Case No: C3/2011/2506A

Neutral Citation Number: [2011] EWCA Civ 1579
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
MR JUSTICE BARLING, PRESIDENT, MR MICHAEL BLAIR Q.C.,
MR GRAHAM MATHER
[2011] CAT 23

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2011

Before:

LORD JUSTICE LLOYD
LORD JUSTICE ELIAS
and
LORD JUSTICE KITCHIN

- -

Between:

RYANAIR HOLDINGS PLC	**Appellant**
- and -	
(1) OFFICE OF FAIR TRADING	
(2) AER LINGUS GROUP PLC	**Respondents**

- -
- -

Lord Pannick Q.C. and Brian Kennelly (instructed by **Covington & Burling LLP**) for the **Appellant**
Daniel Beard Q.C. and Julian Gregory (instructed by the **General Counsel, Office of Fair Trading**) for the **Office of Fair Trading**
James Flynn Q.C., Kelyn Bacon and Daniel Piccinin (instructed by **Cadwalader Wickersham & Taft LLP** and **Linklaters LLP**) for **Aer Lingus Group plc**

Hearing date: 24 November 2011

- -

Judgment

Lord Justice Lloyd:

Introduction

1. In this judgment I set out my reasons for making an order at the end of the hearing of an interim application by the appellant, Ryanair, on 24 November 2011. By that order, upon various undertakings, the court ordered that the application of the time-limit under sections 122 or 24 (or both) of the Enterprise Act 2002 to an investigation by the Office of Fair Trading, Case ME 4694/10, be suspended until the determination of Ryanair's appeal to this court or further order. One of the undertakings was given by the OFT, and was to stay its investigation, though subject to some qualifications.

2. The appeal in which this application is made is itself somewhat unusual. The application is decidedly unusual. The proceedings arise from the situation in which Ryanair holds just under 30% of the shares in the respondent Aer Lingus. I will start with as brief as possible a summary of the relevant history.

3. Ryanair bought its shares in Aer Lingus in 2006 with a view to a full take-over. In 2007 the European Commission refused to allow the take-over, but also refused to order Ryanair to sell its minority stake in Aer Lingus. Both parties appealed to the Court of First Instance (now the General Court), which dismissed both appeals in 2010. In September 2010 the OFT began an investigation under section 22 of the Enterprise Act 2002 into Ryanair's acquisition of the minority holding in Aer Lingus. That is the investigation referred to in the order, Case ME 4694/10. Such an investigation is as to whether a "relevant merger situation" has been created which may have adverse competition consequences. If specified criteria are satisfied under the Enterprise Act, the OFT may refer the matter to the Competition Commission (CC) for it to investigate.

4. Time limits apply to investigations by the OFT under section 22. The dispute which is at issue in the appeal is whether the time limit runs from when the European Commission concluded its investigation, as Ryanair contends, or from the time when, following the determination of the appeals by the General Court, no further appeal was possible to the Court of Justice of the European Union (CJEU), which is the OFT's contention. At the time of the hearing of this application, it was common ground that, if the OFT was right on this, there was still time for them to refer the matter to the CC, but that the period would run out on 30 November 2011. If Ryanair was right, the time had run out long since.

5. Unusually, the OFT made a formal decision, in the course of its investigation, to the effect that the time limit ran from the later date, so that the investigation was in time. Normally, the OFT does not make a preliminary ruling in the course of an investigation, but leaves all such matters to its final decision. Ryanair appealed against that preliminary decision to the Competition Appeal Tribunal, which upheld the OFT's position in its decision on 28 July 2011: [2011] CAT 23, the Tribunal consisting of the President, Mr Justice Barling, Mr Michael Blair Q.C. and Mr Graham Mather. On 7 November 2011, however, permission to appeal was given by Lord Justice Davis to Ryanair to appeal against the Tribunal's decision to the Court of Appeal. When the application was heard that appeal had been fixed to be heard in June 2012. Since then, as I understand it, the date for the hearing of the appeal has been brought forward to April 2012. Either way, however, the prospect was that, if

the OFT decided to refer the matter to the CC on or before 30 November 2011, the CC would then start its investigation, to which time limits apply, but it might then transpire, on the determination of the appeal, that the OFT's own investigation had been out of time, in which case all the efforts of the OFT and the CC, and of the parties involved with each investigation, would have been futile and a waste of time.

6. The interim application was intended to avoid the need for the OFT to refer the matter by 30 November 2011. Accordingly, the issue was whether the court could (and if so should) achieve a position in which time stopped running for the OFT to refer the matter to the CC, pending the determination of the appeal. If that were possible, as Ryanair and the OFT contended, then the OFT was content that it should be done and, on that basis, to pause in its investigation. Aer Lingus, on the other hand argued that it could not be done and that, even if it could, it should not be done, or, if at all, only on different terms from those proposed by Ryanair.

7. The application was plainly urgent. An early hearing date was arranged. The parties were represented at the hearing by Lord Pannick Q.C. with Mr Kennelly for Ryanair, by Mr Daniel Beard Q.C. with Mr Gregory for the OFT and by Mr James Flynn Q.C., with Ms Bacon and Mr Piccinin for Aer Lingus. I am grateful to all Counsel for their able, realistic and well-focussed oral submissions, amplifying appropriately the skeleton arguments.

8. Having heard argument for the best part of the day on 24 November we concluded that power to achieve the suspension of the running of time did exist, that it was appropriate to exercise the power, and that we should do so on the terms proposed by Ryanair and the OFT. We made an order accordingly. I will now explain the basis for this. I will begin with the material provisions of the relevant legislation.

