

GCP

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***Merger Action Group v. Secretary of State
for Business, Enterprise and Regulatory
Reform***

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Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform

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I. INTRODUCTION

On December 10, 2008, the Competition Appeal Tribunal (“CAT”) handed down its judgment in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36. The CAT decided: (i) that the Merger Action Group (“MAG”), an unincorporated association formed for the purposes of mounting this legal challenge and constituted of a handful of Scottish businessmen, was made up of “persons aggrieved” within the meaning of section 120(1) of the Enterprise Act 2002 (“the Act”) but (ii) that the substantive challenge to the Secretary of State’s decision not to refer the merger between Lloyds TSB Group plc (“Lloyds TSB”) and HBOS plc (“HBOS”) to the Competition Commission for investigation should fail.

The claim certainly proved to be dramatic in its execution, not least because MAG’s challenge to the Secretary of State’s decision was brought just hours before the statutory time limit was due to expire and time was undoubtedly of the essence to the prospects of the merger being successfully completed. Ultimately, however, save in two particular aspects on which we focus here, it proved to be unremarkable in its conclusion.

We first discuss the background to the merger and the claim by MAG, followed by the CAT’s substantive conclusion. We then turn to the two more interesting aspects of the CAT’s decision: that the members of MAG had standing to bring the application; and that the appropriate forum of the proceedings was Scotland.

II. BACKGROUND

On September 18, 2008, Lloyds TSB and HBOS announced that terms had been agreed for Lloyds TSB to acquire HBOS. The bid was conditional on no reference to the Competition Commission being made. This announcement came at time of unprecedented turbulence in the world’s financial markets and those of the United Kingdom. That turbulence had already led to the bankruptcy of Lehman Brothers and the enforced merger, nationalization, or partial nationalization of various U.K. financial institutions including Northern Rock, Bradford & Bingley, Alliance & Leicester, and the Derby and Cheshire Building Societies. The future of HBOS had been called into question and its share price had suffered from significant overnight falls. On September

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17, 2008 the Financial Services Authority (“FSA”) had felt obliged to issue a statement on its business strength to prevent further rapid falls in its share price.

On the same day as the merger was announced, the Secretary of State for Business, Enterprise and Regulatory Reform (at that time John Hutton), issued an intervention notice under section 42(2) of the Act (the “Notice”), on the basis that a public interest consideration might be relevant to the proposed merger. The notice stated that the Secretary of State considered that “the stability of the UK financial system” ought to be specified as a new public interest consideration under section 58 of the Act. This amendment was in due course made by an Order that came into force on October 24, 2008.²

The Notice went on to state that this new consideration might be relevant to the consideration of the proposed Lloyds TSB-HBOS merger and required the Office of Fair Trading (“OFT”) to investigate and report on the matter by October 24, 2008. The OFT did so,³ and concluded that the proposed merger would create “a relevant merger situation” within the meaning of the Act, and that this might be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom for goods or services, including personal current accounts, banking services to small and medium enterprises, and mortgages, such that further inquiry by the Competition Commission was warranted.

The OFT also took the view that any relevant customer benefits created by the merger would outweigh the substantial lessening of competition and the attendant adverse effects. However, given its conclusions as to a potential substantial lessening of competition, the OFT advised the Secretary of State that the test for reference to the Competition Commission on competition grounds contained in section 33 of the Act was met.

Having been so advised, the Secretary of State (who was by this time Lord Mandelson), was required to consider whether to make a reference to the Competition Commission under section 45. In making this decision he was bound by the findings of the OFT in relation to the possible effects of the merger on competition.

On October 31, 2008, Lord Mandelson decided not to refer the Lloyds TSB-HBOS merger to the Competition Commission. He took the view that the public interest in ensuring the stability of the U.K. financial system outweighed any potential anti-competitive effects that might be caused. This decision set the four-week period running in which any “person aggrieved” by the Secretary of State’s decision might apply to the CAT for judicial review (under s.120(1) of the Act).

² The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (S.I. 2008 No. 2645). This Order was laid before Parliament on October 7 and was approved by the House of Lords on October 16 and the House of Commons on October 22.

³ http://www.offt.gov.uk/shared_offt/press_release_attachments/Lloydstsb.pdf.

The merger was approved by the Lloyds TSB shareholders on November 19, 2008, with HBOS's shareholders due to meet on December 12. Then, on November 28, 2008, at what can only be said to be the very final hour, MAG issued its application seeking review of the Secretary of State's decision.

