Neutral citation [2019] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1328/4/10/19

Victoria House
Bloomsbury Place
London WC1A 2EB

16 August 2019

Before:

THE HON MR JUSTICE ROTH
(President)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

LEBEDEV HOLDINGS LIMITED
INDEPENDENT DIGITAL NEWS AND MEDIA LIMITED

Applicants

- v -

SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT

Respondent

Heard at Victoria House on 23 July 2019

JUDGMENT

APPEARANCES

Ms Sarah Ford QC (instructed by Bristows LLP) appeared on behalf of the Applicants.

Mr David Scannell and Ms Emily MacKenzie (instructed by the Government Legal Department) appeared on behalf of the Respondent.

A. INTRODUCTION

1. The UK regime for merger control contains special provisions concerning mergers involving newspapers. In particular, whereas merger control on competition grounds is exclusively in the hands of the Competition and Markets Authority ("the CMA"), the Secretary of State has certain rights in cases involving specified public interest grounds. Those grounds include, under sect 58(2A) of the Enterprise Act 2002 ("the Act"):[1]

> "The need for—
>
> (a) accurate presentation of news; and
>
> (b) free expression of opinion;
>
> in newspapers…"

2. The particular regime which applies to newspaper mergers involves several stages, which in summary are as follows:

   (i) the issue by the Secretary of State of a public interest intervention notice ("PIIN"): sect 42;

   (ii) the making of advisory reports to the Secretary of State by the CMA and by the Office of Communications ("OFCOM"): sects 44 and 44A;

   (iii) the making of a reference by the Secretary of State to the CMA for full investigation and report: sect 45;

   (iv) the preparation of a report by the CMA on the questions referred and provision of that report to the Secretary of State: sect 50;

   (v) the decision of the Secretary of State as to whether to make an adverse public interest finding: sect 54; and

   (vi) where such an adverse public interest finding is made, the Secretary of State may take action "to remedy, mitigate or prevent" any of the effects adverse to the public interest: sect 55.

[1] All statutory references are to the Act unless otherwise stated.

3. Although these terms are not used in the legislation, the period up to the making of a reference in stage (iii) is commonly referred to as 'Phase 1', whereas the stages following the making of a reference are referred to as 'Phase 2'.

4. In the present case, the Secretary of State issued a PIIN under stage (i) and the CMA (but not OFCOM) has issued an advisory report under stage (ii). The Applicants contend that the Secretary of State's PIIN is legally flawed since (1) it was issued after the statutory time-limit, and (2) it sets a time period for reports from the CMA and OFCOM which means that no reference under Phase 2 could be made because that would be past the statutory deadline for a reference. Accordingly, this application does not concern the public interest considerations raised by the Secretary of State and whether they are well-founded, but involves much narrower points of interpretation of the relevant statutory provisions, relating to the relevant statutory time periods associated with the issue of a PIIN or its consequences.

5. For the reasons set out in this judgment, we find that (1) the PIIN was issued in time, but (2) that there is a statutory time-limit for the making of a reference (i.e., paragraph 2(iii) above) which has expired such that no reference can now be made.

B. BACKGROUND

6. *The Evening Standard* is the well-known daily London newspaper, now distributed free of charge. Together with the Evening Standard news website, it is published by Evening Standard Ltd, a company in which the majority shareholding is held by Lebedev Holdings Ltd ("LHL"), the First Applicant. Prior to the events at issue, LHL was 100% owned by Mr Evgeny Lebedev.

7. The Second Applicant is Independent Digital News and Media Ltd ("IDNM"). IDNM is described in the witness statement filed for the Applicants as a digital consumer media business. It is the publisher of the digital successor to *The Independent* print newspaper which is now produced only online at independent.co.uk. IDNM also produces another online publication at indy100.com and offers a digital mobile application. Prior to the events leading

to this application, the majority of the shares in IDNM were held by Mr Lebedev.

8. In June or July 2017, 30% of the shares in IDNM were acquired by Scalable Inc ("Scalable"), a company incorporated in the Cayman Islands. Scalable has two issued shares. One each is owned by Mr Sultan Mohammed Abuljadayel and Wondrous Investment Holdings LP ("Wondrous"). Mr Abuljadayel is a citizen of Saudi Arabia and described in the witness statement as a "Saudi investor". Wondrous is a limited partnership in the Cayman Islands that has two partners. One is a management company which is ultimately owned by National Commercial Bank, a bank based in Saudi Arabia, which has the voting rights in Wondrous. The other partner is an investment fund for clients of the bank, and has the economic interest in Wondrous.

9. Following the Scalable acquisition, Mr Lebedev's shareholding was reduced to 40.69%. He continued to be the largest shareholder in IDNM.

10. Between 7 December 2018 and 20 February 2019, 30% of the shares in LHL were acquired by International Media Company ("IMC"). IMC is also a Cayman Island company and has the same shareholding as Scalable. As a result of those transactions (and disposal of some shares to another investor), Mr Lebedev's shareholding in LHL was reduced to 60%.

11. Accordingly, as a result of those transactions, through the intermediate Cayman Islands companies, Mr Abuljadayel and Wondrous together hold 30% of both LHL and IDNM.

12. Some aspects of the 2017 transaction were reported in *Middle East Eye* on 28 July 2017, although that report referred to Mr Abuljadayel as acquiring "up to 50%" of *The Independent;* and in *The Guardian* on 29 July 2017, which stated that Mr Abuljadayel had taken a stake of "between 25% and 50% in IDNM. *Middle East Eye* quoted "an informed Saudi source" as stating that Mr Abuljadayel came from "an established business family based in Medina." *The Guardian* quoted a spokesman for *The Independent* as saying:

> "To secure further strategic growth for the Independent, Independent Digital News and Media Ltd has expanded its investor base to include a minority

> shareholding by Sultan Abuljadayel. The new investment and the guarantee of editorial independence will allow the Independent to flourish into the future."

Neither report made any reference to Wondrous or to National Commercial Bank.

13. The more recent sale of a stake in LHL was first reported in the *Daily Telegraph* on 15 January 2019, but on the basis that the identity of the new investor in the newspaper was unknown and that Mr Lebedev's spokesman refused to disclose his identity. On 30 January 2019, *The Financial Times* published an article entitled "Mystery investor bought 20% of Evening Standard parent." The article referred to an unknown investor, whose identity was concealed behind a Cayman Islands company, acquiring an indirect stake of "about" 18% of *The Evening Standard*, and stated:

> "Despite several requests from the Financial Times, representatives of Lebedev Holdings and Mr Lebedev refused to reveal the identity of the beneficial owner of the stake or to confirm whether Saudi nationals had invested in it."

14. This article referred also to the 2017 transaction, which it stated involved the sale of a 30% stake to Mr Abuljadayel who, "according to his social media profile and previous media reports – works for Saudi Arabian investment bank NCB Capital" and also mentioned that Mr Abuljadayel held his stake through Scalable. However, there was nothing in either of the January press reports linking Mr Abuljadayel to the investment in *The Evening Standard*, nor any mention of Wondrous.