The Enterprise Act 2002

9. The starting point is section 22(1) of the Enterprise Act:

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that—
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

10. Section 23 explains when a relevant merger situation is created. Subject to a threshold of value and to other factors which I do not need to mention, it is if "two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within section 24": section 23(1)(a).

11. I will set out section 24(1); the rest of the section does not matter for present purposes:

> "(1) For the purposes of section 23 two or more enterprises have ceased to be distinct enterprises at a time or in circumstances falling within this section if—
>
> (a) the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day; or
>
> (b) notice of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be distinct enterprises has not been given in accordance with subsection (2)."

12. That is subject to section 122, headed "Primacy of Community law", of which subsections (3) and (4) are relevant:

> "(3) The duty or power to make a reference under section 22 or 45(2) or (3), and the power to give an intervention notice under section 42, shall apply in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within section 24 if the condition mentioned in subsection (4) is satisfied.
>
> (4) The condition mentioned in this subsection is that, because of the EC Merger Regulation or anything done under or in accordance with them, the reference, or (as the case may be) the reference under section 22 to which the intervention notice relates, could not have been made earlier than 4 months before the date on which it is to be made."

13. It is common ground that, while the European Commission was proceeding with an investigation into Ryanair's acquisition of shares in Aer Lingus and its proposed take-over, the OFT could not investigate the same matter itself. That period of time falls within the scope of section 122(4). The issue on the appeal is whether the same applies to the time occupied by the respective parties' appeals against the Commission's rulings, and to the period within which the parties would have been in time to appeal further to the CJEU.

14. Under section 25 the four month time limit may be extended in certain defined circumstances. If the OFT and the relevant enterprises agree, they can extend the period by no more than 20 days, but they can do so only once: see subsections (1) and (12). If the OFT considers that any of the persons carrying on a relevant enterprise has failed to provide information requested in a notice under another section, it can give notice extending the time until the information is provided or earlier cancellation of the notice: subsections (2) and (3). This provision was used in the present case to stop time running on account of what the OFT considered was a failure by Ryanair to provide necessary information. The OFT can extend the period while it seeks undertakings from persons carrying on a relevant enterprise: subsections (4) and (5). There can also be an extension in certain circumstances while the European Commission considers possible action, under subsections (6) to (8). Careful consequential provision is made by subsections (9) to (11) about cases where there is more than one extension.

15. If what may be a relevant merger situation is referred to the CC, its task is set out in section 35. It is to decide whether a relevant merger situation has been created and if so whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services. If it concludes that a relevant merger situation has been created, with adverse effects, it is then to decide what to do about it, for which purpose it has various powers. It must prepare and publish a report on the reference, under section 38.

16. Under section 39 it is required to prepare and publish the report on the reference within 24 weeks beginning with the date of the reference, though it may extend by no more than 8 weeks the period within which the report is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within the 24 week period.

17. I must also mention the provisions about appeals which, as regards merger investigations, are in section 120 of the Enterprise Act.

> "(1) Any person aggrieved by a decision of the OFT, OFCOM, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.
>
> …
>
> (3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.
>
> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may—
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

18. A further appeal lies on a point of law to the Court of Appeal or the Court of Session, with permission.

19. Thus, if the OFT were to refer the matter to the CC, Ryanair could apply to the Tribunal for a review of that decision. Equally (because decision is defined by subsection (2) as including a failure to take a decision permitted by the Act) if it decided not to make such a reference, Aer Lingus could apply for a review of that

decision. As it happens, so far as I am aware, refusals to refer have been challenged on several occasions, but decisions to refer have not yet been so challenged.

The Competition Appeal Tribunal Rules

20. Much of the argument before us turned on provisions of the Competition Appeal Tribunal Rules 2003. Before I come to them, I should note the provisions under which they were made. The Tribunal was set up by the Enterprise Act, and is governed by Part 2 of the Act. Rules "with respect to proceedings before the Tribunal" are made by the Secretary of State under section 15, by statutory instrument subject to annulment. Part 2 of Schedule 4 is brought in on this point by section 15(5). It contains more detailed provision as to what the Tribunal rules can deal with. The only paragraph that I need to quote is paragraph 22, about interim orders:

> "(1) Tribunal rules may provide for the Tribunal to make an order, on an interim basis—
>
> (a) suspending the effect of any decision which is the subject matter of proceedings before it;
>
> (b) in the case of an appeal under section 46 or 47 of the 1998 Act, varying the conditions or obligations attached to an exemption;
>
> (c) granting any remedy which the Tribunal would have had power to grant in its final decision.
>
> (2) Tribunal rules may also make provision giving the Tribunal powers similar to those given to the OFT by section 35 of the 1998 Act."

21. Section 35 of the Competition Act 1998 applies where the OFT has begun, and is still pursuing, an investigation under that Act into possible breaches of the legislation against cartels or against abuse of a dominant position. By section 35(2) it empowers the OFT to give such directions as it considers appropriate, if it considers it necessary for the purpose of preventing serious irreparable damage to a particular person or category or person, or of protecting the public interest.

22. The Rules made under the Enterprise Act include several which featured largely in the argument before us. Rule 19 deals with directions by way of case management. Reliance was placed, for Ryanair and the OFT, on rules 19(1) and 19(2)(i) and (j), which are as follows:

> "(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The Tribunal may give directions
>
> …

(i) as to the abridgement or extension of any time limits, whether or not expired;

(j) to enable a disputed decision to be referred back in whole or in part to the person by whom it was taken;"

23. More relevant, as I will explain, is rule 61, made in reliance on paragraph 22 of Schedule 4. This is as follows:

"(1) The Tribunal may make an order on an interim basis—

(a) suspending in whole or part the effect of any decision which is the subject matter of proceedings before it;

(b) in the case of an appeal under section 46 or 47 of the 1998 Act, varying the conditions or obligations attached to an exemption;

(c) granting any remedy which the Tribunal would have the power to grant in its final decision.

