

Judicial Review in the CAT:

*Somerfield plc v Competition Commission*¹

*Association of Convenience Stores v Office of Fair Trading*²

By Ben Rayment³
28 February 2006

Introduction

As the new UK competition law regime continues to unfold, the Competition Appeal Tribunal ("CAT") has recently registered two firsts in relation to its judicial review jurisdiction under the Enterprise Act 2002 ("the 2002 Act"). *Somerfield* was the first challenge to a decision of the Competition Commission ("CC"), while *Association of Convenience Stores* was the first challenge to a decision of the Office of Fair Trading ("OFT") not to make a market investigation reference to the CC. This note sets out some of the key points.

Somerfield

Somerfield applied for review of the CC's decision contained in its *Report on the acquisition by Somerfield plc of 115 stores and other assets from Wm Morrison Supermarkets plc* ("the contested decision"). In the contested decision, the CC concluded that the completed acquisition by *Somerfield* of 115 stores previously owned by Morrison's may be expected to result in a substantial lessening of competition ("SLC") in 12 local grocery markets in Great Britain. To remedy this adverse effect on competition the CC ordered *Somerfield* to divest itself of 12 stores.

At an early stage *Somerfield* withdrew its challenge to the CC's finding of SLC thereby confining its challenge to the remedy imposed. The challenge to the remedy was based on 2 grounds: (i) that in relation to seven of the affected areas the CC was not entitled to require *Somerfield* to divest itself of the acquired store rather than its existing store in order to remedy the SLC found in those local markets ("the choice of store issue"), and (ii) in excluding a certain class of purchaser for the stores the contested decision was on the evidence perverse and/or inadequately reasoned ("the purchaser set issue").

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

¹ [2006] CAT 4

² [2005] CAT 36

³ Any views expressed are those of the author.

Standard of review

The CAT held, relying on the Court of Appeal's judgment in *IBA Health v OFT*,⁴ that the intensity of review varies according to the statutory context and will depend upon the particular circumstances, which include the fact that merger control decisions of the CC (like those of the OFT) do not involve questions of policy or politics. The CAT adopted as its starting point for review the question: "could a decision maker acting reasonably have reached this decision?" (the formulation it adopted in *Unichem v OFT*⁵). Whatever the precise legal standard of review, there is little doubt that in practice the way in which review is carried out in the CAT is strongly influenced by the CAT's own expertise in the subject matter of the decisions it is called upon to review.

Admissibility of evidence in the CAT

In *IBA Health v OFT* the Court of Appeal observed that a merger clearance decision by the OFT is not a judgment and there is no objection in principle to the CAT receiving some evidence on review by way of elucidation of the reasons or exceptionally to correct or add to the reasons in the decision.⁶ The CAT said that those remarks were made in the context of "short form" clearance decisions by the OFT which could not be expected to set out its reasons to the same extent as the CC after an in-depth inquiry. Although admissible, the CAT "anticipated" that evidence of background or technical matters, or by way of elucidation of what the contested decision means in cases against the CC should be kept to a minimum, and be closely cross referenced to the contested decision to avoid the danger of an impermissible gloss being placed on the decision. The issues proposed to be covered by any witness statement would be considered with care at the first case management conference.

The CAT also indicated a correspondingly firm line with applicants seeking to introduce "new" evidence before it. In the case of three of the acquired stores ordered to be divested Somerfield had not objected to their sale during the CC's inquiry and had therefore submitted no evidence to the CC as to whether the sale of other stores might have addressed the SLC. The CAT held that it would only be in "exceptional circumstances" that an applicant would be entitled to challenge a remedy it had not objected to during the CC's inquiry. No exceptional circumstances arose in the circumstances of the present case.

Review of the CC's criteria for divestment

In relation to the choice of store issue the CC was content in relation to three local markets to leave it to Somerfield to decide which stores to divest. However, in four other local markets the CC concluded that the most effective remedy required Somerfield to divest itself of its acquired rather than existing store. Somerfield argued that as the owner it should be allowed to choose which store to sell. The CC's starting point that it was the acquired stores that should be divested was wrong. In particular, according to Somerfield, the CC ignored that saleability was simply a function of price.

In its judgment the Tribunal pointed out that the CC's powers are designed to enable it to remedy any SLC "as quickly and effectively as possible" and that in this regard the CC has "a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating or preventing the SLC created by Somerfield's acquisition of the disputed stores." The CC's starting point was not open to criticism as it was reasonable to assume that the quickest and most effective way of restoring the status quo ante was to divest the acquired store to a person able to act as a viable competitor to the existing store. This approach was reflected in the CC's merger reference guidelines (June 2003) and its divestiture guidelines (December 2004), which were not challenged by Somerfield. If Somerfield had been worried about this approach it could have sought prior clearance from the OFT rather than complete the acquisition.

⁴ [2004] EWCA Civ 142; [2004] 4 All ER 1103.

⁵ [2005] CAT 8.

⁶ Following the principles originally set out in *R v Westminster CC v Ermakov* [1996] 2 All ER 302, CA.

The CC had approached the issue on the basis that divestment should be ordered where there was a risk that there would be no sale at all. The CAT said it considered that a *risk* that a sale would be more difficult was sufficient to justify specifying the identity of the store to be divested.

On the choice of store issue Somerfield also sought to rely on Article 1 of Protocol 1 ECHR, which protects subject to the public interest, the right to property. Although the CAT found Somerfield's submissions were raised belatedly and lacked detail it appears that the CAT assumed without formally finding that Article 1 did in fact apply. However, the CAT said that not only was it clear that merger control is exercised in the public interest but it could not be said that the remedies proposed by the CC trespassed on the protection provided by Article 1 of Protocol 1 "bearing in mind also that the "possessions" in question had only very recently been acquired by Somerfield in full knowledge of the risk that their acquisition would be subject to scrutiny under the Act and of the principles applicable, as set out in the CC merger reference guidelines."

