COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 02/LM/Jan07

In the matter between:

Emira Property Fund Acquiring firm

And

Freestone Property Holdings Ltd Target firm

Panel: N Manoim (Presiding Member), M Holden (Tribunal Member) and M Mokuena (Tribunal Member)

Heard on: 14 March 2007

Order issued on: 14 March 2007

Reasons issued on: 26 April 2007

Reasons for Decision

APPROVAL

1] On 14 March 2007, the Tribunal approved the merger between Emira Property Fund and Freestone Property Holdings Ltd. The reasons for approval follow.

THE TRANSACTION

2] The primary acquiring firm is Emira Property Fund ("Emira"), a listed property company which is controlled by the FirstRand Limited. FirstRand is a listed holding company with subsidiaries in the banking, insurance & asset management and health.[1]

3] The primary target firm is Freestone Property Holdings ("Freestone"), a property company whose largest (more than 5%) shareholders are Momentum Group (37.26%), Stanlib Funds(14.47%) and Coronation Group(11.38%). Freestone

1 Subsidiaries include First National Bank, Wesbank, Rand Merchant Bank, Momentum Life, FNB Life, RMB Private Equity, RMB Properties, RMB Asset Managers and Discovery. See Page 10-30 of the Commission's record for more details.

controls Freestone Property Investments (Pty) Ltd and Arnold Properties (Pty) Ltd.

4] In terms of the transaction, Emira seeks to acquire the entire issued linked units in Freestone. [2] According to the merging parties, benefits of the merger include exposure to an enlarged asset base, asset management synergies, cost saving through economies of scale and the expansion of Emira's existing BEE structure.

IMPACT ON COMPETITION

5] The transaction results in a horizontal overlap in the parties activities as both parties are not only involved in the property sector - their property portfolios both include retail, office and industrial properties.

6] The transaction also results in some degree of vertical integration as firstly, the property management division of RMB Properties (part of the acquiring group) provides property management services to Freestone and according to the parties, this will continue post merger. Secondly, the acquiring group provides property asset management services and post merger will replace Freestone Manco which currently acts as the asset managers of Freestone. However we are of the view that the competitive landscape will not alter significantly as the premerger market share of the acquiring group is 3.7% and included in this share is its premerger 50% shareholding in Freestone Manco.

7] We will now turn to the horizontal analysis of the transaction.

Horizontal Analysis

8] Having examined the property portfolios of both Emira (including all the properties in the FirstRand Group) and Freestone, the Commission identified the following relevant markets:

a. Neighbourhood shopping centres in Randburg;
b. Grade A office space in Hatfield/Hillcrest;
c. Grade A office space in Sandton;
d. Grade B office space in Cape Town CBD;

2 This is to be effected through a scheme of arrangement in terms of section 311 of the Companies Act, 1973 (as amended).

e. Grade B office space in Rosebank/Rivonia;
f. Grade B office space in Sandton;
g. Grade B office space in Midrand;
h. Grade B office space in Centurion;
i. Industrial Warehousing in Kempton Park; and
j. Industrial Warehousing in Isando/Edenvale/Meadowdale.

9] The Commission's market share analysis showed that in most of the market identified above (with the exception of the Grade B office space in the Sandton node) the increments in market share were relatively low.

10] Both the Commission's and the merging parties' delineation of the relevant markets as well as the underlying data for market share calculation was based on information provided by the merging parties which was sourced from the South African Property Owners Association ("Sapoa"),[3] in respect of office space and the Investment Property Databank South Africa (Pty) Ltd ("IPD") in respect of industrial property.

11] Data obtained from Sapoa are often relied upon by merging parties, and indeed the Commission to firstly define geographic markets in which properties are said to compete and secondly, to define the type of products that can be considered substitutes. [4]In the merger between *The Trustee for the time being of the Growthpoint Securitisation Warehouse Trust and Business Connexion Technology Holdings (Pty) Ltd and Other*, the Tribunal highlighted the limitations of using Sapoa's data to properly define a relevant market for antitrust purposes. In that matter, the post merger market share of Grade A commercial properties located in the Midrand node – 20.2%, submitted by Growthpoint in its initial filing to the Commission had been significantly lower than that submitted by it in a previous merger filed not long before – 34%. The post merger market share then reduced further to 4%:

At the hearing, we were told that SAPOA data could not be relied on in this

3 According to Sapoa, its members control +- 90% of all commercial and industrial property in South Africa.
4 See *The Trustee for the time being of the Growthpoint Securitsation Warehoust Trust and Business Connexion Technology Holdings (Pty) Ltd and Other* Case no: 49/LM/Jun06

respect and the properties required further sub- classification between office blocks and office parks. As what was being acquired in Midrand was an office park, it appears only office parks were taken into account in the new statistic, hence the new and lower number in respect of market share. We were also informed that Growthpoint had commissioned experts to plot commercial properties in Midrand and come up with a new set of data for their holdings in Midrand. In terms of this data we were informed that Growthpoint's share could be as low as 4%. It was not entirely clear whether this was 4% of the new defined sub- market namely office parks or whether this was in terms of the hoary old commercial class A. The Tribunal, somewhat perplexed by Growthpoint's movement from 34% in the Growthpoint/Tresso merger to 20,2% in this filing, and now to 4%, asked the merging parties to file this new report for us to evaluate it. Rather than dispelling the confusion created, the report added to it. Not only did it not serve as a source to advance the promised 4%, it comes up with yet another market share figure, namely, 8 %. However, the relevant product market was not class A, or office parks but commercial property in toto. Thus in one filing the product market had at one moment been alleged to be narrower than commercial grade A, and then later shifted as wide as possible to include all commercial property, irrespective of class or specie.[5]