(2) Without prejudice to the generality of the foregoing, if the Tribunal considers that it is necessary as a matter of urgency for the purpose of—

(a) preventing serious, irreparable damage to a particular person or category of person, or

(b) protecting the public interest,

the Tribunal may give such directions as it considers appropriate for that purpose.

(3) The Tribunal shall exercise its power under this rule taking into account all the relevant circumstances, including—

(a) the urgency of the matter;

(b) the effect on the party making the request if the relief sought is not granted; and

(c) the effect on competition if the relief is granted.

(4) Any order or direction under this rule is subject to the Tribunal's further order, direction or final decision.

(5) …"

24. The relevance of the Tribunal rules is that this court has power to make any order that the lower court could make: see Senior Courts Act 1981 section 15(3) and CPR rule 52.10(1). A "lower court" includes a tribunal from which an appeal is brought: see CPR rule 52.1(3)(c). Thus the Court of Appeal has all the powers that the Tribunal had, in relation to and incidentally to the appeal brought from the Tribunal.

The basis of the application

25. On behalf of Ryanair, the application was presented by reference to rules 19 and 61, and to section 120(5), and also with reference to the court's inherent jurisdiction. The case made is that it would be in the public interest that the investigation should be stayed pending the appeal, in order to avoid the unnecessary waste of public (and private) resources, if the OFT were to refer and the CC were to undertake its own investigation, and later the appeal were allowed so that all the time and effort devoted to the process, on the part of both the regulators as well as of the various interested and affected parties, would have been incurred to no good purpose. Ryanair also contended that it would be seriously damaging to Ryanair if the OFT were to make a reference to the CC, though it is fair to say that Lord Pannick did not press this aspect of the matter in his oral submissions before us.

26. I will say a little more about the facts when I come to deal with the exercise of the discretion. First I must explain our conclusion on jurisdiction. Although the case is distinctly unusual, the points argued may be of wider importance.

Jurisdiction to order the suspension of the time for the investigation

27. The difficulty which the application faces is that the Enterprise Act sets out the relevant time limit as an integral part of the definition of the creation of a relevant merger situation, in section 24, and specifies a variety of circumstances in which the time can be extended, in section 25. How is it, then, one asks, that the court or the Tribunal can have power, not provided for in those sections, to suspend the running of time in other circumstances?

28. Lord Pannick contended that such a power must be capable of being found, in order to avoid potential situations of real injustice, and of the thwarting of the public interest under the Act. He relied on a hypothetical converse of the present situation. Suppose that on 30 November 2011 the OFT decided not to refer the case to the CC. Aer Lingus would be entitled to appeal against that decision, under section 120. On such an appeal, if successful, the Tribunal would have power to allow the appeal and refer the matter back to the OFT with a view to it making a new decision. It would also have to be able to revive the time period which would have expired in the meantime. Otherwise its order allowing the appeal would be of no practical effect, and the right of appeal would be nugatory.

29. If, therefore, the Act or the rules have to be understood as conferring an implicit power in this sort of case to revive a statutory time period which has expired in the meantime, then, he contended, it should also be read as conferring an equivalent power in other cases, exercisable for good reason. The present case is not so stark as his hypothetical converse, because Ryanair's position would not be irrevocably prejudiced if a reference were made in time, in the way that Aer Lingus' would have been if time had run out during an appeal on its part and if the time period could not be revived thereafter. But as a matter of jurisdiction, he said, the reading of the Act as subject to an implicit power, in effect, to alter the operation of the time limit must cut both ways.

30. In support of his starting point that on allowing an appeal under section 120 the Tribunal's order would not be frustrated by the fact that any statutory time limit for

action had expired in the meantime, he showed us the decision of the Tribunal in *Tesco plc v Competition Commission* [2009] CAT 9. In that case, where the relevant powers were under Part 4 of the Enterprise Act, dealing with market investigations, the Tribunal allowed an appeal against a report by the CC and referred it back to the CC. Tesco argued that there was no scope for a reference back because the statutory time limit applicable in that case, which was 2 years under section 137(1), had run out in the meantime. The Tribunal (Mr Justice Barling, President, Professor John Pickering and Mr Graham Mather) held that a decision made pursuant to a referral back by the Tribunal would be a new decision to which the original statutory time limit would have no application. I quote paragraphs 27 and 28 of their ruling:

> "27. It seems to us that the fallacy in Tesco's submissions lies in the suggestion that the time limit in subsection 137(1) has any application once the original report has been prepared and published. As we have said, that limit is inapplicable to the power to grant relief under subsection 179(5), and to any decision of the Commission made pursuant to such relief.
>
> 28. Further, for the reasons set out above (paragraphs [15], [23] and [24]), if Tesco's interpretation were correct the result would be that a fundamental aspect of the relief apparently available in section 179(5) would, in effect, become a dead letter so far as a Commission recommendation for remedial action is concerned. The Commission would be deprived in very many (probably virtually all) of such cases of an opportunity to reconsider the quashed aspects of its report. For the Tribunal to be able merely to quash, in circumstances where the matter could usefully be reconsidered and a new decision taken by the Commission, could well result in a waste of some or all of the effort and resources expended on the particular market investigation."

