Queues and consultation.
Fairness and market power at the London Metal Exchange.

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Key Points:
1. Although the *Coughlan* principles were of general application, every consultation exercise was fact-sensitive.
2. The level of market knowledge about the subject of the consultation was relevant to determining how much information had to be provided in the consultation.
3. Where multiple alternatives were known to exist in the market, the consultation only had to consult on the option favoured by the proposer, not on others which had already been rejected.

Abstract:
The Court of Appeal[1] has firmly rejected the idea that the LME's consultation as to a solution on warehouse queues was procedurally unfair on the grounds by affirming the *Coughlan* principles and the fact-sensitive nature of every consultation exercise. Market participants were not in the same situation as, for example, vulnerable care home residents who were threatened with re-housing and the *Coughlan* principles should be interpreted in light of generally available market knowledge and the economic power of the participants.

Factual summary
The London Metal Exchange, founded in 1877, operates from Leadenhall, not far from the centres of metal trading established in London in the medieval period by the merchants of the Hanseatic League in Steelyard (now buried under Cannon Street Station). The LME was acquired by Hong Kong Exchanges and Clearing Limited in December 2012. In addition to providing a trading floor in non-ferrous metals, the LME provides regulated warehouse facilities where metals are stored to 'back' trades. The total metal delivered in and out of these warehouses in 2013 exceeded 8.7 million tonnes.

The LME price is a price for metal traded 'in-warehouse.' Metals which are not bought on the LME will cost more because the cost of making delivery of the metal will be factored into the price. The physical market price of a metal will therefore be higher than the LME price and is known as the 'all-in price.' In practice, very few of the trades placed on the LME result in physical delivery of stock.

However, the LME had begun to face a warehousing log jam as a result of a significant diminution in demand for metals after the financial crisis of 2008. Queues of metal consignments were developing whereby stocks of aluminium accumulated in warehouses could not easily be extracted. A buyer might have to wait for weeks or months for the metal to be loaded out of the warehouse.

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[1] *R (on the application of United Company Rusal PLC) v The London Metal Exchange* [2014] EWCA Civ 1271

The effects of these queues were damaging to the metals market in several respects. Firstly, by denying users access to their metals, the LME's position as a market of last resort was undermined. Secondly, the costs of paying rent to the warehouse reduced the price offered on the LME, which resulted in an increased divergence between the LME price and the all-in price of metal. Thirdly, the delay in physical settlement of the trades gave rise to regulatory issues.

The Claimant, Rusal, a leading global producer of aluminium and alumina, challenged the LME's consultation process in which the LME had proposed to its market participants just one solution to the queues problem. The principal grounds of its application for judicial review were that the LME's consultation process had been procedurally unfair because it failed to identify and provide information in relation to alternatives to its favoured solution.

Specifically, Rusal objected to the fact that the LME had not proposed a rent cap or ban on metals held in a long queue as a solution to the queuing problem ("the Rent Ban Proposal"). The only solution proposed by the LME was the so-called "Linked Load-In/Load-Out Proposal" by which higher delivery out requirements would be applied to warehouses with stocks above 300,000 tonnes and that these requirements should be reviewed formally at intervals of six months. In effect, a formula would govern the amount of metal which could be loaded into a warehouse, which would be linked to and limited by the amount which the warehouse loaded out. Should the queues persist, the level of stock at which higher delivery out requirements would be imposed would be lowered.

The Consultation document only sought views on one solution to the queuing issue, although the Board of the LME had in fact considered nine possible solutions. The Consultation stated (per Phillips J at paragraph 43):

'*In reviewing warehouse arrangements, the LME has previously considered a complete list of alternative policy options for delivery-out rates, but it was not deemed appropriate to implement any option [other than increasing load-out rates] following feedback from the market. However, in light of the persistence of the situation due to continuing macro economic factors, and the negative impact on market participants, the LME has decided to revisit the most workable of these options, and open a consultation process with the industry as a whole.*'

The LME received 33 written responses to the Consultation and held over 70 meetings with market participants. Rusal favoured the Rent Ban Proposal. Nine other respondees also proposed or supported it. In November 2013, the LME issued a notice setting out its decision to implement the Linked Load-In/Load-Out Proposal with effect from 1 April 2014.