Although the challenge to the purchaser set was primarily based on a lack/ misinterpretation of the evidence the CAT said at the level of approach the definition of a purchaser set was a matter of judgment and it was "far from manifest" that the CC had drawn the line in the wrong place.

The challenge to the CC's findings on the evidence.

On the choice of store issue Somerfield alleged that the CC did not have any evidence on which it could have based its conclusion that there was a significant risk of not attracting a suitable purchaser for the four disputed stores in question. In comparing stores in connection with divestment the CC took into account the profitability, the location and size of the stores. The CAT said those were all matters to which the CC was entitled to have regard on this issue. Furthermore, the weight of the evidence on those matters was a matter for the CC's judgment. Having appeared to assume Article 1 of Protocol applies the judgment does not make any reference to whether in the human rights context there may be circumstances in which the weight of evidence is not solely a matter for the decision maker.

The CAT held that the limited period in which the CC has to consider remedies placed the onus on Somerfield to present evidence to the CC to persuade it that the divestment of an existing store would be as effective in remedying the SLC as would divestment of the acquired store. Assertion in this regard was not sufficient. It is not "practicable" or "reasonable" at the remedies stage to require the CC to seek further evidence and engage in further work.

Somerfield also alleged that the decision to exclude the LADs from the purchaser set was perverse or unsupported by evidence. The evidence on which the CC based its exclusion of the LADs was a competitor impact assessment, the more limited range of products offered by the LADs, the views of competitors and the LADS themselves as to who their main competitors were, a consumer survey on substitutability of stores and a report on levels of usage of LADs.

The CAT noted that Somerfield's essential point was that the LADs had a greater competitive impact than the CC had allowed. However, the CAT noted that the exclusion was only for a limited period of time, the assessment of the LADs was consistent with the CC's findings in relation to the existence of an SLC (which was not challenged), Somerfield accepted that the other competitors included in the purchaser set were closer competitors, and the competitor impact assessment did not appear to support Somerfield's case. The CAT concluded that defining a competitor set was a matter of judgment and it was "far from manifest" that the CC had drawn the line in the wrong place. It was "highly desirable" that the sort of statistical evidence contained in the competitor impact assessment was considered together with other types of evidence available, the weight of which was a matter for the CC. The CAT refused to consider "new" criticisms of the consumer survey advanced in a report submitted during the hearing. Consequently the CAT concluded there had been no public law error committed in relation to the exclusion of the LADs from the competitor set during the initial phase of the divestment period.

In merger control cases where matters have to be determined expeditiously the CAT said it will be “extremely reluctant” to entertain applications based on lack of, or misinterpretation of, evidence unless the groundwork has been properly laid out in the notice of application and accompanied by a witness statement. In this case the ground of “no evidence” was raised only belatedly and in an unparticularised form. Other evidential matters had been dealt with by documents being handed up during the hearing to which the CC had had to respond “on the hoof”.

Conclusion

In addition to the specific points raised above, *Somerfield* clearly stresses the important general point that both in selecting and applying the criteria applicable to remedies the CC benefits from a margin of appreciation which respects both the detailed nature of its inquiry and its expertise (see in particular para.123 of the judgment). Furthermore, the judgment highlights the crucial importance of both the applicant and the CC clearly raising issues during the inquiry stage as it is plain that the CAT will be most reluctant to allow the debate conducted during the inquiry to be expanded on review.

Association of Convenience Stores

The ability of the CAT to control the time within which the OFT or other sectoral regulator must reconsider a decision found to be flawed is currently a topical issue under the Competition Act 1998 following the CAT’s judgment in *Floe Telecom v OFCOM*.⁷

In *ACS* the applicant (supported by Friends of the Earth) sought a review of the OFT’s decision not to refer aspects of the UK grocery market to the Competition Commission. However, at an early stage in the proceedings the OFT indicated that it did not propose to defend its decision on the grounds that it was inadequately reasoned and submitted to an order quashing its original decision and directing it to make a new decision. At the first case management conference the CAT expressed some concern at the OFT’s initial indication that (in addition to the time already spent) it envisaged a further 8 months before making a new decision. In a short ruling the CAT considered the procedural options open to it under the 2002 Act.

The provisions governing the CAT’s powers in cases where it is exercising its judicial review function in relation to both merger and market investigations under the 2002 Act provide that the CAT may, “where it quashes the whole or part of [the] decision, remit the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.” A reviewable decision is defined as a decision “in connection with a reference or possible reference and includes a failure to take a decision permitted or required in connection with a reference or possible reference.”

In considering the procedural options open to it the CAT was not minded to impose a timetable on the OFT’s reconsideration as it had done under the Competition Act 1998 Act in *Floe*. However, in a short ruling it indicated that its powers under the 2002 Act might well include the power to control undue delay by decision makers in reaching a decision under the 2002 Act. In particular, the CAT indicated that there may be circumstances in which undue delay could amount to “a failure to take a decision” permitted under the 2002 Act that is itself reviewable.

In Somerfield, John Swift QC, Daniel Beard and Julian Gregory represented the Competition Commission. In Association of Convenience stores, Paul Lasok QC and Ben Rayment represented ACS, Jennifer Skilbeck represented Friends of the Earth, and Jon Turner, Kassie Smith and Alan Bates represented the OFT.

For more information on any of our members please contact the Clerks on 020 7405 7211 or consult the ‘Find a Barrister’ Section on www.monckton.com.

⁷ [2005] CAT 14, currently on appeal to the Court of Appeal.