Neutral citation [2020] CAT 27

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1354/4/12/20

Salisbury Square House
Salisbury Square
London EC4Y 8AP

17 December 2020

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL DOLLMAN
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

JD SPORTS FASHION PLC

Applicant

- v –

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (PERMISSION TO APPEAL)

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

A. BACKGROUND

1. On 13th November 2020 the Tribunal handed down its judgment in these proceedings ([2020] CAT 24) (the "Judgment"). This Ruling adopts the same defined terms as are set out in the Judgment.

2. In the Judgment, the Tribunal upheld the application in part and ordered the remittal of the Decision to the CMA for reconsideration.

3. On 1st December 2020 the CMA applied for permission to appeal in respect of the Judgment ("the Application"). On 8th December 2020 JD Sports filed its response inviting the Tribunal to reject the Application ("the Response").

4. Neither party has sought an oral hearing and the Tribunal considers it can deal with the Application on the papers.

5. A judgment of the Tribunal in a case of this kind can be challenged under section 120(6)-(8) EA which provides for appeals to the Court of Appeal. Any such appeal requires the permission of this Tribunal or the Court of Appeal and must be on a point of law.

6. In considering whether to grant permission to the Court of Appeal in England and Wales, the Tribunal applies the test in what is now CPR Rule 52.6(1): such that permission may only be granted where (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard.

B. THE PARTIES' SUBMISSIONS

7. The CMA submitted as Ground 1 that, in concluding that the CMA failed to take reasonable steps to acquaint itself with relevant information concerning the impact of COVID-19, the Tribunal misapplied the relevant legal test and/or disregarded relevant matters and/or failed to apply the correct standard of review.

8. The CMA submitted as Ground 2 that, in concluding that the CMA failed to make reasonable inquiries of Footasylum's bank, the Tribunal failed to give adequate reasons and/or disregarded relevant matters and/or misapplied the relevant legal test.

9. The CMA submitted that both grounds had a reasonable prospect of success and/or that there were other compelling reasons why the appeal should be heard. The CMA requested that the Application be determined as soon as possible to avoid prolonged uncertainty in the market, given that this was a completed merger in which the parties have been held separate for a substantial period.

10. JD Sports submitted in the Response that the Application was unjustified and had no reasonable prospect of success. There was no valid criticism shown of the Tribunal's statement of the legal principles at issue. Instead, the Application was directed against the Tribunal's assessment in a very particular set of factual circumstances. The Tribunal had considered all relevant matters, identified the correct legal test and applied it correctly. The Judgment did not have implications for the CMA's conduct of merger inquiries in general and, as the circumstances of the case were unlikely to be repeated, there was no other compelling reason to allow the appeal.

Ground 1

The CMA

11. In its Ground 1, the CMA stated that the evidence on COVID-19 was different from the other evidence received by it in its investigation, being uncertain and speculative. That other evidence pointed clearly to an SLC. The CMA had to decide at a late stage in the Inquiry whether to conduct further inquiries into the effects of COVID-19 or reach a final conclusion based on the evidence before it. This evaluative judgement fell within its acknowledged wide margin of appreciation. It exercised that judgement by deciding not to carry out further last-minute inquiries into the impact of the pandemic. This was principally because the CMA considered that robust evidence was unlikely to be available

before the statutory deadline, although it also took account of the short time remaining for the Inquiry.

12. The CMA said it was well established that the legal test was one of rationality and that it was for the CMA to decide upon the manner and intensity of the inquiry to be undertaken on any given matter. The Tribunal should not intervene merely because it thought further inquiries would have been sensible or desirable. The Tribunal should have asked itself the "critical question" of whether the CMA's conclusion on the likelihood of robust and informative evidence on COVID-19 being available was rationally open to it. If it was, the CMA's decision not to make further inquiries could not be attacked.

13. The CMA said the Tribunal did not address the critical question sufficiently or at all. In particular, it did not consider whether, in the light of the evidence the CMA had already gathered, it was reasonable to believe that robust and informative evidence was unlikely to be available to it before the statutory deadline.

14. The CMA continued to receive evidence on the impact of COVID-19 up to the beginning of May. This evidence remained speculative and uncertain and was one reason why the CMA did not seek to inquire further or test this evidence. The Tribunal failed to consider this point.

15. The Tribunal also failed properly to consider the statutory timetable as placing a substantial constraint on the CMA's ability to seek further evidence at a late stage. The obligation placed on the CMA by the Judgment would have put the CMA in an impossible position with regard to its statutory functions.