31. The same applies by analogy to Part 3 of the Act dealing with mergers, relevant to the present case. Accordingly, if the OFT were to refuse to refer and Aer Lingus were then to appeal successfully, the Tribunal would refer the matter back to the OFT for a new decision, to which the original statutory timetable would not apply as such. That is not the same as saying that the Tribunal, on allowing the appeal, could revive and extend the statutory time period. It is more flexible than that. Nevertheless it shows that the statutory timetable regime is not altogether comprehensive and definitive; it is not the whole story.

32. It is common ground that, if the OFT were to refer the matter to the CC, and if Ryanair were to appeal to the Tribunal against that decision under section 120, the Tribunal would have power under rule 61(1)(a) to suspend the effect of the decision, which would include power to suspend the running of time for the investigation by the CC. One of Mr Flynn's arguments for Aer Lingus was that this would be the right approach. He said that the OFT should not be required, or permitted, to pause in their own investigation and should decide whether or not to refer by 30 November 2011. If they did refer, then no doubt Ryanair would appeal, and it could then apply to the Tribunal for an order under rule 61(1)(a). Whether such an order would be made would depend on the circumstances as they seemed at that time.

33. Another related point made by Lord Pannick (though relevant more to discretion than to jurisdiction) was that, unusually for a merger investigation case, there is no urgency about the present situation. Ryanair has had its minority stake in Aer Lingus since 2006. Nothing will turn on whether the OFT's investigation and, if applicable, an investigation by the CC is processed immediately or subject to some delay, such as a suspension of the running of time would create.

34. Reverting to the issue of jurisdiction, Lord Pannick argued, for reasons already indicated, that the court should approach the present issue on the basis that there must be some implied power or powers for the Tribunal to override the statutory provisions for the running of time, by suspending the period or even reviving it (or creating a new time scale) after a successful appeal. On that basis he also submitted that the court should not be unwilling to find that there is an incidental power to suspend the running of time during an appeal.

35. It is to be noted that, before the Enterprise Act, any challenge to a preliminary decision of the Director-General of Fair Trading in merger cases would have been brought by an ordinary judicial review application in the Administrative Court. In such a case it would, no doubt, have been possible to apply in that court, incidentally to the judicial review application, for interim relief, including a stay of the regulator's proceedings pending the decision on the judicial review application. With that as a possible precedent (even though, so far as I know, never invoked) it would not be surprising to find that such a power exists in the statutory regime introduced by the Enterprise Act. However, the question is where to find it, what it is and on what basis it may be exercised.

36. Lord Pannick and Mr Beard supported each other in their submissions in favour of there being a relevant power for the Tribunal. They differed in the order in which they advanced the various possibilities, and in the weight given to some of them. I propose to deal only with the statutory and rule-based powers, and to do so in what seems to be a convenient order.

37. The first candidate as the source of the power is rule 61(1)(a). Lord Pannick submitted that the "effect" of the decision in this rule means its practical effect and that, on that footing, the effect of the OFT's decision was that the OFT had until 30 November 2011 to make a reference. He therefore argued that this effect could be suspended so as to defer the deadline for a reference. I do not accept that argument. It seems to me that the decision that the OFT's investigation was in time is a quite different kind of decision as compared with, for example, a decision to refer the matter to the CC. It was certainly necessary for the OFT to decide that the time had been suspended under section 122 because of the appeals to the General Court, in order that the OFT's investigation begun in 2010 should continue and be concluded, in whatever way it would be. But either the time had been suspended or it had not; that was a question of law depending on the underlying facts. In one sense the decision had an effect, because if it had gone the other way, the OFT would have supposed (rightly or not) that it could not continue or complete its investigation. In another sense, it had no effect, because if the OFT had been wrong then, if the decision were successfully appealed, it would have been shown to have been wrong, invalid and ineffective. The running of the statutory time is the result of the underlying facts, not of the OFT's decision. In my judgment, rule 61(1)(a) is concerned with substantive decisions by regulators to exercise (or not to exercise)

their regulatory powers in particular ways, for example here by making a reference to the CC, or not to do so, and with the effect of such decisions, e.g. by imposing on the CC the duty to make its own investigation. I do not think that the Tribunal could have suspended the running of time under the Act for the OFT's investigation in the present case in reliance on this rule.

38. The next provision to examine is rule 61(1)(c). Lord Pannick submitted that the Tribunal would have power in its final decision on a relevant appeal to extend or revive the time period, for example under section 120(5) in the hypothetical example of an appeal by Aer Lingus against a decision not to refer. Therefore, he said, the rule conferred power to make a similar order on an interim basis. It was not limited to making, as an interim order, the same order, or a version of an order, such as could be made at the end of the day in the particular appeal. He accepted that, in the appeal now pending before this court, either the appeal will succeed, with a declaration that the OFT investigation was out of time, so that no further step is necessary or possible, or it will not succeed, in which case the investigation already under way will have been properly started. If it had resulted in a reference to the CC by that time, the CC's own investigation would continue, subject to any further proceedings directed at that investigation and the OFT's decision to refer. There would be no need or scope at that stage for an order adapting the time limit in any way. But he argued that the fact that an order extending the time limit would be possible in some appeals under the section, such as in a hypothetical converse appeal by Aer Lingus suggested above, means that it could be made, on an interim basis, in any appeal.