15. These press reports prompted some questions in Parliament, by Lord Myners in the House of Lords on 31 January 2019 and by Mr Tom Watson MP in the House of Commons on 8 February 2019. They were in effect answered identically by the Secretary of State on 13 February 2019, as follows:

> "Neither I nor my Department has had any contact from Lebedev Holding Ltd or its representatives about the transaction. While the Secretary of State has powers under the Enterprise Act 2002 to intervene in certain media mergers raising public interest concerns, there is no requirement under the Enterprise Act 2002 for parties to advise us of the transaction.
>
> My officials will contact Lebedev Holdings Ltd about the transaction, and to obtain further information to determine whether there has been a change of control which would give rise to a merger falling within the jurisdiction of the 2002 Act. However, writing to the party does not necessarily indicate that any transaction raises any public interest concerns.

> These decisions are always made in a quasi judicial capacity by the Secretary of State."

16. There were internal discussions between officials at the Department for Digital, Culture, Media and Sport ("DCMS") and the CMA following *The Financial Times* article, and on 12 February 2019, the Deputy Director of the Media Team at DCMS wrote to the company secretary of LHL, referring to the Secretary of State's statutory powers as regards media mergers and seeking more information about the transaction. In particular, the letter asked for:

> "(1) full details of the party (individual or entity) acquiring the shareholding in Lebedev Holdings Limited;
>
> (2) full details of the ultimate beneficial owner – if an individual, their full name (and title) nationality, UK status including contact details;
>
> (3) details of the voting rights and other rights associated with the shares (including the right to appoint directors);
>
> (4) details of any interests held or control exercised over other UK or international enterprises by the individuals or entities identified at points (1) and (2)."

17. LHL responded, as requested, on 19 February 2019. The letter of 19 February 2019 gave full details of the transactions concerning LHL as set out above, including the identity and participation of Wondrous. In answer to question (4), the letter stated:

> "4 Mr Abuljadayel and Wondrous Investment Holdings L.P together separately own indirectly 30% of the issued shares in Independent Digital News and Media Limited (which publishes The Independent online).
>
> Mr Abuljadayel and Wondrous Investment Holdings L.P own no other enterprises in the UK. Wondrous Investment Holdings L.P. owns a minority interest in [a US media group]."

18. Mr Ian O'Neill, the lead official at DCMS responsible for media merger cases, states in his witness statement for the Respondent that LHL's letter of 19 February was:

> "considered in detail internally, including as to whether we were able to share the letter with the CMA. Our view was that this letter from LHL may have disclosed sufficient details about the transaction to give rise to reasonable grounds for suspecting that it was or might be the case that a relevant merger situation had been created (although we intended to follow-up to establish more information before taking a final view about this)."

However, it was not until 1 March 2019 that DCMS sent a copy of LHL's letter of 19 February to the CMA.

19. In the meantime, on 25 February 2019, *The Financial Times* published a further article entitled: "Hidden buyer of Evening Standard stake revealed as Saudi investor". This reported that "according to two people with knowledge of the deal", the buyer, through a Cayman Islands company, was Mr Abuljadayel and that the stake he had acquired was 30%. Further, the report noted that Mr Abuljadayel had two years previously bought "a similar sized stake" in *The Independent* and stated:

> "Mr Abuljadayel is associated with NCB Capital, the investment banking arm of Saudi Arabia's National Commercial Bank. The lender is majority owned by the Saudi government through its Public Investment Fund."

The Financial Times added that both *The Evening Standard* and Mr Lebedev had declined to comment on the deal.

20. A largely similar article was published in *The Guardian* later the same day, but appears to be derived from *The Financial Times* article and took the matter no further. Because the article in *The Financial Times* is central to the Applicants' argument on the first ground of this application, it is copied in an appendix to this judgment.

21. There followed further requests for information and exchange of correspondence between the officials at DCMS and LHL, but the details are not relevant to this application. On 27 June 2019, the Secretary of State issued a PIIN under sect 42.

The intervention notice

22. The PIIN is headed:

> "ACQUISITIONS BY INTERNATIONAL MEDIA COMPANY OF A SHARE IN LEBEDEV HOLDINGS LIMITED AND BY SCALABLE INC OF A SHARE IN INDEPENDENT DIGITAL NEWS AND MEDIA LIMITED."

23. The first part of the notice states:

> "Whereas the Secretary of State has reasonable grounds for suspecting that, as a result of the sale of 30% of the share capital in Lebedev Holdings Limited to

> International Media Company, and 30% of the share capital in Independent Digital News and Media Limited to Scalable Inc, it is or may be the case that:
>
> (a) a relevant merger situation has been created as defined in section 23 of the Enterprise Act 2002 ("the Act") in that:
>
> (a) two or more enterprises have ceased to be distinct, as control over both Lebedev Holdings Limited and Independent Digital News and Media Limited have been obtained in stages, as defined in section 29 of the Act, by the same parties or interests or group of persons; and
>
> (b) the combined value of the turnover in the United Kingdom of Lebedev Holdings Limited and Independent Digital News and Media Limited exceeds £70 million;"

The notice proceeds to state that the other conditions set out in sect 42(1)(b)-(d) are satisfied and continues:

> "Whereas the Secretary of State believes that it is or may be the case that the following public interest considerations specified in section 58(2A) of the Act are relevant to a consideration of the relevant merger situation:
>
> "(2A) The need for –
>
> (a) accurate presentation of news; and
> (b) free expression of opinion
>
> In newspapers…"
>
> Now, therefore, the Secretary of State in exercise of his powers under section 42(2) of the Act hereby gives this intervention notice.
>
> Under and in accordance with sections 44 and 44A of the Act, the Competition and Markets Authority and Ofcom respectively are required to investigate and report by midnight at the end of 23 August 2019."

24. In fact, the CMA produced its report to the Secretary of State the very next day, 28 June 2019. In accordance with sect 44, the CMA was required to state whether it believed that it was or may be the case that a "relevant merger situation" had been created, and if so whether that merger had resulted or may be expected to result in a substantial lessening of competition ("SLC") in any market in the UK for goods or services. A "relevant merger situation" has a very specific statutory meaning that is discussed further below. The evaluation of any media public interest considerations was not a matter for the CMA but was to be addressed by OFCOM in its report pursuant to sect 44A.

25. In summary, the CMA report set out its decisions that it:

(1) believed that a relevant merger situation had been created; but

(2) did not believe that the merger resulted or may be expected to result in a SLC since (a) IDNM and LHL were already under common control before the merger, and (b) pre-merger there was no overlap between the activities in the UK of Mr Abuljadayel and Wondrous on the one hand and of IDNM and LHL on the other.