16. Alternatively, the CMA stated that the Tribunal, in addressing these matters, had failed to grant the CMA the necessary margin of appreciation and had substituted its own view on the appropriateness of further inquiries.

JD Sports

17. JD Sports disagreed strongly with these contentions.

18. JD Sports argued that the Tribunal had correctly identified the relevant legal principles. It had expressly acknowledged the CMA's wide margin of appreciation but had identified two legal requirements, the need for a rational authority, first, to make reasonable inquiries to obtain proper evidence and, second, not to draw conclusions without the necessary evidence. The Application largely ignored the Tribunal's findings on the second legal requirement.

19. Contrary to the CMA's claim, the Tribunal had not said that there was a general rule that the CMA must always test whether the evidence it might obtain would be reliable by first obtaining it.

20. The Application ignored the clear findings in the Judgment that the CMA drew strong conclusions as to the likely impact of COVID-19 whilst acknowledging that the information it had available was not conclusive.

21. The Tribunal had fully appreciated the constraints placed on the CMA by the statutory timetable, but the CMA had conceded that this was a secondary consideration, which concession the Application appeared to now wish to withdraw.

22. Finally, the Application made assertions of fact which were outside the scope of any permitted appeal and inconsistent with the CMA's case to the Tribunal, in particular as to whether the CMA had made any inquiries as to the likely impact of COVID-19 and the significance to be attached to materials it had received.

Ground 2

The CMA

23. In relation to Ground 2, the CMA said the Tribunal was wrong to hold that the CMA's failure to approach Footasylum's primary lender was irrational. First, because it had speculated on Footasylum's motives for its evidence to the CMA; secondly, because the Tribunal ignored the very little time remaining in the Inquiry; and thirdly because the Tribunal had not taken account of the other evidence considered by the CMA.

24. On the first reason, the Tribunal did not explain the basis of its speculation as to Footasylum's incentives and the Tribunal had no evidence before it to make such a speculation.

25. On the second reason, Footasylum's submission was received only on 28th April, leaving very little time before the statutory deadline on 8th May for any further inquiry. On the third reason, the Tribunal failed to consider Footasylum's own forecasts, the CMA's own assessment of the primary lender's likely conduct and [✂].

26. Taken together, these failures meant that the Tribunal did not address the relevant question, which was whether approaching the primary lender was the only rational course open to it. The CMA had drawn appropriate inferences from the real-world evidence before it and was entitled to make evaluative judgments on the evidence before it without interference from the Tribunal.

JD Sports

27. JD Sports disagreed with these contentions also.

28. First, the CMA omitted to mention that the primary lender [✂]. This in itself suggested a direct inquiry of the primary lender's intentions would be prudent.

29. Secondly, the passage in the Judgment characterised by the CMA as the Tribunal's principal reason was a mere passing observation. The Tribunal had fully considered the evidence on which the CMA claimed to rely.

30. Thirdly, the Tribunal had given all necessary consideration to the statutory time constraint and the CMA had previously conceded this was a secondary consideration.

Other compelling reasons

31. The CMA said that there were, in addition, further compelling reasons why the appeal should be heard. These were that the Judgment raised important questions on the CMA's evidence-gathering powers and obligations, in particular as to its freedom to conclude that further inquiries on any point, having regard to the statutory deadline, are unlikely to be fruitful. In addition, the Judgment had potentially important implications for other ongoing merger investigations where the effects of COVID-19 may be relevant.

32. JD Sports disagreed. The Judgment represented the straightforward application of well-established legal principles to the particular facts of this case and had little general application to the CMA's evidence-gathering activities in other cases. Similarly, it could have little relevance to other, ongoing, merger investigations, as the particular facts of this case, with the first retail lockdown occurring some six weeks before the statutory deadline, were highly unlikely to be repeated.

C. THE TRIBUNAL'S DECISION

33. The Judgment applies well-established principles of judicial review to a very particular set of circumstances associated with the onset of the COVID-19 pandemic in the UK.

34. The COVID-19 pandemic broke in the UK towards the end of the Inquiry, which had already been extended by two months (the maximum possible) from its

original end date of March 8th 2020. It was by that time clear that the official measures in response would have a significant impact on the retail sector, with a so-called "lock-down" being imposed from 23rd March. This included the closure of non-essential retail outlets, including the stores selling the relevant products. As the CMA itself acknowledged, both generally in its published Guidance, and in particular in this case, (see for example the evidence of Mr Meek, the Inquiry chair), the likely effects were substantial but hard to predict with certainty.