<u>The Grounds for Judicial Review</u>

Rusal sought to judicially review the decision to adopt the Linked Load-In/Load-Out Proposal on the following grounds which subsequently became the subject of the Court of Appeal decision (per Phillips J at paragraph 63):

(a) That the Consultation had been procedurally unfair because it had failed to identify other options, specifically the concept of a rent ban; following *R (Madden) v Bury Metropolitan Borough Council* [2002] EWHC 1882 (Admin).

(b) That since the Consultation had referred to the Rent Ban Solution, it should have stated the reasons why the LME Board had rejected that proposal as an option it was prepared to propose ie competition law issues.

(c) That the LME had made enquiries about the Rent Ban Solution with warehouse operators during the Consultation, without informing the Consultation invitees.

(d) That the LME should have proposed for Consultations options which would have caused less financial damage to metal producers, by analogy with *R (Medway) Council v Secretary of State for Transport* [2002] EWHC 2516 (Admin).

(e) That the LME should have published in the Consultation the advice on which it based its decision to reject the Rent Ban Proposal.

(f) That the fact that the LME was partly funded by a stock levy meant that its consultation was vitiated by bias.

Analysis

The Court of Appeal took a robust approach to the findings, both legal and factual, of Philips J[2]. Informing their judgment, throughout, were basic principles of public law fairness, drawn in large part from *R v North & East Devon Health Authority ex parte Coughlan* [2001] QB 213. In particular, the Court of Appeal emphasised that the primary requirement for a consultation was that consultees were given adequate information on which to be able to give a response. Assessing the 'adequacy' of information required the level of general knowledge of market participants to be taken into account - both of the available options, of the structure of the market and of the consequences of the available options.

In short, the market participants of the LME were to be treated as well-informed about the nature and structure of their industry which did not require every last scrap of information to be spoon-fed to them through the Consultation. Principal amongst those issues which the Court was content to hold that they would have been aware of were the fact that the LME was funded by a stock levy (which would probably be increased by the adoption of the Load-In/Load-Out Proposal) and the competition law difficulties of the Rent Ban Proposal (Court of Appeal, paragraph 51).

In this regard, the Court of Appeal in effect drew a sharp distinction between the procedural requirements of a consultation directed to, and with consequences for, vulnerable groups such as the care home residents in *Madden*, and well-funded, well-informed market participants such as Rusal and other metal producers. Further, the

[2] *R (on the application of United Company Rusal PLC) v The London Metal Exchange* [2014] EWHC 890 (Admin)

issue in *Madden* had been that incorrect and misleading reasons for the proposed care home closures had been given in the consultation which led the Court to require much more information to have been given, whereas in this case, the reasons given by the LME were correct. Further, in *Madden*, the residents had been told that they would be re-housed but were not told where. The failure to identify this was of critical importance to the residents. In contrast, the LME market participants were well aware of the other possible options for reducing warehouse queues.

Importantly, the LME was held by the CA not to have been required to consult on details of other solutions such as the Rent Ban Proposal nor to publish the reasons why it had rejected that and other solutions. The fact that only one solution to the warehouse queuing issue had been advanced in the consultation did not negate the principle that the proposals in general should be at a formative stage and that the decision-maker should not already have made their mind up. In particular, the CA held that the LME was under no obligation to disclose the competition law advice (whether legally privileged or not) which had caused it to reject the Rent Ban Proposal. Here, the fact that metal producers had been involved in discussions with the LME for many years about possible Rent Bans (which had been consistently rejected by the LME since 1998) was decisive together with the fact that information as to competition law concerns about Rent Bans had been publicly available and was certainly available to the consultees.

The basic requirement of fairness that a person adversely affected by a decision should have an opportunity to make representations about that decision (see *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560D-G) is preserved by the Court of Appeal's approach. The duty to give sufficient reasons can, in some cases such as *Madden*, appear to be close to requiring a rehearsal of the decision-making process in paper form. The Court of Appeal's decision draws the case law back from that approach, limiting it to cases where the proposal in the consultation lacks detail or contains errors or the consultees affected are vulnerable or will have a fundamental aspect of their lives (such as their residence) affected.