39. Mr Beard supported this submission. He pointed out that it is not always clear at any given time quite what the ambit of an appeal is, so that there might be uncertainty as to the scope for an eventual final order. He also argued that the rule should be understood as allowing an interim order to be made even if it was of a kind that would not be granted as a final order at the conclusion of an appeal. An example he gave was where a merger has been completed, without clearance, and subject to an investigation, but the merging parties start to integrate the businesses, taking steps which it would be very difficult to unravel if the final decision were to rule against the merger on competition grounds. The OFT would have power to take action in such cases under sections 71 and 72 of the Enterprise Act, but he suggested that the Tribunal should have power to require the parties to keep businesses separate in order to hold the ring pending the decision on the appeal. That would not be the sort of order that could be made as a final order because, at the final stage, the Tribunal would not hold the ring. Depending on what decision was under appeal, either the OFT's decision would stand, or it would be referred back for a new decision to be taken. It occurs to me that, even in such a case, it might be desirable to continue protective measures, if a new decision was to be required which might lead to the merger not being approved, and having to be unwound, but I see Mr Beard's point that there may be cases in which a temporary order is needed which, of its nature, would not be granted on a permanent basis at the conclusion of the appeal in question.

40. It might be said, to justify that position, that the power should be taken to extend to something which is ancillary to the claim in the appeal, and which is necessary or desirable on an interim basis in order to prevent the effect of the appeal being pre-empted, which might cover such protective steps as Mr Beard postulated. If that were correct, it might then be said that an order suspending the running of time could itself

be justified as within the rule on the basis that it was needed as ancillary to the appeal. I do not wish to decide this point, because I consider that there is a different power which does give the Tribunal the power which is invoked on this application. However, I am doubtful about the ambit of rule 61(1)(c) for this purpose. The question is whether the order would, on an interim basis, grant a remedy which the Tribunal would have power to grant in its final decision. Going back to Mr Beard's example of a protective interim order requiring business to keep certain operations ring-fenced, that might, in a sense, grant on an interim basis a remedy equivalent to that which the Tribunal would grant in its final decision if the final decision were to uphold a refusal by the OFT to approve the merger, with the result that the completed merger might have to be unravelled and disentangled following the CC's investigation of the merger.

41. In principle it seems to me that the power conferred by this rule is one which allows the Tribunal to anticipate on an interim basis the sort of order that it might make at the end of the day in the particular appeal. It does not confer on the Tribunal to make, as an interim order, a version of an order that could not arise at the end of the day. It seems to me that "its final decision" in the rule means the final decision in the particular appeal. I can see scope for some flexibility in understanding what is, on an interim basis, the grant of a remedy which might be given on the determination of the final appeal. But I am not confident, to put it at its lowest, that the rule would permit the order sought suspending the running of the statutory time period. Nothing that I have said about this rule is necessary to my decision in this case.

42. Then we come to rule 61(2). The arguments about this rule turned partly on its wording, including the ambit of the word "directions", and partly on its source, in section 35 of the 1998 Act. Mr Flynn argued that the rule could not be read as wider than the section, and that because no question could arise under section 35 of giving a direction to a regulator such as the OFT (because under section 35 the direction is to be given by the OFT), then likewise the power under rule 61(2) is similarly constrained. I do not accept that argument. The ambit of the rule is to be judged from its context in the Tribunal rules. As such it must allow the Tribunal to give a direction to the OFT if it thinks it appropriate. Section 35 is concerned with action taken by the OFT in the course of an investigation. Where rule 61(2) applies, the investigation will have taken place, will have resulted in a decision and the decision will be subject to appeal. There may be an analogy with section 35 because the effect of the regulator's decision may have been suspended, under rule 61(1)(a), leaving the public or particular undertakings unprotected by the effect of the regulator's decision in the meantime. Rule 61(2) empowers the Tribunal to give temporary protection to the public or to given persons, if justified according to the test imposed by the rule.

43. We were shown a decision of the Tribunal about rule 61(2): *BT and Everything Everywhere Ltd v Ofcom*, [2011] CAT 28. That was a ruling by the Tribunal (Mr Marcus Smith Q.C., Mr Peter Clayton and Professor Paul Stoneman) on an application by an intervener for a stay, pending a possible appeal, of a ruling made by the Tribunal. The details do not matter. Neither of rules 61(1)(a) or (c) was relevant. In particular the decision, for the purposes of rule 61(1)(a), was the decision which had been appealed to the Tribunal, not the decision of the Tribunal itself, but it was the latter decision that was sought to be stayed. The Tribunal said this about rule 61(2) at paragraph 22 of its ruling:

> "Rule 61(2) is expressed to be "without prejudice to the generality" of Rule 61(1), but is itself confined to the giving of "directions". Rule 19 of the Tribunal Rules describes the directions that the Tribunal may give. In *BCL Old Co Ltd v BASF SE* [2010] EWCA Civ 1258, the Court of Appeal found that Rule 19(2)(i) of the Tribunal Rules, which refers to the "abridgment or extension of any time limits", did not empower the Tribunal to grant an extension of time in damages actions. In *Office of Communications v Floe Telecom Limited* [2006] EWCA Civ 768, the Court of Appeal held that the Tribunal did not have the power to impose a timetable on a regulator for a re-investigation because there was no continuing appeal in relation to which the Tribunal's Rule 19 powers were exercisable. These decisions demonstrate that there are limits to the "directions" the Tribunal can give. Thus, although on one reading, Rule 61(2) could mean that the Tribunal could direct anything, provided that it considered such direction necessary for the purposes articulated in Rule 61(2), we consider such an expansive reading to be unlikely. Moreover, the fact that Rule 61(2) is "without prejudice" to Rule 61(1) suggests that it is narrower in scope, and that it is simply a provision inserted for the avoidance of doubt, making clear that the Tribunal's existing powers (conferred otherwise than by way of Rule 61(2)) should be exercised in order to prevent serious, irreparable damage to particular persons or category of persons or in order to protect the public interest."