35. It would have been open to the CMA to conclude that much of its earlier evidence and analysis needed revision, and that it could not predict with any sufficient degree of certainty what the effects of the pandemic on the retail sector might be. Instead, however, it concluded that the likely impact of COVID-19 on the sector, although substantial, would be essentially neutral (i.e. would not impact overall more harshly on one type of retailer or retail activity than on another). It therefore maintained its previous working conclusion that the merger gave rise to an SLC. It also concluded that Footasylum would remain an effective retail competitor absent the merger.

36. The Judgment found in essence that the evidence the CMA had obtained was not sufficient to support those conclusions and that the CMA had acted irrationally by not seeking further information from the two principal suppliers of the relevant products, who also sold directly online to customers, and from the primary lender to Footasylum.

37. We have considered the parties' respective submissions very carefully. We have concluded that the CMA's principal complaint that the Tribunal failed to have regard to the CMA's wide margin of appreciation in the obtaining of the necessary evidence and the evaluations made of that evidence is not justified and may represent a mis-reading of the Judgment.

38. The Tribunal acknowledged and applied the relevant legal test, as set out most recently in *Ecolab,* and did not merely consider that further inquiries would have been desirable or sensible, far less substitute its own judgment in the matter.

Instead it examined, as required in law, whether the CMA had done what was necessary to put itself into a position properly to answer the statutory questions and whether its conclusions were based on the necessary evidence (see the Tribunal's statement of the relevant principles at paragraph 139 of the Judgment). In finding that in this particular instance these requirements were not met, the Tribunal did not question the principle that in general the CMA has to make many evaluative judgments and has a wide margin of appreciation in doing so.

39. The CMA argues that the Judgment restricts the margin of appreciation properly reserved to it; it must be free to decide, as a matter of evaluative judgment, what evidence to seek and whether the evidence it has is sufficient to draw the conclusions it wishes to draw. We consider that this argument risks mixing up the concept of the CMA's wide margin of appreciation with its obligation not to act irrationally in its obtaining and assessment of evidence.

40. With specific reference to the CMA's Ground 1, the Tribunal was careful to acknowledge the CMA's wide margin of appreciation and the Judgment shows no tendency to dictate or otherwise specify what evidence the CMA should obtain at any particular stage of its inquiry (see for example paragraph 140 of the Judgment[1]). On the contrary, the Tribunal is fully conscious of the CMA's proper role and of the limitations of its own supervisory role in that respect.

41. The Judgment merely finds that, on two particular aspects of the Inquiry, the CMA did not seek sufficient evidence, and drew conclusions on the impact of COVID-19 that the evidence before it did not allow it properly to draw. The Tribunal did not take any view of its own on any of those questions but did find that the CMA did not act rationally in drawing those conclusions, given the evidence available to it.

[1] "We have exercised particular restraint in 'second guessing' the educated predictions for the future that have been made by the CMA, an expert and experienced decision-maker, and acknowledged that it enjoys a wide margin of appreciation…"

42. The CMA states that the evidence on COVID-19 that it had received was speculative and unreliable. The Judgment does not seek to deny that. Instead it points out that in such circumstances it was irrational to treat obsolete forecasts as definitive and to regard them as the best evidence, or setting an "upper bound" on possible contraction in the retail sector. We agree with JD Sports that this aspect of the Judgment, namely the need to avoid drawing firm conclusions from insufficient evidence, is not generally addressed in the Application, which concentrates on the failure to make adequate inquiries.

43. In relation to what the CMA now describes as the "critical question", the Tribunal addressed the question of whether the CMA's freedom to assess what evidence was likely to be useful to it was circumscribed by the legal requirement to put itself in a position properly to answer the statutory questions, as explained above. These are two different considerations and, if they are in conflict, the Tribunal correctly decided that the second must over-ride the first.

44. In relation to the constraints from the statutory timeframe, again, the Tribunal fully acknowledged that this must affect what is reasonable and practicable. However, timing constraints do not give the CMA an all-embracing power to curtail the obtaining of evidence on a particular point, if it wishes to draw final conclusions on that point. In this particular case, the CMA conceded, and the Tribunal found (Judgment paras 145ff) that the CMA was more motivated by its conclusion as to the likely futility of obtaining robust information than on the feasibility of incorporating it into its Final Report.