C. THE STATUTORY REGIME

26. Part 3 of the Act sets out the regime for merger control. Chapter 1 of Part 3 deals with mergers generally and Chapter 2 addresses specifically public interest cases. Many of the provisions governing such cases are labyrinthine. That stems from the facts that, first, the definition of a "relevant merger situation" is not based simply on the structural arrangements but incorporates a temporal element; and secondly, and more significantly, that Chapter 2 is not drafted as a cohesive and self-standing set of rules but involves extensive cross-reference to the general provisions in Chapter 1, subject to a series of complex amendments and substitutions. We were told by Counsel for the Secretary of State that the explanation was that the public interest provisions in what became the Act had been drafted in some haste and without the opportunity for Parliamentary counsel to review and revise the drafting in the usual way. We were also told that the correct meaning of some of the provisions was subject to divergent views in different Government departments. It is notable that the submissions made on behalf of the Secretary of State for Digital, Culture, Media and Sport in this case on the question of the time-limit for references in public interest cases, if correct, would mean that the statutory guidance published by the then Secretary of State for Trade and Industry pursuant to sect 106A was, on this point, wrong. The Tribunal has, of course, to interpret the relevant statutory provisions and then apply them accordingly. But it is unfortunate, to say the least, that the legislation concerning an important aspect of potentially significant commercial transactions should be so convoluted.

27. To understand the grounds on which the application is brought, it is necessary to set out a number of the provisions in some detail.

Chapter 1 of Part 3: the general regime

28. As mentioned above, the general merger regime is set out in Chapter 1 of Part 3: that Chapter comprises sects 22-41B of the Act. Sect 22 sets out the general duty of the CMA to make a reference in the case of a completed merger and provides as follows, insofar as relevant:

> "**22 Duty to make references in relation to completed mergers**
>
> (1) The CMA shall, subject to subsections (2) and (3), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA believes that it is or may be the case that—
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

Sect 22(2) gives the CMA power not to make a reference where the relevant market is not of sufficient importance or where any SLC is outweighed by "relevant customer benefits" (a term defined in sect 30). Sect 22(3) includes the following:

> "(3) No reference shall be made under this section if—
>
> […]
>
> (d) a notice under section 42(2) is in force in relation to the matter or the matter to which such a notice relates has been finally determined under Chapter 2 otherwise than in circumstances in which a notice is then given to the CMA under section 56(1); […]"

That is a reference to the PIIN provisions: the CMA cannot itself make a reference while a PIIN issued by the Secretary of State is in force.

29. "Relevant merger situation" is defined in sect 23. It sets out two, distinct, relevant merger situations, each of which depends on two criteria being satisfied. The first is described in sect 23(1):

> "**23 Relevant merger situations**
>
> (1) For the purposes of this Part, a relevant merger situation has been created if—
>
> (a) two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24; and

(b) the value of the turnover in the United Kingdom of the enterprise being taken over exceeds—

(i) £1 million, if in the course of the enterprises ceasing to be distinct, a person or group of persons has brought a relevant enterprise (see section 23A) under the ownership or control of the person or group; or

(ii) £70 million, in any other case."

For obvious reasons, this is referred to as the 'turnover test'. Sect 23(2) sets out the other relevant merger situation, in which instead of turnover the second criterion is based on the resulting share of supply of goods or services: this is accordingly referred to as the 'share of supply' test. The present case depends on the turnover test. Sect 23(9) is of importance for the argument on this application. It states:

"(9) For the purposes of this Chapter, the question whether a relevant merger situation has been created shall be determined as at—

(a) in the case of a reference which is treated as having been made under section 22 by virtue of section 37(2), such time as the CMA may determine; and

(b) in any other case, immediately before the time when the reference has been, or is to be, made."

30. "Enterprise" is defined in sect 129(1), which applies for the whole of Part 3, as meaning, "the activities, or part of the activities, of a business."

31. Sect 24 deals with time-limits, but by reason of the express reference in sect 23, the arrangements must satisfy those time-limits in order to qualify as a "relevant merger situation". This provision states:

"**24 Time-limits and prior notice**

(1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if—

(a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day; or

(b) notice of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be distinct enterprises has not been given in accordance with subsection (2).

(2) Notice of material facts is given in accordance with this subsection if—

(a) it is given to the CMA prior to the entering into of the arrangements or transactions concerned or the facts are made public prior to the entering into of those arrangements or transactions; or

(b) it is given to the CMA, or the facts are made public, more than four months before the day on which the reference is to be made.

(3) In this section—

"*made public*" means so publicised as to be generally known or readily ascertainable; and

"*notice*" includes notice which is not in writing."

32. The CMA has power to extend the four month period set out in sect 24, in circumstances specified in sect 25. Essentially, four circumstances are there set out:

(1) an extension of no more than 20 days, by agreement with the persons carrying on the enterprises concerned;

(2) if the persons carrying on the enterprises concerned have failed to comply with a notice issued under sect 109 (which enables the CMA to require the provision of information or documents, or the attendance to give evidence). Such an extension lasts until that requirement is fulfilled;

(3) where the CMA is seeking undertakings pursuant to sect 73 from any of the persons carrying on the enterprises concerned: sects 73A-73B prescribe detailed time requirements for the obtaining of such undertakings, and sect 25(5)(b) states that if the person notifies the CMA that it does not intend to give such an undertaking, the extension expires 10 days thereafter;

(4) where the European Commission is considering a request by the UK under article 22 of the EC Merger Regulation that it should examine the merger.

33. The concept of "enterprises ceasing to be distinct" is defined and explained in sects 26-27, subject also to sect 127. Sect 26 states, insofar as material:

"**26 Enterprises ceasing to be distinct enterprises**

(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control).

(2) Enterprises shall, in particular, be treated as being under common control if they are—

[…]

(b) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; […]

(3) A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for the purposes of subsections (1) and (2), be treated as having control of it. […]"

34. The above provision is supplemented by sect 127(1) which states, insofar as material:

"**127 Associated persons**

(1) Associated persons, and any bodies corporate which they or any of them control, shall be treated as one person –

(a) for the purpose of deciding under section 26 whether any two or more enterprises have been brought under common ownership or common control;"

"Associated persons" includes "two or more persons acting together to secure or exercise control": sect 127(4)(d).

35. Sect 127(5) states:

"The reference in subsection (1) to bodies corporate which associated persons control shall be construed in accordance with section 26(3) and (4)."

36. Successive transactions are addressed in sect 27(5)-(8), as follows:

"**27 Time when enterprises cease to be distinct**

[…]

(5) The decision-making authority may, for the purposes of a reference, treat successive events to which this subsection applies as having occurred simultaneously on the date on which the latest of them occurred.

(6) Subsection (5) applies to successive events—

(a) which occur within a period of two years under or in consequence of the same arrangements or transaction, or successive arrangements or transactions between the same parties or interests; and

(b) by virtue of each of which, under or in consequence of the arrangements or the transaction or transactions concerned, any enterprises cease as between themselves to be distinct enterprises.

