Neutral citation [2010] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1110/6/8/09

Victoria House
Bloomsbury Place
London WC1A 2EB

25 February 2010

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
LORD CARLILE OF BERRIEW QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

- supported by -

RYANAIR LIMITED

Intervener

JUDGMENT (RELIEF AND PERMISSION TO APPEAL)

I. INTRODUCTION

1. On 21 December 2009 the Tribunal handed down its judgment in this case ([2009] CAT 35, "the Main Judgment"). The judgment we now give adopts the same abbreviations and terminology as, and should be read with, the Main Judgment, which contains the background to this matter. In that Judgment the Tribunal upheld BAA's application for review of the Report on the ground of apparent bias, whilst rejecting BAA's second ground of challenge, which alleged that the Commission had not complied with the requirements of proportionality in certain respects. The Tribunal left over the question of relief to be determined following further argument, in the absence of agreement between the parties.

2. Accordingly the Tribunal invited submissions from the parties and also provisionally listed a short hearing for 12 February 2010. In advance of that date the parties agreed that an oral hearing was not necessary, and in these circumstances with the aid of the parties' helpful written submissions the Tribunal has been able to deal with these matters on the papers. The question of costs will be determined in a separate judgment once BAA and the Commission have lodged their submissions on that matter.

II. RELIEF

Matters agreed

3. In the event BAA and the Commission are agreed as to the terms of the relief which they wish to be reflected in an order of the Tribunal. To that end they have supplied the Tribunal with a draft of such order. It is agreed that the findings contained in paragraphs 8.4(b)-(f) and the related remedies in paragraph 10.377(b)-(f) of the Report can stand. Those findings relate to the position of Aberdeen airport, Heathrow's position as the only significant hub airport, aspects of the planning system, government policy and regulatory system which distorts competition. The draft order also provides for the quashing of certain parts of the Report (in particular paragraphs 8.4(a) and

10.377(a), which address the adverse effects of, and remedies for, BAA's common ownership of various airports) and for remittal of the matters in question back to the Commission with a direction to reconsider and make a new decision in accordance with the Tribunal's ruling. Although the draft order does not spell this out it is naturally also agreed, given the grounds on which BAA has succeeded in its challenge, that the matters in respect of which a quashing and remittal order is to be made should be reconsidered by a freshly constituted panel of the Commission. Ryanair makes no comment on the relief agreed between the other two parties.

4. In addition to their accord in relation to quashing and remittal, BAA and the Commission also agree that in the light of the Commission's decision to seek permission to appeal against the Tribunal's finding of apparent bias, it would be undesirable for a remittal to take effect while there is a prospect that reconsideration of remitted matters by the Commission may be rendered unnecessary as a result of any such appeal. Accordingly the agreed draft order contains a provision which postpones the taking effect of the remittal order unless and until that prospect is removed. Again, Ryanair is content to make no comment on this aspect in the light of the agreement between BAA and the Commission.

5. The Tribunal approves the substance of the agreement on these issues. The parties are to be commended for the pragmatic way in which they have approached the question of which parts of the Report are to be quashed and remitted. As a result certain findings, reasoning and concomitant remedies in the Report are able to stand, thus limiting to some extent the scope of the matters to be remitted and reconsidered by the Commission. As to the suggestion that remittal should not take effect while the possibility of an appeal is pending, that approach would avoid any risk of the resources and efforts of all concerned being wasted in the event that an appeal were to be successful. It seems to us that we should avoid that risk whilst expressing the hope that, if permission is granted, an appeal would be resolved as soon as possible so as to minimise the period during which the current uncertainty for BAA and others would persist.

Matters contentious

6. Whilst making no comment on the proposed relief discussed above, Ryanair asks the Tribunal to make provision in the order for BAA and the Commission to take specified steps with a view to resolving certain issues which have arisen between them as to the conduct of the reconsideration by the Commission following remittal. Ryanair's suggestion is contentious and needs to be examined in more detail.