It is certainly arguable that the inclusion of only one solution in a consultation when others exist is not a '*genuine invitation to give advice and a genuine receipt of that advice*' (see *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1). However, where a decision-maker can argue that there is only one proposal that it would, in any circumstances, implement, that invitation may still be genuine. It is possible that the Court of Appeal was influenced by the fact that the LME in fact continued to seek further information from warehouse operators about the Rent Ban Proposal during the consultation process, thus demonstrating an open mind (see Court of Appeal, paragraph 60). Those additional enquiries, however, were criticised by Rusal and became a ground of review in their own right on the basis that it showed that the LME was still actively considering options which they were <u>not</u> consulting on. The Court of Appeal disposed of that objection by accepting the LME's argument that the Rent Ban was, at this stage, only being considered as an adjunct to, not a substitute for, the Load-In/Load-Out Proposal (Court of Appeal, paragraph 70). There was no risk, therefore, of that proposal being rejected.

The question can then legitimately be posed: what difference could the consultation have made to the eventual decision made by the LME? In addition to the fact that the LME sought further information during the consultation period suggesting an open mind, their conclusion was accompanied by a refinement. The LME's report on the consultation stated that the Rent Ban Proposal was the only practical alternative suggested by the respondents and undertook to carry out a fuller investigation of its feasibility with a view to its possible deployment in the future. The LME was able to demonstrate on the facts, therefore, that it had had an open mind as to other options. If the final report had demonstrated no appreciation of the respondents' views as to the Rent Ban alternative, it is arguable that the Court of Appeal might not have taken regarded the information in the Consultation as sufficient.

Perhaps most importantly, the Court of Appeal accepted the LME's submission that *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin) was not authority for the proposition that every consultee was entitled to have the option put forward that would cause them least damage. The Court of Appeal rejected that as a principle of consultation outright, holding, rightly, that it was plainly contrary to the consistent line of authority that the duty of fairness did not require a consultant body to put forward options which it had discarded (Court of Appeal, paragraph 67).

The Court of Appeal further distinguished *Medway* on the basis that it was an unusual consultation, since it preceded a government white paper. A white paper set out proposed government policy prior to the production of a bill. Any consultation preceding it was, necessarily, at a very early stage of the decision-making process (Court of Appeal, paragraph 68). The Court of Appeal did not specify precisely why the very formative stages of decision-making should require options to be put forward which minimised damage to consultees if later stages did not. One explanation, might be that fairness at that very early stage required <u>all</u> options to be made public. Options might legitimately be narrowed thereafter if further public consultations or other publications (such as White Papers) were required. However, that explanation would be confined to a multi-stage consultative process, like the legislative process. It does not provide a guiding principle for one-stage consultations such as that held by the LME.

Arguably, the true distinguishing feature between the LME consultation and that in *Medway*, was, firstly, the importance of the underlying issue. In *Medway,* that was the future development of UK air transport including expansion of existing airports. Whilst the LME consultation involved an issue of enormous importance to metal producers, it was of less national importance and of no significance to the private lives of individuals, as had been the case in *Madden*. Secondly, the consultation in *Medway* was the only occasion on which the consultees would have had the opportunity to give their views as to the expansion of Gatwick airport since the government expressly stated that it would not consider any expansion of Gatwick in the White Paper.

Perhaps the better explanation for the *Medway* decision is that the government had expressly demonstrated a closed mind in relation to one option at a very early stage of the decision-making process. In the LME's case, however, that was clearly not the case since the LME had invested considerable time in investigating other options and

had had a dialogue with the market participants for some years preceding the consultation as to the Rent Ban Proposal. In distinguishing the *Medway* case, the Court of Appeal framed the question again as whether the consultees had sufficient information about potential competition difficulties to require publication of the other options in the consultation (Court of Appeal, paragraph 79).

The Court of Appeal was at pains to emphasise that it was not using the level of knowledge of market participants (and, by extension, their market power) to dilute the principles of fairness in commercial judicial review (paragraph 89). Rather, it sought to portray its decision as limiting the obligations on a public body conducting a consultation on complex issues in a politically sensitive area (paragraph 90). By reiterating the fact-sensitivity of any judgment as to the fairness of a consultation, the Court has not developed a new set of principles for commercial judicial review. However, a public body may take some cautious comfort from the limitation of the *Madden* and *Medway* cases to their facts. In short, a consultation must match its content to its audience, both in terms of their prior knowledge of the issues and their economic power. Permission has been sought to appeal to the Supreme Court.

Michael Beloff QC and Simon Pritchard acted for the LME. Monica Carss-Frisk QC, James Segan and Naina Patel acted for Rusal. All counsel are members of Blackstone Chambers.

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