R v Panel on Take-overs and Mergers, Ex parte Datafin Plc *continued*

considering such an application. Nevertheless, I wish to make it clear beyond a peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest and would avoid all of the perils to which Mr Alexander alluded.

The reasons for rejecting this application

There was some failure on the part of the applicants to appreciate, or at least to act in recognition of the fact, that an application for judicial review is not an appeal. The panel and not the court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the court is wholly different. It is, in an appropriate case, to review the decision of the panel and to consider whether there has been 'illegality,' that is, whether the panel has misdirected itself in law; 'irrationality,' that is, whether the panel's decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it; or 'procedural impropriety,' that is, a departure by the panel from any procedural rules governing its conduct or a failure to observe the basic rules of natural justice, which is probably better described as 'fundamental unfairness,' since justice in nature is conspicuous by its absence. If authority be required for propositions which are so well established, it is to be found in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–411 …

[844] In conclusion, I should like to make it clear that, but for the issue as to jurisdiction, this is not a case in which leave to apply should ever have been given. All that could be said at that stage was that there was a case for considering whether the advent of core underwriting might not call for some reconsideration of the definition of 'concert party,' perhaps putting core underwriters in the category of persons in respect of whom there was a rebuttable presumption of concerted action. That was plainly a matter for the panel which was minded to add a rider to its decision pointing to the fact that core underwriting arrangement might be subjected to close scrutiny, particularly where they were associated with market purchases above the level of cash offers. The fact that the panel's conclusion might at first have appeared surprising to someone who was not in day to day contact with the financial markets and who had heard none of the evidence would not have begun to justify the grant of leave to apply.

[Lloyd LJ and Nicholls LJ agreed with Donaldson MR.]

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