Competition Tribunal | Tribunal de la Concurrence

CT - 1996 / 001 – Doc # 157

IN THE MATTER of an application by the Director of Investigation and Research for orders pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of the merger whereby Dennis Washington and K & K Enterprises acquired a significant interest in, and propose to acquire control of, Seaspan International Ltd.;

AND IN THE MATTER of the merger whereby Dennis Washington acquired Norsk Pacific Steamship Company, Limited;

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Dennis Washington
K & K Enterprises
Seaspan International Ltd.
Genstar Capital Corporation
TD Capital Group Ltd.
Coal Island Ltd.
314873 B.C. Ltd.
C.H. Cates and Sons Ltd.
Management Shareholders
Preference Shareholders
Norsk Pacific Steamship Company, Limited
Fletcher Challenge Limited

Respondents

ORDER REGARDING MOTION TO STRIKE OR SEVER A REMEDY

Date of Pre-hearing Conference:

November 13-14, 1996

Members:

McKeown J. (presiding)
Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

William J. Miller
John S. Tyhurst

Counsel for the Respondents:

Dennis Washington
K & K Enterprises
C.H. Cates and Sons Ltd.
Norsk Pacific Steamship Company, Limited
Seaspan International Ltd.

Nils E. Daugulis
Douglas G. Morrison
Sharon Dos Remedios

Genstar Capital Corporation

Robyn M. Bell

TD Capital Group Ltd.

Kent Thomson

Coal Island Ltd.
Management Shareholders
Preference Shareholders

Charles F. Willms

Fletcher Challenge Limited

Nando DeLuca

COMPETITION TRIBUNAL

ORDER REGARDING MOTION TO STRIKE OR SEVER A REMEDY

Director of Investigation and Research

v.

Dennis Washington et al.

Genstar Capital Corporation ("Genstar"), TD Capital Group Ltd. ("TD Capital") and Coal Island Ltd. have all brought motions bearing on the remedies requested by the Director of Investigation and Research ("Director") in this application. There are two mergers or alleged mergers involved in this application, the "Seaspan merger" and the "Norsk merger". In the notice of application, as amended, the Director asks for the following remedial orders with respect to those mergers:

> (1) . . . an order directing the Respondents K & K Enterprises and Dennis Washington to dispose of all their shares and assets in the Respondent Seaspan International Ltd. . . . ; or
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> (2) . . . an order directing the Respondents to dissolve the Seaspan Merger . . .; or
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> (3) . . . an order directing the Respondents K & K Enterprises and Dennis Washington to dispose of their shares and assets in whole or in part in the Respondent Seaspan International Ltd. in respect of shipberthing or directing the Respondent Dennis Washington to dispose of all his shares and assets in C.H. Cates and Sons Ltd., and
>
> > (a) . . . an order directing the Respondent Dennis Washington to dispose of his shares and assets in whole or in part in the Respondent Norsk Pacific Steamship Company, Limited; or
> >
> > (b) . . . an order directing the Respondents Dennis Washington and Fletcher Challenge to dissolve the Norsk Merger . . . .

Genstar and TD Capital seek to strike paragraph (2) of the notice of application, namely the proposed remedy of dissolution of the Seaspan merger. In the alternative, they seek to sever the hearing of the issue of the remedy of dissolution of the Seaspan merger from the remainder of the application, including both the allegations dealing with substantial lessening of competition

and the other proposed remedies. Any consideration of the remedy of dissolution of the Seaspan merger would be reserved to a later, discrete hearing, in the event necessary. Coal Island seeks only to sever the hearing of the dissolution remedy.

The request to sever the hearing of the remedy of dissolution of Seaspan was not opposed by any party. As we indicated at the pre-hearing conference, we are amenable to granting an order severing the hearing of the issues relating to that remedy from the hearing of the remainder of the application, including the other remedies, with that remedy hearing to take place at a later date, if necessary. We should note that all evidence produced at the main hearing will, to the extent relevant, be evidence at that remedy hearing, if such a hearing is indeed held. Evidence on the remedy of dissolution will be presented at such time. We reserved on the question of whether we should strike the remedy from the application altogether. Upon consideration we have decided not to do so. The following are the reasons for that decision.