(7) The decision-making authority may, for the purposes of subsections (5) and (6), treat such arrangements or transactions as the decision-making authority considers appropriate as arrangements or transactions between the same interests.

(8) In deciding whether it is appropriate to treat arrangements or transactions as arrangements or transactions between the same interests the decision-making authority shall, in particular, have regard to the persons substantially concerned in the arrangements or transactions concerned."

37. The situation where control is obtained by a series of transactions is addressed in sect 29, which provides insofar as material:

"**29 Obtaining control by stages**

(1) Where an enterprise is bought under the control of a person or group of persons in the course of two or more transactions (in this section a "series of transactions") to which subsection (2) applies, those transactions may, if the decision-making authority considers it appropriate, be treated for the purposes of a reference as having occurred simultaneously on the date on which the latest of them occurred.

(2) This subsection applies to-

(a) any transaction which-

(i) enables that person or group of persons directly or indirectly to control or materially to influence the policy of any person carrying on the enterprise;

(ii) enables that person or group of persons to do so to a greater degree; or

(iii) is a step (whether direct or indirect) towards enabling that person or group of persons to do so; and

(b) any transaction by virtue of which that person or group of persons acquires a controlling interest in the enterprise or, where the enterprise is carried on by a body corporate, in that body corporate."

38. Finally, sect 33 sets out analogous provisions to sect 22 for the situation of anticipated mergers. The questions to be decided by the CMA on a reference of a completed or anticipated merger are set out, respectively, in sects 35 and 36, to be answered in a published report: sect 38. Sect 39 prescribes that the

CMA must prepare and publish that report within a period of 24 weeks beginning with the date of the reference, subject to an extension of no more than 8 weeks when there are "special reasons" why the 24 week time period cannot be met.

Chapter 2 of Part 3: public interest cases

39. The particular regime governing public interest cases is prescribed by Chapter 2 of Part 3, which comprises sects 42-58A. The giving of a PIIN is dealt with in sect 42, which it is necessary to set out almost in its entirety:

> "**42 Intervention by Secretary of State in certain public interest cases**
>
> (1) Subsection (2) applies where—
>
> (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
>
> (b) no reference under section 22 or 33 has been made in relation to the relevant merger situation concerned;
>
> (c) no decision has been made not to make such a reference (other than a decision made by virtue of subsection (2)(b) of section 33 or a decision to accept undertakings under section 73 instead of making such a reference); and
>
> (d) no reference is prevented from being made under section 22 or 33 by virtue of—
>
> (i) section 22(3)(za), (a) or (e) or (as the case may be) 33(3)(za), (a) or (e); or
>
> (ii) EU law or anything done under or in accordance with it.
>
> (2) The Secretary of State may give a notice to the CMA (in this Part "an intervention notice") if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.
>
> (3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
>
> (4) No more than one intervention notice shall be given under subsection (2) in relation to the same relevant merger situation.
>
> (5) For the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in

contemplation which, if carried into effect, will result in the creation of a relevant merger situation, sections 23 to 30 (read together with section 34) shall apply for the purposes of this Chapter as they do for the purposes of Chapter 1 but subject to subsection (6).

(6) In their application by virtue of subsection (5) sections 23 to 30 shall have effect as if—

(a) for paragraph (a) of section 23(9) there were substituted—

"(a) in relation to the giving of an intervention notice, the time when the notice is given;

(aa) in relation to the making of a report by the CMA under section 44, the time of the making of the report;

(ab) in the case of a reference which is treated as having been made under section 45(2) or (3) by virtue of section 49(1) , such time as the CMA may determine; and";

(b) the references to the CMA in section 25(1) to (3), (6) and (8) included references to the Secretary of State;

(c) the references to the CMA in section 25(4) and (5) were references to the Secretary of State;

(d) the reference in section 25(4) to section 73 were a reference to paragraph 3 of Schedule 7;

(e) after section 25(5) there were inserted—

"(5A) The Secretary of State may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period mentioned in section 24(1)(a) or (2)(b) if, by virtue of section 46(5) or paragraph 3(6) of Schedule 7, he decides to delay a decision as to whether to make a reference under section 45.

(5B) An extension under subsection (5A) shall be for the period of the delay.";

(f) in section 25(10)(b) after the word "(4)" there were inserted ", (5A)";

(g) the reference in section 25(12) to one extension were a reference to one extension by the CMA and one extension by the Secretary of State;

(h) the powers to extend time-limits under section 25 as applied by subsection (5) above were not exercisable by the CMA or the Secretary of State before the giving of an intervention notice but the existing time-limits by virtue of section 24 (as so applied) in relation to possible references under section 22 or 33 were applicable for the purposes of the giving of that notice;

(i) the existing time-limits by virtue of section 24 (as so applied) in relation to possible references under section 22 or 33 (except for

extensions under section 25(4)) remained applicable on and after the giving of an intervention notice as if any extensions were made under section 25 as applied by subsection (5) above but subject to further alteration by the CMA or the Secretary of State under section 25 as so applied;

[...]

(k) in the case of the giving of intervention notices, the references in sections 23 to 30 to the making of a reference or a reference were, so far as necessary, references to the giving of an intervention notice or an intervention notice;

[...]"

40. Further provisions regarding a PIIN are in sect 43, including the following:

"**43 Intervention notices under section 42**

(1) An intervention notice shall state—

(a) the relevant merger situation concerned;

(b) the public interest consideration or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned; […]

[…]

(3) An intervention notice shall come into force when it is given and shall cease to be in force when the matter to which it relates is finally determined under this Chapter. […]"

41. As stated in sect 42(3), the potential public interest considerations for which the Secretary of State may issue a PIIN are set out in sect 58, which provides:

"**58 Specified considerations**

(1) The interests of national security are specified in this section.

(2) In subsection (1) "national security" includes public security; and in this subsection "public security" has the same meaning as in article 21(4) of the EC Merger Regulation.

(2A) The need for—

(a) accurate presentation of news; and

(b) free expression of opinion;

in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for

newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section—

(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;

(b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

(2D) The interest of maintaining the stability of the UK financial system is specified in this section (other than for the purposes of sections 67 and 68 or references made, or deemed to be made, by the European Commission to the OFT under article 4(4) or 9 of the EC Merger Regulation). […]"

The considerations set out in sect 58(2A) to (2C) are referred to as "media public interest considerations": sect 44(8).

42. On giving a PIIN, the Secretary of State shall require the CMA to make a report within such period as the Secretary of State may require: sects 44(1)-(2) and 45(1)(b). That report must include the CMA's decisions on the questions of whether the CMA believes that it is, or may be, the case that there is (actually or in contemplation) a relevant merger situation, and then as to various competition issues relevant to making a reference: sect 44(4). Where the PIIN concerns a media public interest consideration, OFCOM is similarly required to provide a report addressing those considerations, within such period as the Secretary of State may require: sect 44A.