44. The Tribunal held that power to grant a stay did exist, though not under this rule, but that it should not be exercised.

45. I respectfully disagree with the observations of the Tribunal in that passage as to the width of the power under the rule. I see no reason why the meaning of the word "directions" in rule 61(2) should be affected by the width of the particular case management directions which are set out in rule 19(2), or whatever is the width of the phrase "such other directions as it thinks fit" in rule 19(1). I consider that the word "directions" is potentially wide in its meaning, but that what the particular scope of the word is must be judged by the context in which it is used. In rule 19 the context is of case management. I do not resile from what I said about the scope of particular paragraphs of rule 19(2) in *Floe Telecom* and in *BCL Old v BASF*, mentioned in the passage cited (subject to one point which I will mention below about *Floe Telecom*). But the context of case management in rule 19 is not by any means the same as that of interim measures to secure the protection of particular interests under rule 61(2).

46. I also disagree with the proposition that the opening words, "without prejudice to the generality of" rule 61(1), show that rule 61(2) is narrower than rule 61(1), or that it is there for the avoidance of doubt. I suspect that, in making that comment, the Tribunal may not have been aware of the particular provenance of rule 61(2), from the 1998 Act via paragraph 22 of Schedule 4 to the 2002 Act. Rule 61(2) is a free-standing provision, to be interpreted on its own terms. Its opening words are there to preclude an argument that its width cuts down or otherwise affects the width of rule 61(1). As it seems to me, a possible reason why rule 61(2) could not itself justify a stay of the Tribunal's own order may be that, like rule 61(1), it is directed at interim relief, i.e.

relief pending the Tribunal's own decision, not at relief pending an appeal against that decision.

47. Mr Flynn also submitted that, even if the rule is not limited in the same way as section 35 of the 1998 Act, nevertheless a "direction" means a direction to some person to do something, or not to do something, and it does not include a provision at large or in the air, so to speak, such as that time shall cease to run under the relevant sections. That does not tell anyone to do something or not to do something, and is therefore not to be understood as a direction, according to his argument.

48. I do not accept that argument. It seems to me that to differentiate between making an "order", under rule 61(1), and giving a "direction" under rule 61(2), would be to attribute far too much significance to a semantic point with no real substance. Given the variety of matters covered by the three different subparagraphs of rule 61(1) it was natural to use the word "order" there. The word "direction" in rule 61(2) was no doubt used because of its use in the source provision, in the 1998 Act. However, as I have said, the context of the Enterprise Act is clearly different and, in some ways at least, wider than that of the 1998 Act, not least because it is the Tribunal that is to give the direction, and could give such a direction to the OFT. It seems to me that for the Tribunal to ordain a particular effect in relation to a situation, such as the running (or not) of time for relevant purposes, is just as much a "direction" as is an instruction to one party to do, or refrain from doing, a particular thing.

49. Rule 61 does refer separately to "order" and "direction" in most contexts, such as paragraphs (4) and (5). I note that in paragraph (10) the punctilious distinction is not maintained throughout:

> "(10) Subject to paragraph 11, an order or direction for interim relief may be made against a person who is not a party to the proceedings, provided that no such order may be made unless that person has been given an opportunity to be heard."

50. I am not surprised that, in the end, the draftsman did not think it necessary to repeat "order or direction" every time. In substance the two words mean the same thing. The fact that a direction may be made against a particular person, as is shown by that paragraph, does not mean that it cannot be made in more general terms.

51. I see no good reason, from the context of rule 61(2), why "direction" should be construed in a narrow way as limited to a requirement addressed to a person or persons to do, or not to do, something. The provision is limited by its own terms, by reference to the statutory protective purpose and the need for necessity and urgency. Otherwise it is expressed quite generally. The fact that the making of this rule was authorised specifically in the primary legislation, in paragraph 22(2) of the Fourth Schedule to the Enterprise Act, may be regarded as assisting in the view that it can be read as allowing another provision of the primary legislation to be modified in its effect.

52. In my judgment, it is of a width such that, if the statutory criteria are satisfied, this rule does enable the Tribunal to direct that the running of the statutory time period shall be suspended pending the determination of the appeal. A direction given under the rule can include a direction given, so to speak, at large, which affects the parties

involved in the proceedings but does not directly require any of them to act, or to refrain from acting, in any particular way. That does amount to the expansive reading of the rule which the Tribunal thought unlikely in the passage quoted above. It seems to me that it is justified.

53. Having come to the conclusion that rule 61(2) is wide enough to enable the Tribunal, and therefore the Court of Appeal, to suspend the running of time, I need not spend much time on the other points which were relied on for the same purpose.

54. Rule 19(1) and rule 19(2)(i) and (j) were shown to us, subparagraph (j) in particular as being related to section 120(5). Rule 19(1) is a general provision about case management: it allows directions to be made, whether as specified in paragraph (2) or not, "to secure the just, expeditious and economical conduct of the proceedings". I accept Mr Flynn's submission that this does not authorise the Tribunal to do anything to affect a separate and continuing operation by a regulator such as the OFT. I do not see how that could be said to be within the scope of the words which I have quoted from paragraph (1).

55. Rule 19(2)(i) allows the extension or abridgement of time limits. For reasons similar to those which led me, in *BCL Old v BASF*, to conclude that this does not permit the alteration of the time limit for bringing a follow-on action for damages, it seems to me that it cannot suffice to allow the alteration of statutory time limits for merger references. It deals with procedural time limits for the management of cases before the Tribunal.