7. Ryanair's underlying concern is that correspondence between BAA and the Commission after the Main Judgment reveals certain differences of view as to the conduct of the Commission's reconsideration which would take place on a remittal by the Tribunal. In particular Ryanair points to differences which have emerged as to the use of Commission staff who had worked on the original investigation, the admissibility of specific documents prepared or commissioned for the original investigation, and the admissibility of factual findings in the Report. Ryanair is concerned that if these issues are simply "parked" until remittal has taken place following an appeal, then there will be a delay in resolving them, with knock-on delay in completing the necessary reconsideration. This delay could, it is submitted, be avoided if the Tribunal were to include in its order certain procedural directions.

8. The suggested directions are set out in Ryanair's written submissions and comprise three paragraphs. In essence the directions would require the Commission to identify by a date in April 2010 (a) the staff members it proposes to use on the remitted investigation, (b) the documents prepared or commissioned by the Commission for the Investigation to which it proposes to have regard again, and (c) the parts of the Report which it regards as admissible, and upon which reliance can be placed, in the remittal. It is then proposed that BAA would have a period of about 6 weeks to notify any objections to these proposals in the light of the Main Judgment. Absent agreement the parties are to bring matters remaining in dispute back to the Tribunal to be resolved. If thought appropriate such dispute resolution could wait until remittal had

actually taken place, but Ryanair submits that this need not delay the earlier procedures to identify the disputed matters.

9. The Commission objects to these further provisions. So, in effect, does BAA: for although BAA states that it would not object provided that neither the Commission nor BAA were required to carry out the specified steps while there is an appeal on foot or the possibility of an appeal, that proviso would frustrate the purpose of the suggested provision, which is to get the ball rolling straightaway regardless of any pending appeal.

10. The Tribunal is not attracted by Ryanair's proposed directions. The basic objection to them is that they would require the Commission and BAA to carry out a considerable amount of work which might conceivably be unnecessary in the event that an appeal goes forward and is successful. Whether in the meantime it would be prudent for the Commission to give some thought to how it would conduct its reconsideration if the remittal were to take effect, and to make any preparations against that eventuality, is a matter for the Commission to decide. Similarly it is a matter for the Commission whether pending any appeal it engages in further correspondence with BAA in relation to the issues already identified and/or any further issues. We do not consider that it is appropriate for the Tribunal to seek to require or to manage that process by means of directions such as those suggested, even with the laudable purpose of avoiding delay at a later stage, given that that stage might conceivably not arise. Still less would it be appropriate for the Tribunal to become involved in resolving disputes which might in the event become academic. In addition there is much force in the Commission's objection that matters such as staffing and use of documents would need to be determined in conjunction with a newly constituted group following remittal and that to attempt formally to identify such matters before then would be likely to result in wasted effort and expense in any event.

11. The Commission is perfectly well aware of the matters which lead to Ryanair's concern about possible delays in the reconsideration process, and has given its assurance that if and when the remittal becomes effective it will deal with the

matter as efficiently and expeditiously as possible. It seems to us that Ryanair must be content with that.

12. Accordingly the Tribunal will make an order granting relief which includes the terms agreed between the parties and set out in paragraphs 1, 2 and 3 of the draft order attached to BAA's written submissions dated 8 February 2010.

III. REQUESTS FOR PERMISSION TO APPEAL

13. BAA's application for review was brought before the Tribunal under subsection 179(1) of the Act. Decisions of the Tribunal in relation to such applications can be challenged under subsections 179(6) to (8) of the Act which provide for appeals to (in this case) the Court of Appeal. Any such appeal requires the permission of the Tribunal or the Court of Appeal and, by virtue of subsection 179(6), must raise a point of law.

14. In considering whether to grant permission when, as here, sitting in England and Wales the Tribunal applies the test in Civil Procedure Rules rule 52.3(6):

> "Permission to appeal may be given only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
> (b) there is some other compelling reason why the appeal should be heard."