12] Somewhat unsatisfied with the explanation provided for the vacillating market share the Tribunal urged the parties and the Commission to "*be wary of using the Sapoa data, and to investigate a proper methodology for defining property markets in future and to do more by way of evaluation, of competitive effects than mouth the industry statistics*." [6]

13] According to the Tribunal, "*the fact that buildings may fall into what Sapoa regards as a class for its own purposes, does not mean that consumers would not regard them as substitutes or even if not functional substitutes that they would not exercise some constraint on the prices of another class.*" [7]

14] In the present matter, we illustrated the problems with Sapoa's classification s

5 Ibid. At paragraph 13.
6 At paragraph 14.
7 Ibid.

by juxtaposing the rentals achieved by the merging parties' properties in the office space grade A and B. For illustrative purposes we only included the office space properties in the somewhat unclear "Sandton node" as this was the area in which there appeared to be a greater concentration. The Sandton node or "greater Sandton node" included Sandton, Sandown, Bryanston, Rivonia, Rosebank, Dunkeld, Hyde Park, Hurlingham Ext.5, Wierda Valley, Dennehof, Kelvin, Eastgate and Kramerville. This table is annexed hereto as Annexure A.

15] The blue bands represent Grade B property and the pink bands represent the Grade A property. While the names of the properties and the location have been removed from the table, the limitations to Sapoa's classification are clear. The rentals achieved for Grade A ranges between R56.50 to R102,00 while Grade B property fetches between R37,00 and R72,00. There are significant overlaps in the rentals achieved for both grades which therefore calls into question the appropriateness of Sapoa's classification for antitrust purposes. We acknowledge the merging parties' submission that the difference between the grades lie in the quality of the offering. However, the table clearly illustrates that some Grade B property achieves similar rentals as Grade A and some Grade A properties achieve lower rentals than some Grade B properties.

16] During the hearing, the Tribunal reiterated its views on using Sapoa's classifications as a proxy for antitrust market definition. Sapoa's presentation of the data it collects from its members is suitable for its needs which are different from those of competition authorities tasked with analysing the <u>competitive effects</u> of merger transactions.

17] We are of the view that Sapoa's classification should operate as an initial low level filter and if this reveals high levels of concentrations in a particular geographic area, then the rental price dynamics and other factors should be analysed in order to arrive at a conclusion regarding the competitive effects of the transaction.

18] We have decided to unconditionally approve this transaction based *inter alia* on the submissions made by the merging parties' representatives during the hearing. The Tribunal questioned the parties on the likelihood of the merged entity increasing rental prices using the Sandton node as an example. The merging parties explained that while rental prices are largely determined by supply and demand factors, the ability of landlords to increase rentals were constrained by the fact that firstly, tenants were well informed and often used the services of independent brokers in order to gather information on rental prices in that area and adjacent areas. [8] Secondly tenants negotiated their rental prices and were "free to shop around" if they were not happy to renew their leases. Thirdly, there was an approximately 5% vacancy level in the Sandton area (including both A and B grade office space) which tenants could consider if they were not happy with the rentals being asked for by the merged entity. The Tribunal also enquired about the possibility of additional space being created in the future. According to Mr James Templeton, CEO of Emira, Sapoa recorded in their vacancy survey, approximately 88000 square metres which had been committed for new development of which 70 000 square metres was currently available for leasing. The merging parties confirmed that of the new space coming on line, none of which belonged to them.

19] Based on the above, we are satisfied that this transaction is unlikely to substantially lessen or prevent competition in any of the markets which the merging parties are active in.

20] There are no public interest issues which would alter our view.

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N Manoim

M Holden and M Mokuena concurring.

Tribunal Researcher: M Murugan-Modise

For the merging parties: A Le Grange, M Gouws (Hofmeyr, Herbstein & Gihwala Inc)

For the Commission: G Mudzanani (Mergers and Acquisitions)

8 According to the parties, broker firms included Engel & Volkers, 5th Avenue Properties, Baker Street Properties, RMB Properties, Real FMG and Colliers International. See page 446 of the Commission's record.

Grade B Property Grade A Property

ANNEXURE A

Price Range	Rand/m²
100-110	102
90-99	85
80-89	80
70-79	77
	72
	72
	70.50
	70
60-69	68
	67
	66
	65
	62.50
	62.50
	62
	61
	60
	60
	60
50-59	59
	58.50
	58
	58
	56.50
	53
40-49	46
	43
	42
30-39	35
	37