56. Rule 19(2)(j) deals with directions for referring back to the decision-maker a disputed decision. In *Floe Telecom* I said at paragraph 29:

> "Of course, if the decision is not remitted to the regulator, but the power under rule 19(2)(j) is used to refer some point back in a pending appeal, then rule 19 will apply and, for example, the CAT can give a direction as to the time within which the matter so referred is to be dealt with. This was not such a case."

57. I am not now sure that rule 19(2)(j) does apply while proceedings are continuing in the Tribunal. On the face of it a decision can only be taken again if the previous decision has been quashed. If it has, it seems likely that the appeal proceedings will have come to an end. It is unnecessary to come to a firm conclusion on this for present purposes, any more than it was in that case. There may possibly be an analogy with CPR rule 52.10(2)(b) under which an appellate court can refer any claim or issue for determination by the lower court. I make this comment merely to record that the position may not be as simple as I thought in *Floe Telecom*. After the hearing my attention was drawn to *Argos v OFT* [2003] CAT 16, a decision of the Tribunal under the 1998 Act in a cartel case, in which the then equivalent of rule 19(2)(j) was regarded as available for use in relation to a pending appeal, at paragraphs 89 to 97, and to *Albion Water v OFWAT* [2006] CAT 36, a case about abuse of a dominant position, where the Tribunal considered at paragraphs 275-278 what I had said in *Floe Telecom* and held that the power was available on an interim basis. Maybe my current hesitation about the rightness of what I said in *Floe Telecom* is either unjustified or irrelevant, but it seems to me right to record it, for what it may be worth.

58. If the rule is only concerned with the outcome at the end of the appeal proceedings, then it can be of no assistance for present purposes. It would not add anything, on that basis, to section 120(5) itself. But even if it has some application while the appeal to the Tribunal is still pending, I do not see that this can assist on the issue before us. If the provisions of rule 61 were not sufficient, I cannot accept that the solution would be found in the case management provisions of rule 19.

59. Lastly, some reference was made in the skeleton arguments to the inherent powers of the Court of Appeal, in particular the power to prevent the frustration of access to the court on the part of someone who is entitled to appeal to the court, or to apply for permission to appeal. The analogy put was with the decision in *YD (Turkey) v SSHD* [2006] EWCA Civ 52, [2006] 1 W.L.R. 1646. All I need say about this is that the case is very different indeed from *YD (Turkey)* and there is no risk of a party's right of access to this court being frustrated. Rightly, the inherent jurisdiction of the court featured hardly at all in oral submissions at the hearing. It offers no assistance if the statutory provisions do not.

60. Accordingly, my conclusion is that rule 19 does not suffice, and nor does rule 61(1)(a). I express no final conclusion about rule 61(1)(c). The basis on which I proceed is that rule 61(2) does allow the Tribunal to make the order sought, as a matter of discretion, if the conditions are met.

Are the conditions under rule 61(2) satisfied?

61. There are three distinct elements to the requirements of the rule. The direction must be considered necessary, as a matter of urgency, for one or other (or both) of the two specified purposes. The first purpose is to prevent serious irreparable damage to a particular person or category of person. In written submissions Ryanair contended that the direction was necessary to protect it from such damage. I was not persuaded by those arguments, and Lord Pannick did not focus on this aspect of the matter in his oral presentation. The second purpose is put more generally as the protection of the public interest.

62. The protection of the public interest which, it was argued, ought to be achieved in the present case is the avoidance of either or both of (a) a waste of time and effort on the part of the OFT and the CC, and of the parties involved in their respective investigations, and (b) specifically a duplication of proceedings, if the OFT were to refer the matter to the CC, that then being followed by a prompt appeal by Ryanair to the Tribunal against the decision to refer, and an application by Ryanair, incidentally to that appeal, for an order under rule 61(1)(a) suspending the effect of the decision.

63. As regards the first of these points, in relation to the OFT not a great deal of further effort would have been involved between the date of the hearing on 24 November and the decision whether or not to refer, no later than 30 November. However, clearly some resources of the OFT would have been devoted to the matter in those days, which would not be needed at that stage if the clock were stopped. In turn, if the decision made were to refer it to the CC, then the CC in turn would have to devote considerable resources to its investigation, which would also involve a good deal of effort on the part of the parties affected, unless and until the clock for that separate process were stopped by an order under rule 61(1)(a). If Ryanair were to succeed in its appeal, the resources so applied to the investigations would turn out to have been

incurred unnecessarily, and wasted. It was said to be in the public interest to avoid such a waste, particularly on the part of regulators, but also, incidentally, as regards the parties involved in the investigations.

64. As for the second point, it was seen as highly likely, to say the least, that if the OFT did refer to the CC, then Ryanair would appeal against that decision to the Tribunal, and would also apply for the clock for the CC's investigation to be stopped under rule 61(1)(a). Whatever may be the position ordinarily on such an appeal, there might be a strong case for such an order in the present case, since the outcome of the appeal to the Court of Appeal which is already on foot might be to show that the reference to the CC should never have been made at all, whatever might be the merits otherwise. The effect of the time limits applying to the CC's task, absent such an order, is that the basic 24 week period would expire in mid-May 2012, some few weeks after the date when the appeal is now due to be heard, and even with the one permitted extension of 8 weeks, the task would need to be complete by mid July 2012. Thus, on any basis, a great deal of the CC's work would have to be done while the position remained uncertain due to the pending appeal. That might well help to make out a strong case for an order under rule 61(1)(a), at least pending the determination of the present appeal. If, therefore, such an order could be seen as likely at that stage, it might be seen as somewhat formalistic, at the lowest, and as requiring avoidable duplication of effort and expense, to leave the question of a suspension of the investigatory process to be dealt with at the next stage rather than grasping that nettle now.

