

ORDER OF THE PRESIDENT OF THE COURT
16 JANUARY 1975¹

Johnson & Firth Brown Ltd.
v Commission of the European Communities

Case 3/75 R

In Case 3/75 R

JOHNSON & FIRTH BROWN LTD. of Smithfield House, Blonk Street, Sheffield, represented by Peter Webster, Queen's Counsel, of the Middle Temple and Inner Temple; Francis Jacobs, Barrister, of the Middle Temple, and David F. Hall, Solicitor, of London, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 84 Grand'Rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, 200, rue de la Loi, Brussels, represented by D. R. Gilmour, Legal Adviser, with an address for service in Luxembourg at the office of Pierre Lamoureux, Legal Adviser to the Commission, 4 boulevard Royal,

defendant,

HAMBROS BANK LTD. AND JESSEL SECURITIES LTD., of London, represented by Richard York, Queen's Counsel, Konrad Schiemann, Barrister, both of Gray's Inn and the Inner Temple, and Michael Lee, Solicitor, of London, with an address for service in Luxembourg at the Chambers of Messrs Walter and Loesch, 2 rue Goethe;

and

BRITISH STEEL CORPORATION, represented by Mark Waller, Barrister, of Gray's Inn, and Lawrence Collins, Solicitor, of London, with an address for service in Luxembourg at the Chambers of E. Arendt, 34 B rue Philippe II,

intervening,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
makes the following

¹ — Language of the Case: English.

ORDER

Facts

By decision of 5 December 1974 (Com. 74 — 2087), the Commission authorized the acquisition by the British Steel Corporation (hereinafter referred to as 'BSC' of a holding of shares giving it control of Johnson & Firth Brown Ltd. (hereinafter referred to as 'JFB').

JFB is a holding company owning the entire share capital of thirteen undertakings producing or using steel.

36 % of the capital of JFB is owned by Jessel Securities Ltd. (hereinafter referred to as 'JSL').

At the end of 1974, BSC offered to purchase the shareholding of JSL in JFB and expressed an intention, if that offer were accepted, to make a public offer for the remainder of the shares.

JFB, fearing that its business and its employees would be unfavourably affected, emphasized the risks involved in such an operation and asked the Commission to take interim measures of protection under the third subparagraph of Article 66 (5) of the ECSC Treaty.

On 21 November 1974, the Commission decided, by virtue of that article, to require BSC to refrain from any action which would result in the acquisition by BSC directly or indirectly of a controlling minority of the share capital of JFB until a decision had been taken by the Commission on the substance of the matter.

The reasons given for this decision of the Commission were in particular the possibility of control of JFB by BSC, the dominant position of BSC within the meaning of Article 66 (7) and the possibility that Article 66 might be infringed by the proposed transaction.

On 27 November 1974, the Commission decided under the third subparagraph of Article 66 (5) to require another

potential purchaser of the shareholding of JSL in JFB, namely Dunford Hadfields Ltd., (hereinafter referred to as 'DHL'), to refrain from any action similar to that proposed by BSC until a decision had been reached on such application as DHL might make in that regard.

On 5 December 1974, the Commission decided to authorize, subject to certain conditions, the acquisition by BSC of a controlling shareholding in JFB.

Amongst the conditions to which the decision was made subject was the requirement that BSC should divest itself of all rights whether held directly or indirectly in or over the share capital of two subsidiaries of JFB.

On 10 January 1975, JFB lodged an application for the annulment of the decision of 5 December 1974.

By a separate document it made an application under the second and third paragraphs of Article 39 of the ECSC Treaty and Article 33 of the Statute of the Court of Justice of the ECSC for interim measures to the effect first that the Judge adjudicating upon the application should order the suspension of the operation of the decision in question, secondly that he should order BSC and DHL to refrain from any action which would result in the acquisition directly or indirectly of any holding, or any further holding, in the share capital of JFB and thirdly that he should order JSL and Hambros Bank Limited not to deal in any way, without the prior consent of the Court, with the shareholding in JFB.

By observations lodged on 15 January the Commission contended that the application should be dismissed, at least in part.

By observations lodged on 15 January 1975 Hambros Bank Limited (hereinafter referred to as 'HBL') and JSL made what amounts to an application to intervene and claimed that the relief sought by JFB in the form of an order against them not to take any action whatsoever with regard to the capital of JFB without the prior consent of the Court should be refused.

By a telex message sent on 15 January 1975 by DHL the latter company expressed the view that it would be inappropriate to make any order against it at the present stage of the proceedings.

By statement lodged on 15 January 1975, BSC made an application to intervene in the proceedings and claimed that JFB's application for the adoption of interim measures should be dismissed.

