C3/2012/0690

Neutral Citation Number: [2012] EWCA Civ 1077
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 26 July 2012

B E F O R E:
LORD JUSTICE MUMMERY
LORD JUSTICE RIMER
LORD JUSTICE SULLIVAN

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BAA LIMITED

Appellant

and

COMPETITION COMMISSION

Respondent

and

RYANAIR LIMITED

Intervener

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MR N GREEN QC AND MR M CHAMBERLAIN (instructed by Herbert Smith LLP) appeared on behalf of the Appellant

MR BATES (instructed by The Treasury Solicitors Department) appeared on behalf of the Respondent

MR P HARRIS QC AND MISS S LOVE (instructed by Nabarro LLP) appeared on behalf of the Intervener

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Judgment

1. **LORD JUSTICE MUMMERY:** I will ask Lord Justice Sullivan to give the first judgment.

2. **LORD JUSTICE SULLIVAN:** This is an appeal from the judgment dated 1 February 2012 of the Competition Appeal Tribunal ("the Tribunal") dismissing BAA's application under section 179 of the Enterprise Act 2002 ("the Act") for review of the Competition Commission's ("the Commission") decision, dated 19 July 2011 ("the 2011 report") requiring BAA to divest itself of Stansted airport. The background to the 2011 report is set out in detail in the Tribunal's judgment [2012] CAT 3. In summary, the commission published a report on 19 March 2009 ("the 2009 report") in which it found **inter alia** that BAA's common ownership of Gatwick, Heathrow and Stansted created an adverse effect on competition ("AEC"). In order to remedy that AEC, BAA was required to sell Gatwick and Stansted. It was also required to sell one of its two Scottish airports. BAA started to sell Gatwick, but the sale of Stansted was put on hold because BAA challenged the 2009 report in statutory judicial review proceedings before the Tribunal on two grounds: (i) bias, and (ii) failure to take account of material considerations when assessing the proportionality of the requirement to sell three airports ("the divestiture remedy"). The Tribunal allowed the application on the first ground, bias, but dismissed it on the second. On appeal to the Court of Appeal, this court allowed the Commission's appeal against the Tribunal's decision on the first ground on 13 October 2010, see [2010] EWCA Civ 1097. There was no cross-appeal by BAA against the Tribunal's rejection of its second ground of challenge. Although it had been concluded that the 2009 report was a lawful report, time had elapsed since the publication of the 2009 report, as a result of the appeal process, so the Commission consulted on the question whether there had been any material change of circumstances ("MCC") which would justify a departure from the remedies it had decided upon in the 2009 report. BAA was, of course, one of the consultees. After a first round of consultation, the Commission published a provisional report. After a second round of consultation on the contents of the provisional report, the 2011 report was published by the Commission. By that time, Gatwick had been sold; the 2011 report confirmed that BAA should sell Stansted, and one of its Scottish airports. There is no challenge to the latter requirement before the Tribunal; BAA's challenge to the Commission's 2011 report was confined to the requirement to sell Stansted.

3. Before the Tribunal, BAA challenged the lawfulness of the 2011 report on four grounds. The Tribunal rejected all four grounds. In this court, there are two grounds of appeal against the Tribunal's decision. Before considering those grounds, it is helpful to outline the structure of the Tribunal's lengthy decision, which runs to 92 paragraphs. Having set out the background to the challenge to the 2011 report in an introduction to the judgment, the Tribunal set out the legal framework in paragraphs 16 to 21 of its judgment. It then summarised the relevant findings in both the 2009 and the 2011 reports in paragraphs 22 to 42 and 43 to 59 respectively.

4. Against that legal and factual background, the Tribunal analysed and rejected the four grounds on which BAA challenged the lawfulness of the 2011 report. Before this court, there is no challenge to the Tribunal's statement of the applicable legal principles. For present purposes, two of those principles are relevant. First, it was common ground

that the divestiture remedy had to satisfy the principles of proportionality. The agreed formulation of the proportionality test for this purpose was as follows:

"... the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued ..."