43. Following receipt of these reports, the Secretary of State may initiate the Phase 2 process by making a reference under sect 45 to the CMA for full investigation and report on the merger. Sect 46(2) provides:

"(2) The Secretary of State, in deciding whether to make a reference under section 45, shall accept the decisions of the CMA included in its report by virtue of subsection (4) of section 44 and any descriptions of undertakings as mentioned in subsection (5) of that section."

44. Pursuant to sect 45, the Secretary of State may make a reference where he believes that it is or may be the case that a relevant merger situation has been created (i.e. a completed merger) or is in contemplation (i.e. an anticipated merger), where the merger may be expected to result in a SLC or where the merger may not be expected to result in a SLC, provided that a public interest consideration mentioned in the PIIN is relevant to consideration of the relevant merger situation.

45. If a reference is made, then as under Chapter 1, the CMA must investigate and report on the questions referred, and prepare and present its report to the Secretary of State within 24 weeks of the making of the reference, subject to an extension of no more than 8 weeks if there are special reasons why the time-limit cannot be met: sects 50-51.

46. The final decision on the merger after receipt of the CMA's report rests with the Secretary of State: sect 54. He must make and publish his decision within 30 days of receipt of the CMA report: sect 54(5).

D. THE APPLICATION

47. In the present case, as stated above, the Secretary of State issued a PIIN on 27 June 2019. The PIIN stated that the Secretary of State had reasonable grounds for suspecting that control over both LHL and IDNM had been obtained in stages, relying on sect 29, by the same parties or group of persons, that the turnover test was satisfied and that none of the obstacles to the making of a PIIN in sect 42(b)-(d) applied. The PIIN stated that the relevant public interest consideration was that specified in sect 58(2A) (accurate presentation of news/free expression of opinion), and pursuant to sects 44-44A required the CMA and OFCOM to submit their reports to the Secretary of State by 23 August 2019: see paras 22 and 23 above.

48. The Application is brought pursuant to sect 120, which requires the Tribunal to determine it according to the same principles as a court hearing an application for judicial review: sect 120(4).

49. The Application seeks an order quashing the PIIN on two discrete grounds:

(1) that the PIIN was issued out of time; and/or

(2) that the PIIN set a deadline for the reports from the CMA and OFCOM which was after the time in which the Secretary of State could make a reference for Phase 2 (i.e. under sect 45), and in any event, that time has now expired, so that no reference could now be made.

We will address these two grounds in turn.

(1) WAS THE PIIN OUT OF TIME?

50. There is no dispute as to the applicable legal provisions. For a completed merger such as this, the Secretary of State can issue a PIIN only if he has reasonable grounds for suspecting that it is or may be the case that a "relevant merger situation has been created": sect 42(1)(a). That incorporates reference back to the definition of "relevant merger situation" in sects 23-24, subject to amendments: sect 42(5) and (6). Thus, it requires that "two or more enterprises have ceased to be a distinct enterprise at a time or in circumstances within section 24": sect 23(1)(a). And pursuant to sect 23(9) as amended by sect 42(6)(a), the question whether a relevant merger situation has been created shall be determined as at:

> "in relation to the giving of an intervention notice, the time when the notice is given."

Further, it was accepted that pursuant to sect 42(6)(k), the specification of time-limits in sect 24 is to be read, for this purpose, as if for the making of a reference there were substituted the giving of an intervention notice.

51. Accordingly, sect 24 as amended by sect 42, reads as follows:

> "**24 Time-limits and prior notice**
>
> (1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if—
>
> (a) the two or more enterprises ceased to be distinct enterprises before the day on which the [PIIN] relating to them is to be [given] and did so not more than four months before that day; or
>
> (b) notice of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be

distinct enterprises has not been given in accordance with subsection (2).

(2) Notice of material facts is given in accordance with this subsection if—

(a) it is given to the CMA prior to the entering into of the arrangements or transactions concerned or the facts are made public prior to the entering into of those arrangements or transactions; or

(b) it is given to the CMA, or the facts are made public, more than four months before the day on which the [PIIN is given].

(3) In this section—

"*made public*" means so publicised as to be generally known or readily ascertainable; and

"*notice*" includes notice which is not in writing."

52. Here, the various transactions can be treated as having occurred on the date of the latest of them: sect 29(1). This was on 20 February 2019 and thus more than four months before the PIIN. However, it is common ground that before the relevant transactions were entered into, no notice of them was given to the CMA nor were they made public. Accordingly, sect 24(1)(b) is the governing provision and the temporal requirement of a relevant merger situation will not be satisfied pursuant to sect 24(2)(b) and (3) unless the PIIN is given within four months of *the earlier of*:

(1) notice of "material facts" being given to the CMA; or

(2) "material facts" being so publicised as to be generally known or ascertainable.

53. It is common ground that sufficient publication in a national newspaper can satisfy the statutory definition of "made public." The argument for the Applicants is that the article in *The Financial Times* on 25 February 2019 meets the criterion of making public material facts and, as the PIIN was issued more than four months later, it is out of time.

54. The Secretary of State disputes that this article set out sufficient facts to satisfy the statutory criterion. He contends that, at the earliest, sufficient material facts were given (but not made public) in the letter from LHL to the Secretary of State of 19 February 2019. In particular, it was only by that letter that there was disclosed that an equal share in the two acquisitions was made by Wondrous

and that they were connected. However, a copy of that letter was sent to the CMA only on 1 March and it was this communication that constituted the notice to the CMA of material facts. The statutory period, he submits, therefore runs from 1 March, in which case the PIIN was issued in time.

55. It is notable that sect 42(6) has not substituted "the Secretary of State" for "the CMA" in sect 24 for the purpose of sect 42. Accordingly, although only the Secretary of State can issue a PIIN, the notice criterion for the time period is dependent on the requisite notice having been given to the CMA. It seems curious that if the relevant information is given to the Secretary of State, a delay by him in the transmission of that information to the CMA would have the effect of delaying the start of the four months period, seemingly without any statutory limit. However, the parties to a merger could avoid this risk by copying their correspondence to the CMA. In any event, there is no doubt that this is the effect of the wording of sect 24.

56. Further, the Secretary of State stresses that the criterion under sect 42(1) is that he "has reasonable grounds for suspecting" that it is or may be the case that a relevant merger situation has been created. He submits that the statute allows him a margin of appreciation, and that his assessment as to whether the temporal element of a relevant merger situation was met as at the date of the PIIN should not be impugned unless it was unreasonable. By contrast, the Applicants submit that this is a question of law, to be determined on objective grounds. In that regard, Ms Ford for the Applicants relied on the statement by Lord Sumption, giving the judgment of the Supreme Court, in *Société Coopérative de Production SeaFrance SA v CMA* [2015] UKSC 75, at [31]. Accordingly, if material facts were set out in the newspaper article, there are no reasonable grounds for suspecting there was a "relevant merger situation" (incorporating the temporal element) on a date more than four months later.

