Neutral citation [2023] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1579/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 April 2023

Before:

HODGE MALEK K.C.
Chair

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) CÉRÉLIA GROUP HOLDING SAS
(2) CÉRÉLIA UK LIMITED

Applicants

\- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (DISCLOSURE)

A. INTRODUCTION

1. This Ruling concerns a disclosure application made by the Applicants, Cérélia Group Holding SAS and Cérélia UK Limited (together, Cérélia) in the context of their application for judicial review pursuant to section 120 of the Enterprise Act 2002 (the "Act") of decisions in the Competition and Markets Authority's final report dated 20 January 2023 entitled 'Completed acquisition by Cérélia Group Holding SAS of certain assets relating to the UK and Ireland dough business (Jus-Rol) of General Mills, Inc' ("Final Report"). The Applicants are legally represented by Willkie Farr & Gallagher (UK) LLP.

B. BACKGROUND

2. Section 39 of the Act creates a time limit within which a report must be prepared and published following an investigation into a completed merger. Section 39(3) of the Act provides:

> "The CMA may extend, by no more than 8 weeks, the period within which a report … is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period."

3. During its investigation into the acquisition, and before publication of the Final Report, the Respondent ("CMA") extended the statutory inquiry period by eight weeks. In a Notice of Extension published on 5 October 2022, the CMA stated that "it considers that there are special reasons … why the final report cannot be prepared and published within the reference period".[1] The CMA stated that in taking the decision to extend the reference period, "the Inquiry Group had regard to the complexity of the inquiry, the need to consider the issues raised by the Parties and by third parties, including the broad scope of the submissions made by the Parties in response to the Annotated Issues Statement and Working Papers and the need to reach a fully reasoned final decision in the statutory timeframe".

[1] Notice of Extension of the Inquiry Period published by the CMA on 5 October 2022.

4. In its Final Report, the CMA decided that the acquisition, if implemented, would give rise to a substantial lessening of competition in the wholesale supply of dough-to-bake products to grocery retailers in the UK, and required Cérélia to divest the Jus-Rol business in the UK and Republic of Ireland.

5. In section 8 of its Notice of Application ("NoA"), filed on 17 February 2023, Cérélia contends that the CMA's decision to extend the statutory timetable was not justified by "special reasons", as required by the legislation, and was therefore *ultra vires*. Cérélia contends that the Final Report is void because it was published after the expiry of the relevant statutory deadline, and that the acquisition should be treated as having been cleared by the CMA.

C. CÉRÉLIA'S DISCLOSURE APPLICATION

6. Cérélia wrote to the Tribunal on 6 March 2023 seeking a direction that the CMA set out the searches undertaken to identify documents relevant to the reasons for the extension of the statutory timetable.

7. On 8 March 2023, Cérélia provided a schedule of requests for disclosure and information to the CMA. Disclosure Request 6 sought:

> "Internal CMA documents, including for the avoidance of doubt emails, explaining or justifying the decision to extend the statutory timetable in October 2022 for "special reasons" under section 39(3) of the Act."

8. In response to Disclosure Request 6, the CMA provided a witness statement dated 17 March 2023 from the Chair of the Inquiry Group, Margot Daly ("Daly Statement"). The CMA advised Cérélia by letter on 23 March 2023 that the Daly Statement and its exhibits sought to explain the basis on which an extension of the inquiry timetable was required, and that all documents relevant to the Inquiry Group's decision to extend the inquiry timetable had been disclosed alongside the Daly Statement.

9. A case management conference ("CMC") was held on 24 March 2023. Counsel for the CMA and Cérélia addressed the Tribunal as to the adequacy of disclosure provided by the CMA in response to Disclosure Request 6. The Tribunal informed the parties that it expected the CMA to search for documents which

evidenced the reasons for the extension, which may include documents that were not seen by the Inquiry Group but cast light on the decision to extend the inquiry timetable, and that such documents should be disclosed under the duty of candour. The Tribunal told the parties that “[The CMA] will do a search within what I've described. They will write back to you and say, "This is the search we've done.”[2]

10. On 28 March 2023, the CMA informed Cérélia that it had “considered whether there are any further documents to disclose that are relevant to the reasons for the Inquiry Group’s decision to extend the statutory timetable”, including whether there was “any relevant material that was not shown to the Inquiry Group”. The CMA stated that it “does not have any further documents to disclose”.