15. By written applications dated 9 and 11 February 2010 respectively, the Commission and Ryanair apply for permission to appeal against the Tribunal's finding of apparent bias. BAA has lodged written submissions dated 17 February 2010 in opposition to the applications. On 22 February 2010 the Commission filed a Reply to BAA. In addition the Tribunal received a letter from BAA's solicitors dated 23 February commenting on the Commission's Reply and a letter dated 23 February from the Commission's solicitors in response to that letter.

The Commission's application for permission

16. The Commission seeks permission to appeal on the sole ground that "the Tribunal committed an error of law in concluding that the connections between

Professor Moizer and MAG gave rise to apparent bias" (paragraph 5 of the Commission's application).

17. In essence the Commission contends that the connections between the Fund, whom Professor Moizer advised, and MAG were too tenuous and remote to give rise to apparent bias. The Commission relies particularly (as it and Ryanair did at the hearing) on the argument that the Fund's trustees are legally required to have regard exclusively to the interests of the beneficiaries who are the employees of the local authorities rather than the local authorities themselves. The Commission argues that Professor Moizer was not advising the local authorities, and that the Tribunal has wrongly treated MAG, the Fund and the authorities as if they were one body. It is submitted that there was "no basis" for identifying the Fund with MAG (at least until later when the real possibility of a joint Fund/MAG bid for Gatwick arose), still less was there any basis for identifying Professor Moizer with MAG. Therefore, contends the Commission, the Tribunal's conclusions on apparent bias cannot be supported and reveal an error of law. In the light of the above the Commission submits that the proposed appeal has a real prospect of success.

18. In any event there are, in the Commission's view, two other compelling reasons for an appeal to go ahead. First the Commission points to the importance of the Report as the culmination of two years' intensive work which identified a series of AECs, with knock-on effects on the wider economy, arising from BAA's common ownership of certain airports. The effect of the Tribunal's judgment is that those adverse effects cannot be remedied by the Commission until after a further inquiry involving additional effort and expense. The second compelling reason is the public interest in the Court of Appeal clarifying the operation of the rules on apparent bias in the context of part-time external decision-makers such as Commission panel members and those fulfilling a similar role in other regulatory or disciplinary bodies.

19. We must first consider whether the application for permission raises a point of law so as to satisfy subsection 179(6) of the Act. It is clear that the question whether apparent bias exists is not a matter for the exercise of any discretion;

there is no discretion: either apparent bias exists in the light of the material facts or it does not. The Commission's proposed ground of appeal, amounting as it apparently does to an assertion of irrationality or perversity ("no basis" for the Tribunal's findings) does disclose a point of law. Beyond perversity the Commission does not contend that the Tribunal applied the wrong test or that there was some relevant matter which we failed to consider. However, the question whether, on the decided facts, apparent bias exists can also now safely be treated as a point of law: see the discussion in *Gillies v Secretary of State for Work and Pensions* (HL(Sc)) [2006] 1 W.L.R. 781, per Lord Hope of Craighead at paragraphs 2-7.

20. We therefore turn to the question whether there is a real prospect of a successful appeal. All the factors relied upon in the Commission's application for permission to appeal were urged upon the Tribunal at the substantive hearing and were carefully considered, along with other factors described in the Main Judgment and not specifically referred to in this application. Our conclusion that the test for apparent bias in favour of MAG was satisfied as from October 2007, although one we were naturally reluctant to reach in view of its implications, was unanimous and was not in any sense a borderline one. On the material facts as we found them, and which are set out in the Main Judgment, the conclusion did not seem to us to be in doubt. In these circumstances the Commission has not satisfied us that an appeal would have a real prospect of succeeding, whether the basis of challenge is that our conclusion was perverse (in the sense that no reasonable tribunal properly directing itself could have reached that conclusion in the light of the material facts) or simply that it was "wrong".