57. There is no definition of "material facts" in the statute. In their written skeleton argument, Mr Scannell and Ms MacKenzie, appearing for the Secretary of State, sought to draw an analogy with the reference to "material facts" in sect 14A of the Limitation Act 1980 concerning latent damage. However, that provision contains an express definition of "material facts" for that particular purpose: sect 14A(7). Counsel for the Secretary of State did not pursue this point in oral

argument and we do not derive assistance from the wording of a very different statute.

58. Ms Ford stressed that the statute does not require *all* material facts to be made public. The information did not have to be complete or exhaustive, and there would necessarily be a process of investigation and verification before the Secretary of State would be able to issue a PIIN. She submitted that what was required was sufficient information for the Secretary of State to appreciate that his jurisdiction might be engaged and that further investigation might be warranted.

59. Ms Ford sought to derive support from the Explanatory Notes to the Act, which state as regards the 'made public' requirement in sect 24:

> "The intention is that [the] OFT would reasonably be expected to have known or found out about the merger if it has not been notified about it."

However, that is simply elaborating on the 'made public' requirement, explaining the definition in sect 24(3). It does not take further the question of the requisite minimum information that has to be made public.

60. That question is addressed in the CMA's statutory guidance, *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2, 2014), issued pursuant to sect 106. The CMA states, at para 4.44:

> "The CMA interprets 'material facts' as being the necessary facts that are relevant to the determination of the CMA's jurisdiction in terms of the four month time period (but not in terms of other jurisdictional issues). In practice, this means information on the identity of the parties and whether the transaction remains anticipated (including the status of any conditions precedent to completion) or has completed."

61. The Secretary of State accepted that this was correct. Mr Scannell submitted that materiality has to be assessed in its context. Here, it is for the purpose of considering whether there may be a relevant merger situation such as would enable the Secretary of State to issue a PIIN. The skeleton argument for the Secretary of State submitted:

> "Material Facts must ... mean the facts necessary and sufficient to enable the Secretary of State to decide whether there are reasonable grounds to suspect that it is or may be the case that: (i) that enterprises have ceased to be distinct

> within the relevant time-limit; and (ii) that (in this case) the value of turnover test is met."

62. Further, it submitted that the information:

> "must logically include information as to the true identity of the merging parties. Without that information the Secretary of State cannot form a view, in particular, as to whether the threshold test is met."

63. We do not think that it is here necessary to decide between the competing submissions as to whether under sect 42 the Secretary of State enjoys a margin of appreciation as to whether there may a relevant merger situation, and thus on the question of whether material facts have been made public under sect 24. That is because even if we accepted Ms Ford's argument to the contrary, that the test is a strict one admitting of only one answer, we consider that the test was not satisfied. We would only observe that in the *SeaFrance* case, Lord Sumption was addressing the language of sect 35 and the decision which the CMA has to make in a Phase 2 reference; he was not considering the distinct statutory wording "believes that it is or may be the case" in sects 22 and 33 (or similarly, in sect 42).

64. While it is clearly not the case that *all* material facts have to be made public, the statute does not say that *any material fact*, or indeed *a* material fact, becoming public is sufficient to start time running, but refers more broadly to "material facts". It would not, in our view, be sufficient if a newspaper reported that a Saudi buyer was rumoured to have purchased a significant minority stake in *The Independent* and *The Evening Standard*, even if that might provoke questions in Parliament and prompt inquiries by the Secretary of State. We do not think that there needs to be sufficient public information to ascertain that the turnover test or the share of supply test is likely to be satisfied; it seems to us that it would be sufficient if the information showed that this is a serious possibility. But in any event, we consider that, save in exceptional circumstances, the information should include facts which provide a reasonable basis for considering that there is or may be a 'merger' for the purpose of the Act, i.e. a situation where two enterprises cease to be distinct within the meaning of sect 26.

65. None of the newspaper articles on which the Applicants relied made any reference to the involvement of Wondrous, or indeed that Wondrous was half

owned by the National Commercial Bank. Indeed, *The Financial Times* article of 25 February 2019 incorrectly stated that it was Mr Abuljadayel alone who had indirectly acquired a 30% stake. But here, the involvement of Wondrous, and possibly the National Commercial Bank, was critical. That is because an acquisition by Mr Abuljadayel of a stake in both IDNM and LHL, and thus in the controlling interests over *The Independent* and *The Evening Standard,* would not have caused those two enterprises to cease to be distinct for the purpose of the Act. By reason of the shareholding of Mr Lebedev, those enterprises were already under common control prior to these transactions: on the then publicly available information, there was no other enterprise from which those enterprises ceased to be distinct – the introduction of a mere private investor is not sufficient. Pursuant to sect 127(1)(a), for the purpose of the analysis under sect 26, IDNM and LHL fell to be treated as "one person". There was no basis on which to assume that Mr Abuljadayel himself conducts the activities of a business, as opposed to being simply a private investor: he therefore is not an "enterprise" as defined in sect 129(1), nor is there any suggestion that he controls other enterprises. It follows that if he alone had purchased a 30% stake in *The Independent* and then in *The Evening Standard*, as the newspaper articles suggested, there would have been no relevant merger situation and no basis on which the Secretary of State could have issued a PIIN, irrespective of whether such an acquisition might be thought to give rise to any public interest considerations.

66. Neither IMC nor Scalable are considered to be enterprises because they are only holding companies without any commercial activities, By contrast, Wondrous is regarded to be an enterprise. As Mr Scannell stated:

> "... the enterprises that are ceasing to be distinct are, on the one hand, [LHL] and [IDNM], which are together rationalised as a single enterprise under the control of Evgeny Lebedev, and on the other side of the equation, Wondrous."

That corresponds to the analysis by the CMA in its report on the transactions pursuant to sect 44. The CMA considered that Mr Abuljadayel and Wondrous are to be regarded as "associated persons" for the purpose of sect 127 since they acted together in acquiring the 30% shareholding in each of IDNM and LHL, and that Wondrous is an 'enterprise' as it is engaged in the commercial activity of making investments. On that basis, as a result of the transactions two or more

enterprises have ceased to be distinct: the CMA Report at paras 26-35. Ms Ford for the Applicants did not dissent from this approach.

67. We should add that even if, contrary to that analysis, it might be argued that Wondrous itself is not an 'enterprise' within the meaning of the Act, the National Commercial Bank is unquestionably an enterprise, and pursuant to sect 127(1) and (5) it is an 'associated person' with Wondrous. Although some of the newspaper articles referred to the National Commercial Bank, that was only in the context that there was some vague and unspecified connection between Mr Abuljadayel and the bank: none of the articles suggested that the bank had a financial or ownership interest in these transactions.

68. Accordingly, in our judgment, *The Financial Times* article of 25 February 2019 did not make public sufficient material facts to engage the provisions of sect 24 since it did not disclose the basic factual foundation for considering that, in these transactions, two enterprises might cease to be distinct. It follows that publication of this article could not, and did not, start time running for the issue of a PIIN.