III. THE CAT'S SUBSTANTIVE FINDINGS

The CAT heard argument on two principal bases: that the Secretary of State's analysis of the proposed merger—and thus his decision not to refer it to the Competition Commission—had been fettered by a prior decision by the government not to invoke the competition law rules (the “over-arching argument”); and that the Secretary of State had framed his decision inappropriately and had undue regard to irrelevant considerations (the “narrow argument”).

The over-arching argument was based on remarks made by the Prime Minister and Chancellor at the time the merger was announced.⁴ However, the CAT rightly focused on the precise decision being made and the process undertaken by the decision-maker himself. This was a matter of evidence and not of the objective construction of the prior statements. MAG's claim faced insuperable difficulties as a result. First, the evidence of the civil servants responsible for advising Lord Mandelson did not indicate any fettering of discretion. Secondly, and crucially, when moving the Order introducing the new public interest consideration, Lord Mandelson expressly confirmed to the House of Lords that he had “*an open mind to both the competition and the public interest considerations.*”⁵ Lord Mandelson's approach was thus held to be an entirely proper one.⁶

MAG's submissions on the narrow argument were that Lord Mandelson's decision contained three factors which belied a prior determination to approve the merger without a reference to the Competition Commission. These were said to be (i) disregarding the OFT's concerns; (ii) mentioning the competition concerns of the FSA, rather than relying solely on the OFT's analysis; and (iii) reference to the FSA's submissions on state aid concerns which were said to contain an error of law which accordingly vitiated the decision as a whole.

The CAT dismissed each of the above contentions as being entirely without merit. There was no evidence that the Secretary of State had sought to diminish the findings of the OFT or failed to treat them as binding.⁷ This conclusion was not affected by reference to the FSA's submissions, which in any event, the Secretary of State did no more than recite.⁸ Finally, even if there were an error of law by the FSA (which the CAT

⁴ [2008] CAT 36, [72].

⁵ [2008] CAT 36, [78].

⁶ [2008] CAT 36, [79].

⁷ [2008] CAT 36, [81].

⁸ [2008] CAT 36, [83].

doubted), this did not vitiate the decision: the Secretary of State had in any event simply recited what had been said in the FSA's submissions.⁹

The CAT therefore unanimously dismissed MAG's application.

IV. STANDING

The issue of MAG's standing was strenuously contested. The members of MAG all banked with HBOS—either in a business or personal capacity—and one was a shareholder in HBOS (though the extent and nature of that shareholding remained unclear). Each was resident in Scotland.

The members of MAG contended that they were each concerned: 1) about the reduction of choice in the banking sector which, it was said, would result from the proposed merger; 2) that no other applicant had raised the question before the CAT in an area in which public scrutiny was important; and 3) that there was a significant interest among the general public in the issue at stake. Interestingly, no reliance was placed by MAG on its members having banking arrangements or shareholdings in HBOS (although these factors were ultimately regarded as relevant by the CAT).¹⁰ Rather, MAG was said to be “*a group of responsible individuals pursuing a real and legitimate interest.*”¹¹

The Respondent Secretary of State (supported by HBOS and Lloyds TSB as interveners) contended that to be “aggrieved” under s.120 of the Act a person must be more than merely interested in the decision in question and must be differentiated from the general body of consumers and the public at large. That is to say, an applicant must show that he or she had been injuriously affected by the decision challenged¹² and the members of MAG could not.

For reasons developed below, the issue as to whether the members of MAG were “persons aggrieved” was to be decided as matter of Scottish law. The CAT accepted that the standard for establishing standing under section 120 of the Act might be different to that in English and Welsh judicial review cases, but considered that the same factors were likely to be relevant in both cases.¹³ The CAT did, however, endorse its previous interpretation of s.120 (particularly in *IBA Health v Office of Fair Trading* [2003] CAT 28) and held that the words “any person aggrieved” was a “*wide category.*” It concluded that the question of whether an applicant is such an “aggrieved person” was one which falls to be determined in light of all the circumstances of the case.¹⁴

⁹ [2008] CAT 36, [86].

¹⁰ [2008] CAT 36, [44].

¹¹ [2008] CAT 36, [34].

¹² [2008] CAT 36, [36]-[37].

¹³ [2008] CAT 36, [40].

¹⁴ [2008] CAT 36, [43] citing *IBA Healthcare Ltd v Office of Fair Trading* [2003] CAT 28.