It is now appropriate to summarize briefly the arguments put forward by the parties in support of their contentions:

JFB applies for the adoption of urgent measures consisting in:

- the suspension of the operation of the Commission's decision;
- an order requiring BSC and DHL to refrain from any action which would result in the acquisition directly or indirectly of any holding or any further holding in the share capital of JFB;
- an order requiring JSL and/or HBL not to deal in any way, without the prior consent of the Court, with the shareholding in JFB;
- an order that the defendant pay the costs of the interim proceedings.

JFB submits that the measures to be adopted are urgently required and that its application is *prima facie* justified by the fact that if BSC were to act on the authorization granted by the Commission and if such authorization were subsequently declared by the Court to be void, irreversible consequences would result for JFB and its two subsidiaries referred to;

that if BSC were to acquire effective control of JFB any opportunity for the

Court to control the legality of the Commission's action might be lost as it would be faced by a *fait accompli*;

that there could be no reasonable objection to the reinstatement, pending the proceedings before the Court, of the same restrictions as were imposed by the Commission itself pending the outcome of the administrative proceedings — restrictions applying both to BSC and to another potential purchaser DHL, which was forbidden to acquire the shares in question held by JSL or HBL, the latter in its capacity as adviser to the creditors of JSL.

JFB recognizes that a restriction imposed on BSC alone might favour other potential purchasers and accordingly submits that the interim measures should apply also to such other purchasers, which would permit the position of all parties concerned to be protected pending a decision on the substance of the case.

Finally JFB asks that the second subparagraph of Article 84 (2) of the Rules of Procedure should be applied in view of the exceptional urgency of the matter.

The *Commission*, after recalling the previous history of the case, emphasizes the financial difficulties of JSL which, whilst owning 35 % of the share capital of JFB, has been obliged to use the latter as security for a loan granted by HBL and that it is therefore in the interest of JSL to sell these shares.

The Commission submits that an application for the adoption of interim measures must satisfy the double condition that the urgency of the matter be proved — by showing the existence of a threat of irreparable damage — and that the said measures be *prima facie* justified as required by the case-law of the Court;

that the fact JFB and JSL are third parties interested in the case makes it necessary in an application for the adoption of interim measures of such a special kind 'to balance the interests of the various private parties who are

affected by the concentration authorization’;

that, with regard to the present situation, the three interim measures requested are ‘at least in part’ excessive;

that, in the first place, it is questionable whether the application for suspension of the operation of the Commission’s decision is justified at the moment since British legislation requires for a transaction of this kind an approval which has not yet been obtained by BSC;

that moreover a change in the commercial *status quo* does not necessarily constitute a source of irreparable damage in a situation where Community control is applicable to any take-over or merger the realization of which, as envisaged by the Treaty, necessarily involves such changes;

that, on the other hand, it is probable that the acquisition by BSC of the shares held by JSL in JFB would lead to BSC’s being able in fact to exert a decisive influence over the affairs of JFB;

but that such an acquisition would help in solving the difficulties of JSL, the present owner of the shares, whose interests must also be taken into consideration;

that the same considerations apply, *mutatis mutandis*, to the application for an order against BSC;

that however, as DHL has made it clear that it is now unlikely to proceed to acquire a holding in JFB, there can be no justification for making the order sought against DHL;

that the application for an order against JSL and HBL (a creditor of JSL) would appear to be excessive as taking no account of the legitimate interests of JSL and its creditors who have been waiting for a considerable time for their difficulties to be resolved.

However, in view of the complexity of the case, the Commission wonders whether an intermediate solution could not be found. It submits that, in spite of the fact that the Court cannot substitute

its own discretion for that of the Commission, ‘there are two courses of action which the Court could adopt, short of granting or refusing the request fully, which would give adequate protection to the interests of the parties and which would not prejudice the outcome of the case on the merits’;

that, first, the Court could order that BSC should not so exercise any control which it may hereafter acquire over JFB so as to prevent that company’s continuing to challenge the validity of the Commission’s decision;

that, secondly, the Court could order that Article 2 (1) of the decision (‘At the latest within one year of the entry into force of this authorization the British Steel Corporation shall, whether by sale or otherwise, divest itself of all rights, whether held directly or indirectly, in or over William Beardmore & Co. Ltd. and Johnson & Nephew (Mill Street) Ltd.’) should be suspended pending the outcome of the case on the merits;

that, in this way, all the interests at stake would be safeguarded, JSL and its creditors would receive the funds of which they have urgent need, the rights of BSC would be protected albeit that it would have to consider the possibility of deconcentration in the event of the Commission’s being unsuccessful in the main action, whilst JFB would be in a position to continue to challenge the validity of the Commission’s authorization in the knowledge that in the meantime nothing would be done which might affect the structure of its group.

The Commission suggests that the decision as to costs should be reserved for the main action.

