COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 70/LM/Jul07

In the matter between:

Growthpoint Management Services (Proprietary) Ltd Acquiring Firm

And

Fund Management Business;
Property Administrators Business; and

Buildmain Managers (Pty) Ltd Target Firms

Panel : U Bhoola (Presiding Member), Y Carrim (Tribunal Member), and M Holden (Tribunal Member)

Heard on : 31 August and 17 October, 2007
Decided on : 17 October 2007

Reasons issued on: 13 November 2007

REASONS FOR DECISION

APPROVAL

[1] On 17 October 2007, the Tribunal conditionally approved the merger between Growthpoint Management Services (Pty) Limited (**"GMS"**) and Fund Management Business; Property Administration Business; and Buildmain Managers (Pty) Ltd (**"the target firms"**), as follows:

"The merger between the parties in this matter is approved in terms of section 16(2)(b) of the Act subject to the following conditions:

1. The entire paragraph 12.1 in the Sale of Business Agreement signed by the merging parties on 20 July 2007 is of no force and effect and shall be deleted forthwith.

2. Paragraph 10.2 in the Co-operation Agreement concluded between the merging parties on 20 July 2007 shall be deleted. The duration of the entire agreement shall be limited to four (4) years and may not be extended or renewed.

3. The parties shall provide the Tribunal with signed copies of the Sale of Business and Co-operation Agreements, amended to reflect the above conditions, within five (5) business days of this order."

BACKGOUND TO THE APPROVAL

[2] The first hearing for this merger took place on 31 August 2007. In its recommendations the Commission had recommended that the merger be approved without conditions. It, however, emerged during the hearing that the proposed merger is subject to three interrelated agreements, namely the Sale of Business Agreement; the Property Management Agreement; and the Co-operation Agreement. Of the three agreements only the Sale of Business Agreement had been filed with the Commission. The Tribunal ordered the parties to submit copies of the agreements.

[3] On 4 September 2007 the merging parties provided copies of the agreements to the Commission together with written legal submissions on the implications of the Agreements. The Commission submitted its legal opinion on the agreements to the Tribunal on 8 October 2007. On 17 October 2007 a second hearing was held. The Commission and the merging parties made oral submissions on the implications of the agreements, an aspect to which we shall revert later.

THE TRANSACTION

[4] The primary acquiring firm is Growthpoint Management Services (Pty) Limited ("GMS"), a newly formed subsidiary of Growthpoint Properties Limited ("Growthpoint"). GMS does not control any firm. The target firms are Fund Management Business;

Property Administration Business; and Buildmain Managers (Pty) Ltd. The target firms are collectively controlled by Investec Property Group (**"IPG"**), which in turn is an indirect subsidiary of Investec Limited (**"Investec"**).

[5] In terms of the Sale of Business Agreement Investec Property Group is to sell all rights, title and interest in the target firms as well as all related activities conducted as a going concern. As a result of the transaction Growthpoint will acquire control of the target firms via GMS.

[6] The transaction, as stated in paragraph 2 above, is also subject to three interrelated agreements, which includes the Sale of Business Agreement and the Cooperation Agreement.[1]

RATIONALE FOR THE TRANSACTION

[7] Growthpoint owns a portfolio of properties, which prior to the merger were managed by Investec Property Group. According to Growthpoint in-house property management is more convenient than outsourced management. Investec Property Group on the other hand wants to realise a return on its investment on the target properties. The parties also pointed out that Investec Asset Management holds 12.1% of Growthpoint's issued share capital and as result Investec will benefit continuously from the sale. The parties described the transaction as an arrangement by Growthpoint to move the target firms in-house.

THE PARTIES' ACTIVITIES

[8] Growthpoint owns a diversified portfolio of retail, commercial and industrial property and derives its income from the rentals it charges from its tenants. The target firms' business activities can be grouped under three categories viz,

- Property Fund Management Business (which provides advice and proposals on acquisitions; developing; and managing the portfolio in order to maximise the

1 Nothing of substance turned on the Property Management Agreement and as result this agreement was not considered.

performance and minimise risks);

- Property Administrators Business (which as property manager is responsible for the physical management of the property under its control including letting; lease renewals; facilities management; and rent collection); and
- Buildmain Managers (Pty) Ltd, (which provides maintenance services such as plumbing; electrical; and general repairs).

THE RELEVANT MARKET

[9] This transaction will affect the listed property loan stock market; the market for the provision of property fund/asset management services; and the market for the provision of property management/administration services. Due to the nature of the product markets involved we consider the geographic market as national.