45. In relation to the CMA's claim that the Judgment criticises it for considering, within the statutory time frame, evidence voluntarily submitted to it whilst failing to make active inquiries, this is possibly a misreading of the Judgment. The Tribunal merely pointed out (Judgment para 154) that the constraint of the timetable could not in itself be a reason not to seek further information if the CMA was able to take into account information submitted to it very late in the process.

46. Turning to the CMA's Ground 2, (the CMA's failure to seek direct evidence from Footasylum's primary lender), the Application appears to misread the Judgment in an important respect. The CMA argues that the Tribunal's "principal reason" for its adverse finding was an impermissible and unevidenced speculation as to Footasylum's motives for seeking to persuade the CMA (in a submission made very late in the Inquiry and summarised at paragraph 173 of the Judgment) [✂]. The paragraph in question is paragraph 174, which we set out in full:

> "In view of this [i.e. Footasylum's] detailed submission, delivered very late in the investigation, and its own view of the incentives applying to Footasylum's lender and notwithstanding the material in the Alix Partners submission, the CMA did not feel it was necessary to seek further information from the primary lender itself. We find this puzzling. It was possible that Footasylum, which was separately advised from JD Sports, wished to reassure the CMA as to the likely attitude of its primary lender, but on such a crucial issue the CMA ought to have completed its information gathering before making a decision".

47. It is clear from this paragraph that the Tribunal did not rely as its "principal reason" on what might have been Footasylum's motives. Instead, it refers expressly to the detailed submission by Footasylum's legal advisers, and the reported discussions it contained, the CMA's own assessment of the primary lender's likely incentives, and the material in the submission by Alix Partners, retained on behalf of JD Sports. The apparent contradictions in these materials make the Tribunal's expressed puzzlement perhaps understandable.

48. Given that the CMA appears to have misread the Judgment in this respect, its claim that the Tribunal's reasoning was inadequate falls away. The CMA is also wrong to suggest the Tribunal overlooked the other evidence underlying the CMA's conclusion. Paragraphs 173 and 174 of the Judgment show that it considered the contents of the Alix Partners report, the CMA's own assessment, and the matters referred to in the Footasylum submission of 27th April. The Application also fails to mention another matter considered by the Tribunal, namely that [✂].

49. It is therefore clear that the Tribunal fully assessed the adequacy of the evidence on which the CMA had based its conclusion that Footasylam's primary lender

would not withdraw its support to Footasylum absent the merger. However, it also found that the CMA's conclusion lacked the necessary piece of confirmatory evidence from the primary lender itself. The Tribunal considered there was still time to obtain this evidence and CMA has not shown that the statutory timetable rendered this impossible.

50. We therefore find that the Application contains no new points of any substance and that all the arguments now advanced by the CMA were sufficiently considered in the Judgment. The Judgment applies well established legal principles to a particular set of facts and we see no realistic prospect of the appeal being successful.

Other compelling reasons

51. The CMA further argues that the Judgment casts doubt on its ability to decide how to manage its merger inquiries in general, and may be relevant to other ongoing merger investigations affected by the COVID-19 pandemic.

52. On the first aspect, the CMA ascribes too wide a significance to the Judgment, which is highly specific and dependent on the facts of this particular case. There is no attempt to challenge the overall freedom of the CMA to decide on its own methods of investigation and analysis; indeed, the Judgment rejected JD Sports' attempts to circumscribe this freedom in its other grounds of appeal. The Judgment applies the well-established rule that an authority acts irrationally if it draws conclusions in relation to its statutory tasks without having put itself in the position with regard to the evidence properly to do so. We therefore do not see any general principle of law that needs clarification.

53. On the second aspect, the facts of this case were very specific and unlikely to be repeated. The CMA's difficulty arose from the appearance of a major pandemic late in its inquiry process, with consequential governmental measures significantly affecting the market under investigation. The question of the irrationality of its conclusions under these particular circumstances is, by definition, unlikely to recur in this form, and it is hard to see how a ruling by

the Court of Appeal in this specific case would assist the conduct by the CMA of other cases in different circumstances.

54. We therefore conclude that there are no other compelling reasons for this appeal to be heard.

D. RULING

55. For the reasons given in this ruling, it is our unanimous conclusion that the Application be rejected.

Peter Freeman CBE QC (Hon) Chairman

Paul Dollman

Tim Frazer

Charles Dhanowa OBE, QC (*Hon*) Registrar

Date: 17 December 2020