65. The requirement of urgency is easily satisfied, since, if the process was to be stopped in its tracks, this had to be done before 30 November 2011, that is to say either on the date of the hearing of the application or at the latest within the next very few days.

66. The question of necessity seems to me also to be satisfied, in that the only way in which the postulated waste of public (and private) resources could be avoided would be by the course suggested, of suspending the running of time for the OFT's investigation. Otherwise the OFT would have no choice but to continue its process, and, assuming that it were to decide to refer the matter, equally the CC would have no alternative but to commence its own investigation.

67. In my judgment the objective of avoiding the waste of public resources (and incidentally also private resources) and unnecessary duplication, identified in paragraphs [63] and [64] above, is properly to be regarded as a protection of the public interest, for the purposes of rule 61(2)(b). It is not in the public interest that regulators should be exposed, avoidably, to a risk of devoting resources, which are no doubt under pressure from competing demands, to a task which, as it may turn out, they ought not to be undertaking at all. It is an unusual case, because of the continuing uncertainty, pending the outcome of the present appeal, and it may be that, on the facts, there will never be another case like it. But I am satisfied that in the present case the aim of saving the possible waste of public resources in this way is a way of protecting the public interest, within the scope of the rule.

68. Mr Flynn submitted that, even if it were open to the court to make the order sought (contrary to his primary submissions) we ought not to do so as a matter of discretion, but we should leave the OFT to take its course. In that event if (as Aer Lingus no doubt hoped) the OFT were to refer the matter on or before 30 November 2011, the

consequences described at paragraph [64] above would be very likely to follow. It is relevant to the exercise of the discretion that this is not a case in which the underlying exercise is urgent, unlike many merger cases. On balance it seemed to me that it would be right to use the court's power, identified as I have explained, to avoid the potentially unnecessary waste of the resources of the OFT (to a relatively modest extent) and, more substantially, of the CC, and incidentally of the parties involved in the investigations, and also to avoid the unnecessary duplication of proceedings.

69. For those reasons, at the end of the hearing before us, I considered that it was appropriate to make the direction sought, as being necessary (see paragraph [66] above) as a matter of urgency (see paragraph [65] above) for the purpose of protecting the public interest, as identified in paragraphs [62] to [64] above.

70. The parties' respective skeleton arguments included some contentions as to what the right test ought to be for the grant of interim relief of this kind, with arguments by reference to *American Cyanamid v Ethicon* [1975] AC 396 on one side, and to *Genzyme v OFT* [2003] CAT 8 on the other. I do not propose to get into that question. Rule 61(2) has its own requirements which, if satisfied, give the Tribunal the discretion to make a direction appropriate for the stated purpose. That seems to me a sufficient framework and guidance for the task which would face the Tribunal on such an application, and which therefore faced us on this application.

The terms of the order

71. Ryanair, in agreement with the OFT, proposed an order under which Ryanair would give an undertaking in damages, and the OFT would refrain from continuing with its investigation in the meantime, though leaving open the possibility of invoking interim measures under sections 71 and 72 of the Enterprise Act if necessary by way of interim protection. That would enable it to act if it considered that Ryanair was trying to take advantage of the standstill to improve its competitive position.

72. Aer Lingus contended that different protection should be afforded as a condition of the order, if one was to be made at all, for which purpose it made its own cross-application for interim relief. It complained that Ryanair has been acting as a disruptive shareholder since it acquired its large minority stake, that it is still so acting, and that if the investigation process is delayed, it is likely to go on acting in this way for the future. It therefore sought orders that Ryanair should not take certain types of action with reference to its position as shareholder without the consent of the OFT. These included exercising any of its voting rights, bringing litigation or making complaints against Aer Lingus on the basis of alleged infringement of Ryanair's rights as shareholder, seeking access to commercial information of Aer Lingus other than that which is generally available to the company's shareholders, or disposing of Ryanair's shares.

73. It seemed to me that sufficient and appropriate protection could be given to Aer Lingus by the preservation in the order sought by Ryanair of the OFT's powers to act under sections 71 and 72. To give greater and more detailed protection to Aer Lingus, as it sought, would go considerably further than was justified by the need to ensure that protection was available for Aer Lingus against inappropriate advantage being taken by Ryanair of the delay during the period while the investigation would be in

abeyance as a result of the proposed order. Accordingly, the court's order was made on the terms proposed by Ryanair and the OFT, not those sought by Aer Lingus.

74. The court's order suspended the running of time under section 122 (or, if and to the extent relevant, section 24) pending the determination by this court of Ryanair's appeal. We did not have any submissions as to what the position would be if the appeal is dismissed, showing that the OFT's investigation was brought in time and should therefore be pursued to a decision. Mr Flynn laid down a marker on that point in the course of his submissions by observing that if the OFT is to resume its process at that stage it will have to consider the position as it then stands, and will need to consult again, for which they would need more than the few days that were left of the statutory period as at 24 November 2011. Not having had submissions about this, I say no more about it than that the Court of Appeal will need, in that event, to consider what it can and should do in order to allow the OFT to complete its statutory functions and duties.

Lord Justice Elias

75. I agree

Lord Justice Kitchin

76. I also agree.