COMPETITION ANALYSIS

[10] The parties and the Commission held the view that this was a vertical merger and was unlikely to result in customer foreclosure since the target firms were the sole providers of property services to Growthpoint.

[11] The Commission had further submitted that no firm will suffer input foreclosure, except Investec Property Group, since Investec will in future need the services or businesses it is selling to Growthpoint, as it holds a property portfolio of its own. Growthpoint, however, undertakes to provide these services to Investec at a fee. In the unlikely event that Growthpoint refuses to supply Investec with these services, the Commission further submitted, there are alternative suppliers that Investec can turn to. As regards fund/asset management services alternative suppliers includes Madison Property Fund; Resilient Income Property Fund; Acucap Properties Limited; Gensec Property Services; and Old Mutual Investment Group. As regards property management services alternative suppliers includes Broll Property Group; Hyprop Investments; Marriot Property Services; Colliers International; Gensec Property Services; and City Property Administrators.

[12] However at the hearing of the matter, the Tribunal expressed its concerns about relevant provisions of the Sale of Business Agreement and the Co-operation Agreement.

The Sale of Business Agreement

[13] Section 12.1 of the Sale of Business Agreement, in relevant parts, provided as follows:

"12 **Restraint**-

21.1 **Restraint Against Competition**

12.1.1 The Warrantors-
Each of the warrantors undertake to the purchaser that, unless otherwise agreed in writing between them, it shall not, either alone or together with, or as agent for any person, firm, company or association whatsoever, directly or indirectly –

12.1.1.1. carry on or be entered in, in any way;
12.1.1.2. be employed in; or

12.1.1.3. be engaged in or concerned with,

the creation of any listed property fund or property management business, in competition with the business or with Growthpoint generally, as the case may be (which for the avoidance of doubt does not include any property development or listed property investment management businesses).

12.1.2 Purchaser and Growthpoint-
Each of the purchaser and Growthpoint undertake to the warrantors that, unless otherwise agreed in writing between the parties, it shall not, either alone or together with, or as agent for any person, firm, company or association whatsoever, directly or indirectly –

12.1.2.1. carry on or be entered in, in any way;
12.1.2.2. be employed in; or

12.1.2.3. be engaged in or concerned with,

any property development, other than those properties being developed by Growthpoint at the Effective Date and other than in accordance with the provisions of the Co-Operation Agreement."

[14] The Commission took the approach that the Sale of Business Agreement was an agreement between parties in a vertical relationship and would fall within section 5(1) of the Act.[2] It analysed the impact of clause 12.1 on this basis and concluded that the agreement was unlikely to substantially lessen or prevent competition.

[15] However, The Tribunal was concerned that clause 12.1 effectively amounted to an agreement between the parties in contravention of 4(1)(b)(ii) of the Competition Act. The Commission had not investigated this possibility.

[16] Section 4(1))(b)(ii) of the Act provides as follows:

> "4. Restrictive horizontal practices prohibited
>
> 1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship* and if
> ....
> (b) it involves any of the following *restrictive horizontal practices:*
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services."*

[17] In *Nedschroef Johannesburg (Pty) Ltd and Teamcor Limited and Others*,[3] the Tribunal held as follows:

> "…market division does not require that both firms be competitors prior to the act of division. If they are potential competitors this will suffice. Frequently firms will divide a market before they become *de facto* competitors precisely to avoid that outcome[4] (our emphasis).

[18] In support of the above conclusion the Tribunal quoted the United States

2 Section 5(1) of the Act prohibits agreements, as defined, between parties in a vertical relationship if that agreement has the effect of substantially preventing or lessening competition in a market.

3 Case No: 95/IR/Oct05.
4 Id at para 44.

Supreme Court decision in *Jay Palmer et al v BRG of Georgia, INC et all*,[5] where the Court held,

> "Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other"

[19] At the hearing, the parties were afforded an opportunity to address the Tribunal on this matter. Mr Sasse on behalf of Growthpoint submitted that the restraint agreement was a normal commercial agreement and was agreed upon between Investec and Growthpoint, pursuant to the payment by the latter of a substantial purchase price. He explained that the nature of the business being bought relied upon the relationship between the service provider and the customer, in which employees developed the skills and know-how to manage such relationships. In order for Growthpoint to succeed post merger, it necessitated imposing a restraint on Investec from entering the market and from poaching its employees for a period of 2 (two) years.

[20] The Tribunal was not concerned about the restraint on employees. However in the Tribunal's view clause 12.1 was not an ordinary commercial restraint which sought to limit only the seller from entering the market from which it had exited through a sale transaction and for which it had been paid a premium. Clause 12.1 in fact restrained both Investec and Growthpoint from entering into each other's markets and seemed to be more in the nature of a market division agreement.