21. As to the separate point made by the Commission at paragraph 26 of its 9 February 2010 submissions (elaborated at paragraphs 7 to 10 of the Commission's Reply dated 22 February), this does not appear to challenge the Tribunal's finding that from 2 December 2008 until he stood down from the Investigation there existed a real possibility that Professor Moizer was also biased in favour of the Fund. Rather it is contended that any such apparent bias "cannot have had any operative effect" because BAA had already decided to sell Gatwick. This point seems to go more to the question of relief (which was not

dealt with in the Main Judgment, and is now agreed) than to the appearance of bias. It is also difficult to see it as raising a point of law. But in any event the factual premise that there was no possibility of operative effect seems to us to be dubious for the reasons set out in paragraphs 22 to 24 of BAA's submissions dated 17 February 2010. Finally, the point only becomes material if the Commission succeeds on its main ground (apparent bias in favour of MAG with effect from October 2007) or Ryanair succeeds in relation to waiver. Therefore here, too, we can see no real prospect of a successful appeal.

22. Turning to the other reasons relied upon by the Commission, it is true, as the Tribunal pointed out in the Main Judgment, that the additional expense and delay involved in a reconsideration of parts of the Report are greatly to be regretted. However, as Mummery LJ has said:

> "Inconvenience, costs and delay do not…count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights." (Emphasis in original) (*Morrison v AWG Group Limited* [2006] EWCA Civ 6.)

23. Further, some delay in the implementation of a remedy for any AECs is now unavoidable whether there is an appeal or not. The grant of permission to appeal would of course exacerbate the ultimate delay if the appeal were to be unsuccessful.

24. Nor is the Tribunal convinced that the public interest requires further clarification of the operation of the rules on apparent bias in the present context. The principles to be applied in order to test whether apparent bias exists (real possibility of bias identified from the objective viewpoint of the fair minded and informed observer) have been the subject of clear exposition in recent case law at the highest level: see paragraphs 107-115 of the Main Judgment. There was no dispute during the hearing before the Tribunal as to the nature of those principles or their applicability to a Commission group carrying out a market investigation reference. At no stage in the course of the proceedings did the Commission suggest that the test to be applied or the manner of its application should be any different in this context.

Ryanair's application for permission

25. Ryanair's application for permission to appeal dated 11 February 2010 is wider in scope than the Commission's. By reference to its first proposed ground of appeal Ryanair supports and adopts the Commission's challenge to the finding of apparent bias in respect of the period prior to 2 December 2008, and the draft grounds attached to the application for permission reflect in essence the points raised by the Commission. Therefore the Tribunal's comments at paragraph 20 above on the prospects of success apply equally to Ryanair's first ground.

26. Ryanair seeks permission on two further grounds: it wishes to challenge the Tribunal's conclusions that (1) BAA had not waived the apparent bias and (2) that the other members of the Group were "tainted" by apparent bias on the part of Professor Moizer.

27. In relation to the first of these additional grounds Ryanair alleges that:

> "the Tribunal erred in law in finding that BAA did not know (or is not to be taken as knowing) the essential fact….The Tribunal ought to have found that BAA knew (or is to be taken as knowing) the link between MAG and the Fund, and therefore waived any objection by remaining silent and continuing to participate in the Inquiry."

28. There is a tension discernible between the alleged error of law and the challenge to a finding of fact. Further, the points of law as to the incidence of the burden of proof relied upon by Ryanair in paragraph 16.1 of the draft grounds of appeal appear to be based upon a premise which does not reflect what the Tribunal actually said at paragraphs 157-161 of the Main Judgment about the case law to which its attention had been drawn by Ryanair. Thereafter, paragraph 16.2 of the draft grounds of appeal seems to invite a reassessment of the evidence upon which the Tribunal's finding of fact was based. We very much doubt whether any real point of law is revealed in proposed ground 2. Nor do we consider that these points have a real prospect of success in any event.