HBL, a creditor of JSL, and also its financial adviser, explains the facts of the situation and emphasizes that the offer made by BSC was always conditional having regard to British legislation;

that it is necessary for JSL to sell as soon as a reasonable price can be obtained for the shares in view of its difficult financial situation;

that any attempt to sell through the market would substantially depress the market price, from which it follows that a successful realization can only be achieved by a sale to a single purchaser or to a consortium;

that, under the terms of the various charges, all the banks are now entitled to sell JSL's shares in JFB; that HBL should not be placed at a disadvantage as compared with other banks nor should any order of the Court preclude sales to strangers with no interest that could bring the transaction within Article 66.

HBL maintains that in law the relief sought against JSL and HBL is in any event unnecessary, there being no evidence that the grant of that relief is necessary or desirable to achieve the objectives of the Community or of Article 66 in particular;

that, in any event, no restriction should be imposed on JSL and HBL if BSC is left free to act, and finally that no interim relief should be granted without an undertaking by JFB and BSC that, should JFB ultimately fail in their substantive application, they will indemnify JSL and HBL if necessary.

HBL accordingly contends that the third claim in the application should be dismissed and that JFB should be ordered to pay the costs.

In its telex message DHL refers to the restriction on competition to which the taking of control of JFB by BSC would lead. DHL points out that it has not applied for any authorization under Article 66 to purchase a controlling minority of the share capital of JFB and cannot therefore proceed with such a transaction. The order that JFB asks the Court to make is in DHL's submission *ultra vires* the powers of the Court under Article 66.

However, if JFB's application were granted as against DHL, it would be

essential, in DHL's submission, that JSL and HBL should be required not to deal in any way with the relevant shareholding in JFB, so as to ensure that the position of one potential purchaser *vis-à-vis* others should not be prejudiced.

BSC applies to intervene in the proceedings, giving as the reason for its interest the fact that the decision in question refers to it. It submits that that decision is perfectly lawful;

that JFB still has to demonstrate that it has a *prima facie* case to bring the substantive proceedings and a *prima facie* case that those proceedings will succeed;

that JFB hardly appears to have been acting under the spur of urgency as it has waited more than four weeks before lodging its application for the adoption of interim measures;

that JFB has not shown that any damage which it might suffer is irreversible, in that, if BSC purchased the shares, it could ultimately sell them again. BSC states that it would in fact be prepared to undertake not to dispose of the two subsidiaries pending the hearing of the substantive application.

BSC further points out that JFB is applying for an interim measure against a person, BSC, against whom no relief is sought in the substantive proceedings.

BSC draws attention to the fact that British legislation in any event prevents its acting without the approval of the national authorities and that that approval has not been given;

but that, if that approval were given, it would prejudice BSC's position if it were enjoined from purchasing the shares whilst other potential purchasers were not.

Finally BSC expresses the hope that the proceedings in the main action will be expedited and asks for its costs to be met by JFB or the Commission.

Law

- 1 Although certain of the grounds on which the substantive application is made appear, on first examination, not to be manifestly without foundation and thus make it impossible to dismiss the present application for the adoption of interim measures, nevertheless it is necessary that the measures applied for should appear to be urgently required.
- 2 In this regard, the application for the suspension of operation of the decision in question is intended to avoid irreversible damage to JFB in the event of that decision being declared void by the Court.
- 3 To grant the application would result in making the creditors of JSL, who are entitled to a considerable quantity of shares in JFB, suffer damage at least as serious and as irreparable as that which the latter founds upon.
- 4 Those creditors may indeed have the greatest interest in selling as soon as possible the shares which constitute their security and this they would be prevented from doing if the operation of the Commission's decision, which is, after all, provisionally enforceable having regard to Article 39 of the ESCS Treaty, were to be suspended.
- 5 The application for suspension of operation of that decision should accordingly be refused.
- 6 It remains none the less necessary to limit the damage which JFB might suffer from the provisional operation of the decision of the Commission if, by reason of the assumption of control by BSC, the substantive application were to escape consideration by the Court or if important decisions as to the future of the undertaking were to result from that assumption of control.
- 7 It is therefore appropriate to make the operation of the Commission's decision subject to two conditions designed to keep the position as stable as possible in the interests of all parties until judgment on the substantive application — that is to say first the non-exercise by BSC of the voting rights attached to any

shares that it may acquire in JFB and on other hand the suspension of operation of Article 2 (1) of the decision until that judgment is delivered.

- 8 In the circumstances it is appropriate to reserve costs.

On those grounds,

by way of interim ruling,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

hereby orders:

1. The application for suspension of operation of the decision of the Commission of 5 December 1974 (Com. 74 — 2087) is refused;
2. However, the operation of the Commission's decision shall be subject, until judgment on the substantive application, to two conditions:
 - the non-exercise by BSC of the voting rights attached to any shares which it may acquire in JFB;
 - the suspension of the operation of Article 2 (1) of the decision;
3. The costs are reserved.

So done and ordered at Luxembourg on 16 January 1975.

A. Van Houtte
Registrar

R. Lecourt
President