, of course, heard my submissions as to why England and Wales should be the correct forum. You have said at the end of your judgment, Sir, that this was a difficult matter, not at all easy, but that in the end you came to the conclusion that it should be a Scottish forum, on that basis I would respectfully submit that there must be a reasonable prospect of overturning a decision that has been a difficult one to make. The two points that I effectively pray in aid are, very briefly because you have heard them from me before, that as you pointed out as well in your judgment this is a nationwide matter, and that is reinforced by the figures that do appear in para.21 of the skeleton argument. If it is right to

say that there is a particular impact upon Scotland, then just looking at those figures alone it must be right to say that there is an even bigger impact upon places outside Scotland because of the sheer preponderance of the weight of business that takes place outside Scotland. It simply follows as a matter of logic in my submission.

I also repeat very briefly what I said before, which is the focus of the decision, and hence the attack upon the decision has, with respect, got nothing to do with Scotland. The focus of the decision and hence the attack is upon the public interest consideration that became a part of the Enterprise Act, and by definition that is ensuring financial stability within the UK. So again that has no focus upon Scotland. So effectively for those two substantive reasons I would invite you to give permission, and bearing in mind you have found it to be a difficult matter yourself.

(The Tribunal conferred)

THE PRESIDENT: Mr. Harris, we refuse leave to appeal. Although we entirely accept the point you made about it being a nationwide matter, the problem is we do not have a choice of a forum that is nationwide; we have to choose between Scotland, England and Wales or Northern Ireland, and we have given our reasons why we think that if the dispute has a particular connection with any of these it has particularly a connection with Scotland. But rightly or wrongly we think that the discretion element in our decision will mean that an appeal probably has no real prospect of success.

MR. HARRIS: Thank you.

THE PRESIDENT: I am sorry, Mr. Green, Miss Davies, if there is anything you want to add to it?

MR. GREEN: I think we have a month in which to make our application for permission to appeal! (Laughter).
