

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 49/LM/Jun06

In the matter between:

**The Trustee for the time being of the Growthpoint
Securitisation Warehouse trust**

Acquiring Firm

And

**Business Connexion Technology
Holdings (Pty) Ltd and Other**

Target Firm

Panel : DH Lewis (Presiding Member), N Manoim (Tribunal Member), and U Bhoola (Tribunal Member)

Heard on : 12 July 2006

Decided on : 12 July 2006

REASONS FOR DECISION

Approval

[1]. On 12 July 2006, the Tribunal unconditionally approved the proposed merger between the abovementioned parties. The reasons for the decision follow.

Parties

[2]. The acquiring firm is The Trustees for the time being of the Growthpoint Securitisation Warehouse Trust ("Growthpoint Trust"). The Growthpoint Trust is a wholly owned subsidiary of Growthpoint Properties Limited ("Growthpoint") a variable rate stock company listed on the Johannesburg Stock Exchange on the real estate sector¹. Growthpoint is not controlled by any entity. Growthpoint is in the business of acquiring property for rental to third parties. The primary target firm is Business Connexion Technology Holdings (Pty) Ltd ("BCTH"). BCTH is a wholly owned subsidiary of Business Connexion Group Limited ("BCX Group") and it is involved in the broader IT sector.

¹ A list of all the firms that hold more than 5% of the issued capital of Growthpoint can be found on page 2 of the Commission's Report.

Transaction

[3]. The proposed transaction comprises of two interrelated phases in which Growthpoint is acquiring several properties from Business CX. The first phase consist of the Absa Restructuring and the FirstRand Restructuring. The second phase involves the acquisition of eight properties from BCTH and BXC FirstRand Properties. The BCX Group concluded financing transactions with Absa Group² and the FirstRand Group³.

For the sake of convenience we will from now on, simply refer to the acquiring entity as Growthpoint and the selling entity as Business Connexion as the involvement of the particular legal entities directly implicated in the sale has no bearing on the competition analysis

Below is a table reflecting the Property Portfolio to be acquired

Table 1: PROPERTY PORTFOLIO BEING ACQUIRED

Property	Geographic Area	Type	Grade
Glenfield Park	Faerie Glen (G)	Office	A
Business Connexion Park Block A, B, C	Midrand (G)	Office	A
Business Connexion Park, Block D, E and Q	Midrand (G)	Office	A
Century City	Montague Gardens (CT)	Office	A

² The financing transactions with the Absa Group were meant for the acquisitions of certain properties and such transactions were structured such that Biprops 44(Pty) Ltd (“Biprops”) will own BCX Absa Properties. The restructuring agreements provide for the sale by Biprops of the BCX Absa Properties to BCTH with the effect that the sole control of the BCX Absa Properties will be with the BCX Group immediately before the transfer to Growthpoint. For a list of the BCX Properties owned by Biprops, see page 518 of the parties Competitive Report.

³ The financing transactions with the FirstRand Group were meant for the acquisition of certain properties and such transactions were structured that three companies (La Lucia Properties (Pty) Ltd, Keriod Investment (Pty) Ltd and Atlantic Ocean Properties (Pty) Ltd) controlled by FirstRand Group are registered owners of BCX Properties (Frosterly Crescent, a Lucia, Durban located in La Lucia Durban is owned by La Lucia Properties (Pty) Ltd; Business Connexion Park, Midrand, Blocks D, Q and E located in Midrand are owned by Keriod Investment(Pty)Ltd; Century City located in Montague Gardens, Cape Town and 106 Park Drive Port Elizabeth is owned by Atlantic Ocean Properties (Pty)Ltd.

1 Crescent	Cranbrook	La Lucia (KZN)	Office	A
7 Crescent	Cranbrook	La Lucia (KZN)	Office	A
Frosterly Crescent		La Lucia	Office	A
106 Park Drive		St Georges	Office	A

Rationale of the Transaction

[4]. Business Connexion has made a decision that property holding is not related to its core business of being an IT company. Growthpoint is always in the market for property acquisition opportunities.

Competition Analysis

[5]. In this transaction it is not necessary to define a relevant market more precisely than that of lettable commercial property in South Africa, despite the overlaps. The Midrand properties being acquired by Growthpoint are not presently part of the market because up to now they have been used by the owner Business Connexion for its own purposes and have not been available to compete in the commercial rental market. Post merger, Business Connexion will have ten- year lease over the properties and this means that for at least that period they will not form part of the market competing for commercial tenants. After the ten-year period assuming the properties are released on to the market they will of course add to the supply of lettable commercial property, but given the dynamic nature of these markets, this is not a problem that presents itself for apprehension now.

[6]. Growthpoints' holding in Menlyn, which could conceivably be regarded as competitive with the Business Connexion property in Faerie Glen. The Commission has taken comfort in the fact Faerie Glen and Menlyn fall into different nodes, but we find that this is not the proper way to approach adjacent suburbs as we explain more fully below. Nevertheless, we agree that this acquisition again raises no concerns, as the post merger accretion is sufficiently small regardless of where the correct geographic boundaries lie. Growthpoint's holding in Menlyn comprises one property and only some of that space is available for commercial letting, the rest being retail. The commercial space is considerably smaller than that in Glenfield suggesting that up until now Growthpoint has not been a significant player in either of these areas. The same consideration applies to its Port Elizabeth acquisition where the Commission and the merging parties' geographic analysis lack precision.