Despite expressly finding that MAG had “*certainly failed to establish any specific concern that differentiates them from the general body of consumers of banking services,*”¹⁵ the CAT narrowly preferred the arguments of MAG on this issue. It considered that the question was “*borderline,*”¹⁶ but went on to hold that: “*in the wholly exceptional circumstances of this case, and particularly in view of the specific interest and strong feeling which the Merger has aroused in Scotland the Applicants are ‘persons aggrieved.’*”¹⁷

The circumstances of the proceedings certainly were exceptional, and on a purely pragmatic level there was much to be said for the view that the application was better dealt with (and dismissed) on its merit, rather than on the more technical issue of standing. Moreover, the fact that the case was dealt with so expeditiously (for which the CAT is to be commended¹⁸) meant in practical terms that the wide approach to standing adopted by the CAT was of no real prejudicial effect. Had the CAT been unable to deal with the substance of the case as expeditiously as it did, the adoption of a wide approach to standing might have meant that the members of MAG were able to utilize an unmeritorious challenge to seek to derail the merger.

However, had those been the circumstances, it is very likely that the CAT would have adopted a different approach. Certainly, it emphasized in its judgment that the strength of the underlying challenge was a factor that could tip the balance against accepting the applicants’ standing to bring judicial review proceedings.¹⁹ This provides a useful filter against spurious claims and, in the judicial review context, ensures that the administrative process is not unduly restricted and rendered uncertain by the ability of members of the general public (or for that matter of particular pressure groups) to bring weak claims against public bodies.

It is certainly arguable that the decision of the CAT establishes a dangerous precedent. The members of MAG professed themselves to be no more than Scottish consumers and had not differentiated themselves from any other members of that class as a whole. Indeed, they expressly disavowed any reliance on a close relationship of proximity with the merger. Their argument was simply that if the merger went ahead, they, as general users of banking services in Scotland, would suffer from less choice. The decision therefore arguably opens the door for any individual that utilizes the goods or services provided on the market affected by the merger in question to bring a challenge under s.120 (or at least for several such taxpayers who form a new and unspecialized umbrella association under which to bring their challenge). However,

¹⁵ [2008] CAT 36, [45](b).

¹⁶ [2008] CAT 36, [46].

¹⁷ [2008] CAT 36, [47].

¹⁸ The proceedings were concluded in less than two weeks from MAG lodging its application notice on November 28, 2008. In this time, there was a case management conference (“CMC”) on 3 December, skeleton arguments were filed on December 5, oral argument was heard on December 8 and 9, and a fully-reasoned judgment was produced on December 10.

¹⁹ [2008] CAT 36, [48].

properly analyzed we believe the decision is unlikely to lead to such results. Indeed, the CAT heavily qualified its decision: stating that it was both borderline and reached in exceptional circumstances.

V. LOCATION OF THE FORUM

On December 3, 2008, the CAT determined that the proper forum of the proceedings was Scotland (as MAG contended) rather than England and Wales (as the Secretary of State and the intervening banks contended),²⁰ albeit that for reasons of practical convenience the venue of the hearings was to be in England.

In arguing for Scotland, MAG pointed to the fact that its members were based in Scotland, that the OFT viewed the Scottish market as particularly vulnerable to the effects of the merger, that the scheme of arrangement following the merger would be managed by the Scottish courts and that HBOS was registered in Scotland.²¹

The Respondents argued that the management of the scheme of arrangement was irrelevant (the CAT agreed);²² that the substance of the banks' business was largely outside of Scotland; and that the issue was really a nationwide one affecting the whole of the United Kingdom.²³

The CAT found the issue difficult and appears to have wished that a "UK-wide" choice of forum had been available.²⁴ Indeed, the decision seems to have been made on the basis that the CAT had to select one forum from the various constituent parts of the United Kingdom, and that Scotland appeared to be the most natural given that one had to be chosen.

The practical consequences of this determination were raised by the Respondent and the intervening banks but were rejected as a reason for preferring England.²⁵ These considerations went beyond the fact that Counsel were all based in England and were not members of the Scottish Bar, which itself created obvious practical and costs consequences as, given current rules in Scotland, the Respondent and the banks would have had to go to different counsel had there been any subsequent appeal proceedings.²⁶ The CAT's hopeful statement that this might not happen was well-intentioned but in practical terms proved ineffective.²⁷

Of greater import, however, is that an automatic right of appeal lies from the Court of Session (Inner House) to the House of Lords. In the context of a claim in which

²⁰ [2008] CAT 34, [3]

²¹ [2008] CAT 34, [5]-[8]

²² [2008] CAT 34, [5], [8]

²³ [2008] CAT 34, [8]

²⁴ [2008] CAT 34, [10]

²⁵ [2008] CAT 34, [9]

²⁶ In fact the CAT refused permission to appeal, and MAG did not pursue the matter any further.

²⁷ [2008] CAT 34, [111]

certainty and expediency were important, this created the specter that despite the entirely hopeless nature of MAG's claim (as found by the CAT), any appeal would ultimately have had to have been determined by the House of Lords.