69. We should add that we do not consider that this conclusion should give the Applicants any legitimate grievance. There is no system in the UK, unlike many other countries, of mandatory notification of merger transactions to the competition authority, but businesses involved in a significant merger or intended merger nonetheless often voluntarily notify the transaction to the CMA, with the consequence that they determine when the statutory time period begins to run. The parties here chose not to do so. While for the purpose of this application the Applicants now argue that sufficient facts were published in the press, at the time they declined all requests from the newspapers for further information or confirmation of what was taking place. Having chosen not to disclose any facts, it should be no surprise to the Applicants that sufficient 'material facts' were not made public to start the statutory time period.

(2) HAS TIME EXPIRED FOR A REFERENCE?

70. The Applicants submit that a reference under sect 45 can be made only when a relevant merger situation subsists at the date of the reference, and that the four

months time-limit under sect 24 therefore applies to a reference by the Secretary of State in a public interest case. Here, there has been no extension of that period under sect 25. Therefore, even if the four months began to run on 1 March 2019, as the Secretary of State contends (and as we have found), the period expired on 1 July 2019 and no reference can now be made. The position of the Secretary of State is that the Act imposes no time-limit on his making a reference in a public interest case. Accordingly, he remains free now to do so.

71. The Applicants' argument is based on sect 23(9)(b): see para 29 above. That is the provision which specifies the time at which the question of whether there is a relevant merger situation falls to be determined. It is not in dispute that:

(1) for the purpose of a non-public interest case under Chapter 1, that is to be determined at the time of the reference: this is the unequivocal language of sect 23(9)(b). (There is special provision in sect 23(9)(a) for a case where a reference made regarding an anticipated merger is subsequently converted into a reference of a completed merger under sect 37(2), but that is not relevant to the argument before the Tribunal); and

(2) for the purpose of a PIIN, that is to be determined at the time when the PIIN is given: see para 50 above. That follows clearly from the substituted sect 23(9)(a), inserted by sect 42(6)(a).

72. The critical question is: what is the correct construction of sect 23(9) for the purpose of the making of a reference in a public interest case? That depends on the effect of sect 42(5) and (6). Sect 42(5) prescribes that sects 23-30 in Chapter 1 "shall apply" for the purposes of Chapter 2 (i.e. to public interest cases) but subject to sect 42(6). And sect 42(6) makes a series of very specific amendments to those provisions in Chapter 1, including, by sect 42(6)(a), a substitution for sect 23(9)(a). As a result, for the purpose of Chapter 2, sect 23(9) reads as follows:

> "(9) For the purposes of this Chapter, the question whether a relevant merger situation has been created shall be determined as at—
>
> "(a) in relation to the giving of an intervention notice, the time when the notice is given;

(aa) in relation to the making of a report by the CMA under section 44, the time of the making of the report;

(ab) in the case of a reference which is treated as having been made under section 45(2) or (3) by virtue of section 49(1) , such time as the CMA may determine; and

(b) in any other case, immediately before the time when the reference has been, or is to be, made."

73. Ms Ford submitted that it is accordingly clear that for the purpose of a reference by the Secretary of State under Chapter 2, the question is to be determined "immediately before the reference has been, or is to be, made", i.e. at the time of the reference.

74. Mr Scannell argued that this cannot be correct since if it were, the same four months time period would apply both to the issue of a PIIN and to the subsequent making of a reference. That would mean that the Secretary of State could never avail himself of the full four months allowed for the issue of a PIIN, which must be what the statute intends, because it would allow no time for the CMA to report and for a reference to be made. Accordingly, Mr Scannell submitted that the word "reference" in sect 23(9)(b), which was unamended for the purpose of Chapter 2, meant a reference under Chapter 1; i.e. a reference under sect 22 or 33. He explained that this was not illogical, since after the issue of a PIIN the reference by the Secretary of State in a public interest case could be discontinued, in which case the CMA might still seek to make a reference on purely competition grounds under Chapter 1. Mr Scannell acknowledged that his was not a straightforward construction, but said that to make the statute work it was necessary to adopt what he termed "the least bad construction."

75. Ingenious as Mr Scannell's argument for the Secretary of State was, we cannot accept it, essentially for the reasons put forward by Ms Ford. In the first place, it is clear that in drafting sect 42(6), careful consideration was given to the changes that needed to be made to sects 23-30; and more specifically, consideration was given to the changes needed to sect 23(9). If sect 23(9)(b) was not to apply in a Chapter 2 case, then sect 42(6)(a) would have specified that the substitution thereby made was for sect 23(9) in its entirety and not simply for sect 23(9)(a). In fact, sect 42(6)(a) does precisely the opposite, expressly preserving sect 23(9)(b). Sect 23(9) as a whole is stated to apply "for

the purpose of this Chapter", and by reason of sect 42(5) that means for the purpose of Chapter 2 subject only to the changes resulting from sect 42(6). Further, the retention of the conjunctive "and" at the end of the substituted provision shows that sect 23(9)(b) is to apply in a Chapter 2 case along with sect 23(9)(a)-(ab).

76. Secondly, the word "reference" in sect 23(9)(ab) clearly refers to a reference under Chapter 2. Mr Scannell acknowledged that under his construction the same word would be given a different meaning as between different sub-sub-sections of the same statutory provision. That would be a striking anomaly which would only apply in extreme circumstances that admitted of no other interpretation.

77. Thirdly, if this construction were correct, then as Mr Scannell very properly recognised, sect 42(6)(h) is otiose. That densely worded provision concerns extension of time-limits and is to apply only after a PIIN has been given, but on the construction being urged for the Secretary of State, there was no applicable time-limit at all after a PIIN. Further, sect 42(6)(e) also would become inexplicable, since that inserts an additional circumstance in sect 25(5) upon which the four months can be extended. That cannot apply, as Mr Scannell sought to suggest, to the period for the issue of the PIIN, since sect 42(6)(h) provides that there can be no extension to the period for the issue of a PIIN.

78. Fourthly, the explanation put forward for the deliberate retention of sect 23(9)(b) for the purpose of Chapter 2 is not sustainable within the statutory scheme. Although a reference under sect 45 may in certain circumstances be cancelled – see e.g. sect 53(1) – in that event sect 43(3)-(4) prescribes that the PIIN shall cease to be in force. In those circumstances, Chapter 2 ceases to apply. If the CMA then considers making a reference, that will be a Chapter 1 reference, to which sect 23(9) will apply in its unamended form, without any modification through sect 42(6). Hence the modified version of sect 23(9) enacted by sect 42(6)(a) can apply in its entirety only to Chapter 2 references, including sect 23(9)(b).