[7]. For this reason, the merger without the need for further analysis raises no competition concerns.

Public interest

[8]. No public interest issues arise from this merger

Post-script analysing property mergers

[9]. The facts of this merger have given us an opportunity to comment on a problematic feature of analysis in recent mergers in the property sector that have come before us.

[10]. Acquiring parties in this industry have urged the Commission and the Tribunal, in the absence of a proper competitive analysis of markets, to accept data obtained by the South African Property Association ('SAPOA') as a proxy. The Commission and merging parties have of late used SAPOA data to perform two functions – to define geographic markets in which properties can be said to compete, and secondly, to define the types of products that can be considered substitutes. Thus SAPOA divides commercial retail property into four classes (P, A, B and C) and properties are not considered substitutes unless they are of the same class.

[11]. This merger has shown up the limitations of SAPOA's data in both these respects. In its filing Growthpoint submitted that its post merger share of Grade A commercial properties located in the Midrand node expressed as a percentage share of lettable grade A commercial buildings in Midrand market would be 20,2 %.

Below is a table reflecting the parties market shares as well as the combined market shares in Grade A commercial properties located in the Midrand node based on total rentable area for commercial use

Table2

Party	Gross Lettable Area	Market Share %
Growthpoint	34 307	12.6
Business Connexion	20 846	7.6
Combined	55 153	20.2
Others	217 947	78.8

Total	273 100	100
--------------	---------	------------

[12]. The Tribunal queried this as in a recent merger involving Growthpoint/Tresso ⁴ Growthpoint alleged that its post merger market share was 33.48%. The explanation for this sudden dilution in market share unravelled in a most unsatisfactory manner.

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

[14]. That all these redefinitions have been self- serving to Growthpoint did not pass unnoticed. We would urge parties and the Commission to be wary of using the SAPOA data, and to investigate a proper methodology for defining property markets in the future and to do more by way of evaluation, of competitive effects than mouth the industry statistics. 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.

[15]. Thus a consumer evaluating if they should lease commercial grade A office space may have regard to the prices for grade B in considering whether the price differential is justified in the consumers mind by an increase in perceived value. Similar considerations may influence a choice between an office park and an office block albeit they may have some different characteristics. Thus to seize on a particular class of building or specie

⁴ 18/ LM/Feb06

without regard to possible substitutes that may constrain pricing in that class may be incorrect from an antitrust point of view. ⁵

[16]. The use of SAPOA's area nodes in this case has exposed similar deficiencies. SAPOA classifies urban areas into nodes, or clusters of suburbs, adjacent to one another, which it believes tenants would consider interchangeable. When nodes are some distant for one another they may serve as a useful proxy for screening out potential problems in evaluating the boundaries of geographic markets. The problem with reliance on this data is when nodes are adjacent to one another. The Commission adopts the attitude that because buildings are in different nodes, they are not in the same geographic antitrust markets. This does not follow. A building on the outer edges of one node presumably would be considered a competitive substitute for another situated on the nearest boundary of an adjacent node. They might even be across the road from one another, because SAPOA for whatever reason sought to establish its line of delineation on that street. This is illustrated in this case where the Commission has regarded the building acquired from Business Connexion in Faerie Glen, as not being in the same market as the building in Menlyn, despite their being in adjacent suburbs, simply because SAPOA treats them as separate nodes.

[17]. Growthpoint in its filing acknowledges that nodes are not a satisfactory proxy for an antitrust market when its states that because of chain of substitution effects, a relevant market may be broader than a single node.⁶ As a theoretical proposition, this may well hold true in some areas but again this approach is self-serving. A proper analysis may need in some cases to approach the node more narrowly than the single node or to disregard the boundaries of nodes when properties may be in adjacent nodes.

[18]. This is not to say that SAPOA statistics may not be useful as a filter to determine which cases require more analysis and which raise no issues. We are mindful of not putting merging parties or the Commission to the burden in respect of minor matters. However the filter, as this case has shown, has its flaws, and sole reliance on it in future cases may not be satisfactory; we caution all concerned that we may send them back to do more homework if we are not satisfied with the analysis.

[19]. Commercial property mergers are a frequent feature of mergers that come before us and concentration levels would appear to be on the increase, although this is not to suggest that they are in anyway alarming it does require the effort necessary to make a proper evaluation of them.

Conclusion

⁵ See for instance our analysis in the Massmart Holdings Limited and Moresport Limited Case No: 62/LM/Jul05 paragraph 86-87

⁶ See record page 525

[20]. Based on the above the transaction will not result in a substantial lessening or prevention of competition in the identified markets and is accordingly approved unconditionally

07August 2006

Date

N Manoim

Tribunal Member

D Lewis and U Bhoola concur in the judgment of N Manoim.

Tribunal Researcher : J Ngobeni

For the merging parties :Ilse Gaigher and Zanele Mngadi Jowell Glyn and
Marais and Paul Coetser(Brink Cohen Le Roux)

For the Commission :Mogale Mohlala and Edwina Ramohlola
Mergers and Acquisitions