11. On 29 March 2023, Cérélia (through its solicitors, Willkie Farr & Gallagher) wrote to the CMA requesting that it “bring itself into compliance with the directions of the Tribunal” and:

> “set out by return the precise searches that have been carried out, including the names and functions of the custodians searched and to the extent keywords were used, what those keywords were and the date ranges of the search. If keywords were not used, please specify how the search was conducted. Please also specifically confirm how the searches that were carried out met the Tribunal’s direction that the CMA search for documents which “cast[s] light on what the [Inquiry Group] decision was and the reason for the decision” whether or not they were “seen by the members of the group”.

12. By letter dated 6 April 2023, the CMA advised Cérélia that it had “conducted reasonable and appropriate searches in order to identify relevant documents in accordance with its duty of candour” and stated that no further documents had been identified.

13. On 6 April 2023, Cérélia wrote to the Tribunal and requested a direction that the CMA set out what searches were undertaken as requested by Cérélia’s letter of 29 March 2023 (the “Disclosure Application”).

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[2] Line 15-16 of page 16 of CMC transcript.

14. The CMA opposed the Disclosure Application by letter dated 12 April 2023. The CMA disagreed with Cérélia's interpretation of the Tribunal's comment at the CMC (extracted in paragraph [9] above) as a direction that the CMA provide Cérélia with a search log, instead considering the Tribunal was describing the application of the duty of candour to the issue at hand. The CMA wrote that the scope of its enquiries would have unearthed any further relevant material as described at the CMC, and that Cérélia's Disclosure Application should be considered in the context of the Daly Statement and disclosure already provided.

D. GOVERNING PRINCIPLES

15. The Tribunal's power to order specific disclosure is set out in rule 19(1) and (2)(p) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"), to be read in conjunction with the governing principles in rule 4 of the Tribunal Rules that each case is dealt with justly and at proportionate cost.

16. The principles governing the Tribunal's approach to specific disclosure in judicial review proceedings were set out in *Ecolab Inc v CMA* [2020] CAT 4 ("*Ecolab*") and *Tobii AB (Publ) v CMA* [2019] CAT 25 ("*Tobii*").

17. In *Ecolab*, considering previous case law, the President set out the principles that govern the Tribunal's approach to specific disclosure in such cases at [17]:

> "(1) The principles to be applied are those appropriate to disclosure in applications for judicial review.
>
> (2) The decision maker in responding to the substantive application to challenge its decision is under a duty of candour. Where a particular document or documents are significant to a contested decision and relevant to the grounds of challenge, they should normally be disclosed at the outset rather than a deponent attempting to summarise them in a witness statement. But in particular where the decision is lengthy and detailed, the decision maker is not under a more general obligation to disclose all the material referred to in the decision or which it collected in the course of its investigation.
>
> (3) Disclosure in such cases is never automatic and an order for specific disclosure will usually be unnecessary. This is because the issue is usually the lawfulness of a body's decision-making process rather than the correctness of its substantive decision or because the decision-maker has complied with its duty of candour.

(4) In every case, the Tribunal must be satisfied that the disclosure sought is relevant, proportionate and necessary in order to determine the issues before it fairly and justly.

(5) The need for the requested disclosure must be examined in the light of the circumstances of each individual case. Prominent amongst those circumstances are likely to be: the nature of the decision challenged; the grounds upon which the challenge is being made; the degree of evidence already provided in the decision, in the course of the prior investigation and in the response to the substantive application before the Tribunal; and the nature and extent of the disclosure being sought.

(6) Even in cases involving issues of proportionality and Convention rights, orders for disclosure are "likely to remain exceptional"; and such disclosure should be "carefully limited to the issues which require it in the interests of justice". In that regard, the greater the alleged interference with Convention rights, the stronger the justification for scrutiny of the evidential basis relied upon.

(7) Mere 'fishing expeditions' "for adventitious further grounds of challenge" will not be allowed.

(8) Where provision of the disclosure sought will be burdensome or the disclosure is voluminous, that is a factor to be weighed but is not in itself decisive." (Footnotes omitted).

18. In *Tobii*, the Tribunal noted (at [11]) that:

> "The nature and extent of disclosure before the Tribunal very much depends on the form of the proceedings... where the proceedings consist of a challenge to a decision applying judicial review principles, disclosure is generally not necessary or is only limited to specific documents or categories of documents."

19. At [14], the Tribunal cited a statement by Lord Brown in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 ("*Tweed*") at [56] that:

> "… disclosure orders are likely to remain exceptional in judicial review proceedings … and the courts should continue to guard against what appear to be merely 'fishing expeditions' for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time-consuming, to flood the court with needless paper."