The Co-operation Agreement

[21] At the hearing of the matter the Tribunal panel raised concerns with clauses 4 and 5 of the Co-operation Agreement. Clauses 4 and 5, in relevant parts, provide:

> "4. DEVELOPMENT ARRANGEMENT

5 498 U.S. 46, 111, S.CT. 401.

4.1 Right of First Refusal

4.1.1 The parties agree that Growthpoint grants (and shall procure the same on behalf of each company within the Growthpoint Group) IPG a right of first refusal in respect of development opportunities and requirements of all the properties within the Growthpoint Portfolio of properties (only to the extent that any such development exceeds R50 000 000 (fifty million rand) in value or if under R50 000 000 (fifty million rand) in value and Growthpoint does not itself decide to develop same)..."

"5. RECIPROCAL RIGHT OF FIRST REFUSAL IN RESPECT OF PROPERTIES
AND RELATED PROVISIONS

5.1 General

....

5.1.1 Each of Investec and Growthpoint undertakes in favour of the other that should any of the companies within their respective Groups wish to place any property within the Investec Portfolio of Properties or Growthpoint Portfolio of Properties, as the case may be, owned by it in the RSA on the market for sale whether pursuant to the receipt of an unsolicited bid from a third party or not, then such selling party (**"Selling Party"**) shall advise the other party (**"the Potential Purchasing Party"**) thereof in writing as soon as reasonably possible after it or such company within its Group has resolved to sell such properties,
.....

5.1.3 If the Potential Purchasing Party is not willing to accept the terms of the Sale Notice....the Selling Party and/or any member of its Group shall be entitled to dispose of and transfer such property within a period of 180 (one hundred and eighty) days following the date on which the parties stopped negotiating in respect of such Sale notice is terms of this 5.1.3, to any third party provided such sale shall not take place on terms materially more favourable than those contained in the Sale Notice, failing which the provisions of this 5 shall apply afresh thereto."

[22] The parties submitted that the Co-operation Agreement is a temporary arrangement intended to facilitate the sale of the target firms by Investec to Growthpoint.[6] The Commission in its written submissions stated that rights of first

6 The merging parties supported this contention by adding that as Investec facilitated the growth of the business of Growthpoint over the past six years, it was prudent from a commercial perspective to retain their relationship for a limited period as both parties are dependent on the services and support which either the one or the other provides, and that it was similarly prudent

refusal are common in the property market and do not raise any significant competition concerns;[7] and recommended that the merger be approved without conditions.

[23] The Tribunal expressed the view that while it may be common practice for firms in the property market to enjoy rights of first refusal, the Co-operation Agreement provided for a renewal of it by mutual agreement between the parties. On this basis, clauses 4 and 5 could be renewed in perpetuity by agreement between the parties, a fact that the Commission had not previously considered. This meant that the rights of first refusal could continue beyond the initial four years contemplated in the agreement.

[24] In light of above concern the Commission submitted that it would be concerned about a Co-operation Agreement being renewed by mutual agreement between the parties. In its view the competitive impact of an agreement beyond the initial four year period would have to be done at that time in future, as market condition changes. The Commission submitted that it would want such renewal to be notified to the Commission and to be investigated for competition implications.

PARTIES' UNDERTAKINGS

[25] At the end of the hearing the parties submitted that they were willing to accommodate the Tribunal's and the Commission's concerns by effecting amendments to their agreements. They undertook to delete clause 12.1 of the Sale of Business Agreement and delete clause 10.2 of the Co-operation Agreement which provided for the renewal of that agreement.[8]

[26] The Tribunal accepted the undertakings offered by the parties.

CONCLUSION

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to introduce certain restrictions to safeguard the investment that Growthpoint has made.

7 The Commission's communications with market participants revealed that there were no objections or concerns raised about the merger or associated agreements by their competitors as the merging parties are considered insignificant players in a market characterized by very large corporations.

8 This is evident from letters of 17 October 2007, received by the Tribunal from the merging parties' Attorneys and the Commission.

[27] We find that the transaction does not raise any significant public interest issues and accordingly approve the merger on the conditions set out in paragraph 1 above.

_____ **13 November 2007**

Y Carrim **Date**

U Bhoola and M Holden concurring.

Tribunal Researcher	:	P S Munyai
For the merging parties	:	Jowell Glyn & Marais (Proprietary) Limited
For the Competition Commission	:	M Dasarath and HB Senekal (Mergers & Acquisitions)