The respondents bringing this motion made similar submissions in support of the request to strike. We will deal with their arguments as a group. They argue that the Director is not currently seeking the remedy of dissolution and that therefore it should be struck from the pleadings in order to simplify and narrow the issues before the Tribunal in this application. They say that the Director has control of the litigation before the Tribunal and that any remedies that she is no longer actively seeking should be removed from the application. They submit that it is a misconception of the Tribunal proceedings, which are purely adversarial, for the Director to argue that the remedy of dissolution should remain "in case" the Tribunal, in the exercise of its independent discretion, decides to adopt it.

They point out that as the vendors in the Seaspan transaction, their participation in the proceedings depends in large measure on whether or not the remedy of dissolution is still "on the table". They say that they are entitled to finality in terms of knowing exactly what their exposure is as respondents in this proceeding. Further, they submit, allowing the Director to continue to maintain in the application remedies which she no longer seeks encourages the Director to formulate every application in broad terms which pull in many persons as respondents who are peripheral or minor players when it comes to the main issues in question. This was referred to as the "floodgates" argument.

The Director has clearly stated on the record that divestiture is currently her preferred remedy and that the Director is not aware of any evidence to date that would be an impediment to divestiture. That is not in dispute. While in the written memorandum of argument of this pre-hearing conference, the Director neither consented nor opposed the motion to strike, in oral argument, counsel for the Director made emphatic submissions in opposition to striking the remedy of dissolution. He emphasizes that there has been no suggestion on the part of the Director or her counsel that she is prepared to amend the notice of application to withdraw the remedy of dissolution. Counsel for the Director points out that the current position is based on what the Director knows at this stage and that further evidence might be called at the hearing that would change that position. Given the dynamic nature of the proceeding, it is argued that it is not practical to delve in more detail into the issue at this point. The Director's statement of her preferred remedy, it was submitted, was intended solely to assist the respondents in preparing their case. Dissolution is still a "live" issue. The Director also advances an argument that the Tribunal is a regulatory body required to act in the public interest in deciding this application and, in particular, in exercising its discretion with respect to remedies.

The respondents Washington et al. take the position that unless more can be struck from the pleadings than the remedy of dissolution alone, it is premature to strike that remedy at this point. They are concerned that if the Tribunal eventually finds that there is a substantial lessening of competition and that Dennis Washington is required to leave the relevant markets, it be open to Mr. Washington to argue in favour of the method of exit that he prefers, whether divestiture or dissolution.

Rather than run the risk that the remedy of dissolution may, when all is said and done, turn out to be necessary, we decline the motion to strike in the circumstances of this case. As mentioned above, we are willing to sever the hearing of this issue. As conceded by counsel for TD Capital, there is little difference in the costs of participation for the respondents bringing the motion if severance is granted as opposed to striking since the costs have already been incurred. There is, therefore, little to be gained by striking the remedy and a risk that much will be lost if dissolution later turns out to be required and the Tribunal is precluded from granting the remedy.

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[1] For example, in the application involving Hillsdown Holdings (Canada) Ltd. (CT-91/01).

With respect to the arguments advanced by the various parties regarding the respective roles of the Tribunal and the Director and the "floodgates" arguments, we make the following comments. While we accept that the Tribunal must endeavour to act in the "public interest", and this consideration entered into our decision, we take no position on whether the Tribunal is a "regulatory body", whatever that may imply in general and in specific circumstances. The respondents bringing the motion urge us to focus on the allegations that the Director has put before the Tribunal. Although her written memorandum of argument was perhaps somewhat ambiguous, in oral argument we heard the Director, through her counsel, state that the remedy of dissolution should *not* be struck from the application. With respect to the "floodgates" argument, we take notice of the fact that the Director does not always include dissolution in a merger application. Further, although it was argued that including dissolution in this application involved over 30 parties who would otherwise have no stake in the proceeding, we note that the bulk of the 30 are the individual shareholders associated with Coal Island which did *not* seek to strike the remedy of dissolution but were only seeking severance.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

1. The motion to strike the remedy of dissolution of the Seaspan merger is denied.

2. The hearing regarding the issue of the remedy of dissolution of the Seaspan merger shall be severed from the hearing of the remaining issues in this proceeding. Any hearing regarding the remedy of dissolution of Seaspan shall only proceed after the hearing of the remaining issues is completed, should the Tribunal so order at that time.

DATED at Ottawa, this 21st day of November, 1996.

SIGNED on behalf of the Tribunal by the presiding judge.

(s) W.P. McKeown
W.P. McKeown