29. Ryanair's third proposed ground assumes (contrary to the Tribunal's conclusions in the Main Judgment) that either no apparent bias existed prior to 2 December 2008 or alternatively that any such bias had been waived by BAA. In

other words it assumes that an appeal has succeeded on proposed ground 1 or ground 2. Ryanair then contends that, had the Tribunal considered the matter on this premise, it would have necessarily concluded that in all the circumstances the other members of the Group were not "tainted" by any apparent bias of Professor Moizer which arose only from that time. This point seems to be similar to the Commission's additional argument to which we refer at paragraph 21 above, in that it looks at the period from 2 December 2008 in isolation.

30. In view of the Tribunal's actual conclusions on apparent bias and waiver we did not need to determine the "tainting" effect of the apparent bias in favour of the Fund which arose as from 2 December 2008 in isolation from the effect of the apparent bias in favour of MAG which we found to have existed from October 2007. Although the Tribunal took into account the effect of the former when considering the impact of apparent bias on Professor Moizer's colleagues in the Group (see paragraph 196(c) of the Main Judgment), the Tribunal considered the overall effect of these two strands of apparent bias (see paragraphs 193 to 198). In those circumstances it is not appropriate for us to comment on what our view would have been had we simply focussed on the apparent bias which arose only as from 2 December 2008. However since this proposed ground of appeal is admittedly dependent on Ryanair succeeding on ground 1 or ground 2, its prospects of success cannot be better than their prospects for the purposes of permission to appeal. We therefore conclude that the third proposed ground of appeal does not have a real prospect of success.

31. Ryanair urges three other compelling reasons for granting permission. First it refers to the importance of the Report to airport customers in the UK, and the damage to their interests which its quashing would cause. In support of this Ryanair cites a number of passages in the Report listing the detriment to customers caused by the monopolistic behaviour of BAA, and the corresponding benefits accruing from divestment of BAA's airports. Ryanair states that quashing the Report will postpone these benefits and allow the detriment to continue indefinitely. This point is very similar to the delay argument put forward by the Commission as a reason for granting permission. We refer to our response at paragraphs [22] and [23] above.

32. Ryanair also urges the need for further judicial guidance on the matters raised in its draft grounds of appeal. Again, we have dealt with a very similar argument put by the Commission, upon which we have commented at paragraph [24] above. In so far as Ryanair makes the same point in relation to what constitutes waiver and "tainting" of co-decision-makers in this context, our response would be the same *mutatis mutandis*. When the relevant case law is examined the governing legal principles are well-established, and their application is likely to turn very much on the particular facts of the case.

33. Finally Ryanair relies upon the undoubted fact that a finding of apparent bias is a serious and unpleasant matter for the person or persons concerned. The Tribunal does not in any way underestimate this factor; we have been very conscious of it throughout. However we do not consider that, of itself, this is a compelling reason for granting permission to appeal. As we have already said, we did not in this case regard the question of apparent bias as one in which the answer was borderline.

34. For these reasons the Tribunal unanimously refuses the Commission's and Ryanair's requests for permission to appeal. The applications may be renewed to the Court of Appeal within 14 days pursuant to CPR rule 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling, along with the written submissions identified at paragraph [15] above, should be placed before the Court of Appeal.

IV. EXPEDITION OF ANY APPEAL

35. Both the Commission and Ryanair asked us to state a view as to whether, if permission were to be granted, any appeal should be expedited. In the event we have not granted permission. Should the Court of Appeal do so, the degree of expedition is plainly a matter for it. However, as we have already indicated, it would clearly be desirable for such appeal to be resolved as soon as possible, so as to minimise the period during which the current uncertainty persists.

The President | Lord Carlile | Sheila Hewitt

Charles Dhanowa
Registrar

Date: 25 February 2010