79. Hence, we conclude that by reason of sect 23(9)(b) for the purpose of a reference by the Secretary of State under sect 45 the question of whether a relevant merger

situation exists, thus comprising the four month temporal element, is to be determined at the time the reference is made. Although it is of course not determinative, we observe that our conclusion is consistent with the statutory guidance issued (by the then Secretary of State for Trade and Industry) under sect 106A: *Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers* (May 2004). This states, at para 3.19:

> "…As is the case with all UK relevant mergers situations, the merger may be referred to the CC after the completion of the transaction. In the event of an adverse public interest finding in such a case, the transaction may have to be unwound if no other remedies are appropriate. The power to refer a completed media merger to the CC on competition or public interest grounds (under the standard, special or European intervention schemes) is subject to the standard longstop on reference of four months."

80. Mr Scannell suggested that imposing the four month temporal requirement in the determination of whether there was a relevant merger situation at the date of the reference under sect 45 would be inconsistent with the duty of the Secretary of State, when deciding whether to make a reference, to accept the decisions in the sect 44 report from the CMA: sect 46(2). Those decisions include the CMA's decision as to whether it was or may be the case that a relevant merger situation has been created: sect 44(4)(a). Mr Scannell pointed out that the report from the CMA would obviously precede the reference, possibly by several weeks. However, we see no inconsistency, as demonstrated by the present case. The CMA here expressly addressed this question by reference to two dates, the date of the PIIN and the date of its report. The CMA could be expected in its sect 44 report to consider when the four month period for a reference would expire, and then express its decision as to a relevant merger situation also with regard to that date.

81. Nor is the fact that the same deadline applies to the issue of the PIIN and the making of a reference a cause of inevitable difficulty. It is no doubt one of what Mr Scannell termed the "many drafting infelicities" in the Act. That such a regime is practicable is illustrated by the fact that other public interest cases have been investigated and made subject to a reference by the Secretary of State on that basis without particular problems.

82. Altogether, the merger control regime in the Act is replete with time-limits for the various subsidiary stages, and very specific prescriptive provisions regarding the circumstances in which those limits can be extended and for how long. That approach clearly supports business certainty regarding potentially major transactions. It would be curious if despite this general approach, the making of a reference in public interest cases should be left without any time-limit at all. Mr Scannell submitted that in such cases business certainty has to yield to wider considerations of the public interest and pointed out that one of the specified public interest considerations is national security. However, time-limits unquestionably apply to all other aspects of these public interest cases: a four months deadline applies to the issue of a PIIN; a 24 weeks deadline applies to the provision of the CMA's Phase 2 report if a reference is made (subject to a single 8 weeks extension): sect 51(1) and (3); and a deadline of 30 days applies to the decision of the Secretary of State after receipt of the CMA's report: sect 54(5). It is apparent that there is no policy in the statute to avoid imposing time-limits because there may be important public interest issues at stake.

83. We should add that we were referred to the duty of expedition in relation to references set out in sect 103. Sect 103(2) provides that in deciding whether to make a reference under sect 45:

> "the Secretary of State shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable."

However, sect 103(1) imposes an analogous duty on the CMA, which is nonetheless subject to a statutory deadline for the making of Chapter 1 references. We consider that this duty of expedition is precisely that: a general duty that applies in any event and does not obviate the rationale for an absolute time-limit as a longstop. Accordingly, it does not assist on the particular point of statutory interpretation raised by this application.

E. CONCLUSION AND RELIEF

84. For the reasons set out above, we unanimously:

(1) dismiss ground 1 of the Application as the PIIN was issued in time;

(2) uphold ground 2 of the Application insofar as we hold that there is a four months time-limit for the Secretary of State to make a reference, which time-limit has expired.

85. In the light of our decision above, we do not think it is appropriate to quash the PIIN, as sought in the Application. In our view, the appropriate relief is to make a declaration that the time-limit for the Secretary of State to make a reference of these transactions under sect 45 expired on 1 July 2019.

The Hon Mr Justice Roth
President

Tim Frazer

Paul Lomas

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 16 August 2019

APPENDIX

Text of *Financial Times* article of 25 February 2019

Hidden buyer of Evening Standard stake revealed as Saudi investor

Sultan Mohamed Abuljadayel has links to Riyadh-owned bank and also backs the Independent

Matthew Garrahan and Cynthia O'Murchu in London and Ahmed Al Omran in Riyadh

February 25, 2019

The mystery buyer of a large stake in the Evening Standard's parent group who used a Cayman Islands company to mask his identity is Sultan Mohamed Abuljadayel, a Saudi investor, according to two people with knowledge of the deal.

The free London newspaper, which is edited by former UK chancellor George Osborne, is majority owned by Lebedev Holdings, the corporate vehicle of Evgeny Lebedev. In total, Mr Abuljadayel has bought a stake of 30 per cent for about £25m, according to two people — about a third more than initially disclosed in company filings in December, with the final tranche agreed last week.

Little is known of Mr Abuljadayel, who two years ago bought a similar sized stake in the Independent, a digital-only title that was acquired by Mr Lebedev's father, Alexander, a former KGB officer, in 2010.

Mr Abuljadayel is associated with NCB Capital, the investment banking arm of Saudi Arabia's National Commercial Bank. The lender is majority owned by the Saudi government through its Public Investment Fund.

His purchase of the Independent stake in 2017 raised the prospect of Saudi Arabia using media investments for soft power purposes. However, a spokesman for the title said at the time that its editorial freedom would be protected.

"We would ask anyone to look at the Independent's coverage since 2017. It has been robust and holds the Saudi regime to account," said one person briefed on the deal.

The Evening Standard and Mr Lebedev declined to comment on the latest deal. Mr Abuljadayel did not respond to requests for comment.

The use of a Cayman entity to acquire the stake in the Standard's owner stake attracted some criticism. Paul Farrelly, an MP who serves on parliament's digital, culture, media and sports committee, told the Financial Times last month that the Standard's influential position in London meant it was important "to have honesty about its ownership".

It is unclear why Mr Abuljadayel used the Cayman entity to make the investment. The deal was completed four months after the murder of the Washington Post journalist

Jamal Khashoggi — a killing that was allegedly carried out by Saudi agents. International anger at the killing has not dissipated. Several high-profile deals between the kingdom and western groups have been reviewed or scrapped in the wake of the murder.

The purchase of the stake in Lebedev Holdings is the latest push into western media by a Saudi investor. In 2015, NCB Capital acquired a controlling stake in the Saudi Research and Marketing Group, a publisher with links to King Salman's family. Since then, SRMG has announced a series of partnerships with big media organisations in the west.

SRMG said last September that it would launch an Arabic-language business and financial news service with Bloomberg in a deal worth an estimated $90m over 10 years. The company also announced a licensing agreement with the Independent for news websites in Arabic, Urdu, Farsi and Turkish. Independent Arabia was launched at the end of January.

The latest investment provides important funding for the Standard. The Lebedevs bought the Standard and the Independent in 2009 and 2010 respectively for £1 apiece and have since invested millions in the titles.

The Standard eventually turned a profit but recorded a £10m loss in the financial year ended in September 2017. It is hoped that the new funds will help it return to the black, people briefed on the transaction said.