20. Applying *British Sky Broadcasting Group plc v The Competition Commission and the Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 7 ("BSkyB"), which followed the principles set out in *Tweed,* the Tribunal noted (at [17]):

> "… the Tribunal's general approach to disclosure in applications for review under s.120 of the 2002 Act is that disclosure is not automatic nor would the Tribunal allow mere fishing expeditions. Before it will make an order for

> disclosure, the Tribunal must be satisfied that the disclosure sought is necessary, relevant, proportionate and in the interests of securing the just, expeditious and economical conduct of the proceedings. Consequently, the Tribunal will examine the requested disclosure in light of the particular circumstances of each individual case, such as the nature of the decision challenged, the nature of the grounds on which the challenge is being made, and the nature and extent of the disclosure sought."

21. The Tribunal noted at [21]:

> "What makes disclosure in judicial review proceedings more circumscribed is the fact that the issue is usually the lawfulness or otherwise of a body's decision-making process, rather than the correctness of any substantive decision so produced, and that the decision maker (in this case the CMA) normally complies with its duty of candour."

22. The need for proportionality in relation to disclosure is particularly important in proceedings before the Tribunal. It is appreciated that disclosure can be both costly and time consuming. An approach of leaving no stone unturned is not one which is appropriate in any proceedings before the Tribunal, even the more in cases where the standard of review is that of judicial review where disclosure is not the norm and needs to be properly justified.

23. The Tribunal does have the power as part of its case management powers to require a party who has provided disclosure to specify precisely what searches have been undertaken. It will typically exercise that power where there is real doubt in the mind of the Tribunal as to whether a party has complied with its disclosure obligations, including its duty of candour. It is of course open to the Tribunal to fashion a disclosure order whereby the precise searches to be undertaken, including the custodians and places or systems or databases to be searched, are specified.

E. DECISION

24. In determining Cérélia's Disclosure Application, I have considered what is just and proportionate in the circumstances of this case, specifically by reference to the way in which Cérélia's case has been pleaded in its NoA, and in light of the Daly Statement and exhibits provided by the CMA in response to Cérélia's disclosure request of 8 March 2023.

25. The question to be decided is whether the further disclosure sought, namely details of the precise searches undertaken by the CMA to identify relevant documents, is proportionate and necessary for the Tribunal to reach a determination on the appeal ground at section 8 of Cérélia's NoA fairly and justly.

26. Here, the CMA contends that it has fulfilled its duty of candour, by providing the Daly Statement and documents which explain the reasons for the extension, and in carrying out searches for the documents falling within the category sought by Cérélia. These supplement the explanation given in the Notice of Extension itself. The CMA has stated that it does not have any further documents to disclose in relation to Disclosure Request 6 and that it conducted "reasonable and appropriate searches in order to identify relevant documents in accordance with its duty of candour". I have not seen evidence at this stage to persuade me that the CMA has not complied with its duty of candour. I am satisfied that the CMA has carried out reasonable and proportionate searches and I do not consider it necessary for the CMA to in effect give further particulars of the precise searches it has carried out. The CMA has already given its explanation through the Notice of Extension and the Daly Statement for the extension. It is therefore, in my view, not necessary, nor would it be proportionate, to require the CMA to provide the further disclosure by way of explanation of the searches actually carried out as sought by Cérélia.

27. The Disclosure Application requests that the CMA details the searches by which it determined that all the relevant documents had been disclosed. In asking the Tribunal to direct the CMA to disclose the searches that were undertaken to identify relevant documents, Cérélia is asking the Tribunal to look behind the Daly Statement and determine whether the CMA has complied with its duty of candour and provide the disclosure that it had agreed to provide both before and at the CMC. I am satisfied on the basis of the material that I have seen at this stage that the CMA has complied with its duty of candour in respect of the disclosure it has agreed to provide.

28. Disclosure of the searches by which the CMA identified the relevant documents will not assist the Tribunal in determining whether the CMA's reasons for

extending the statutory inquiry timetable were indeed “special reasons” as required by section 39(3) of the Act. Nor do I think that disclosure of the actual searches will assist in either supporting the case of Cérélia or undermining that of the CMA.

29. Accordingly, I refuse Cérélia’s request for disclosure of the actual searches undertaken by the CMA to identify documents relevant to the “special reasons” for extending the statutory timetable for review of the relevant acquisition.

Hodge Malek K.C.
Chair

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

Date: 13 April 2023