5. Secondly, the Tribunal said that when giving reasons for its decision, the Commission was required to do so in accordance with the familiar standards that were set out by Lord Brown in **South Buckinghamshire District Council v Porter** (No 2) [2004] UKHL 33. Having set out the relevant passage from Lord Brown's speech, the Tribunal said this in paragraph 20 of its judgment:

"In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the Commission with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see **R v Monopolies and Mergers Commission**, **ex p. National House Building Council** [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the Commission must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

6. Subject to the matters raised in BAA's two grounds of appeal, see below, there is no criticism of the Tribunal's account of the factual background to the section 179 challenge, or of its summary of the relevant parts of the 2009 and 2011 reports. I turn to the two grounds of appeal. In its first ground of appeal, BAA contends that the Tribunal erred in rejecting ground 4 of its challenge before the Tribunal. The grounds of appeal to this court are somewhat discursive. The two grounds are explained in no less than 44 paragraphs. Paragraph 9 of the grounds summarises BAA's position in this way:

"By its ground 4, BAA submitted that the Commission failed properly to take into account a significant cost to it, namely the loss attributable to the fact that any sale would be a sale under compulsion, even if sufficient time is allowed, so that it could not be described as a fire sale."

7. In its second ground of appeal, BAA contends that in paragraph 61 of its judgment the Tribunal misconstrued the 2009 report. It is convenient to consider this ground before examining ground 1. In paragraph 60 of its judgment, the Tribunal referred to the submissions of Mr Green QC, who appeared on behalf of BAA before both the Tribunal and this court, that circumstances had changed so much by the time of the 2011 report that the AEC identified in the 2009 report had ceased to exist in any significant way, so that the divestiture requirement was no longer a proportionate remedy. The Tribunal's response to this submission, in paragraph 61 of its judgment, was as follows:

8. "We reject Mr Green's submission. It ignored the implications of the CC's unchallenged findings in the 2009 report that in the London area there had been 'an almost complete absence of competition and almost total market failure' ... with 'plentiful evidence of monopolistic behaviour' on the part of BAA. It failed to give proper weight to the robust findings of the Commission in the 2009 report and carried into the 2011 report regarding the strong substitutability of Heathrow and Stansted (when looking at the scope for bilateral competition between them) and the strong substitutability of Heathrow, Gatwick and Stansted (when looking at the scope for development of a trilateral competitive dynamic between them all). It also failed to take into account the CC's assessment in the 2009 report and the 2011 report, in large part flowing from these findings, that substantial constrained capacity benefits could be expected to arise specifically from the divestment by BAA of Stansted (in addition to Gatwick)."

9. BAA's second ground of appeal alleges that in concluding that the 2009 report had found that there was "... strong substitutability of Heathrow and Stansted (when looking at the scope for bilateral competition between them) and ... strong substitutability of Heathrow, Gatwick and Stansted (when looking at the scope for development of a trilateral competitive dynamic between them all) ..." the Tribunal misconstrued the 2009 report and this was an error of law. An analogy was drawn with the court's approach to the construction of policy documents. In **First Secretary of State v Sainsbury's Supermarkets Limited** [2005] EWCA Civ 520, Sedley LJ, giving the judgment of the court, said in paragraph 16 that:

> "... the interpretation of policy is not a matter for the Secretary of State. What a policy means is what it says."

10. In my judgment, the analogy with the court's approach to the interpretation of a policy statement is not appropriate. Of course, the 2009 report means what it says, but what it says about substitutability is contained principally, but by no means exclusively, in section 3 of the report in 168 paragraphs (paragraphs 3.1 to 3.168) which run to 43 pages of closely typed text. The Tribunal's overall conclusions on this issue in paragraph 3.168 were as follows:

> "The analysis in this section has considered the substitutability of the BAA airports and non-BAA neighbouring airports for one another in two broad geographic regions - Scotland and the South-East. Overall we consider this evidence to suggest that the BAA airports are the closest demand substitutes for one another. However, we recognize that there may be external constraints that impact on the potential for competition even for very close demand substitutes, in particular the existence of capacity constraints. As a result, we look at the issue of capacity constraints in Section 4 and then consider the potential for competition between the BAA airports in the presence of capacity constraints and price cap regulation in Section 5."

11. The proper approach to such reasoning in the report is to be found in the South Buckinghamshire case (see above). The 2009 report must be read as a whole and in a common sense way. If that is done, it is immediately apparent that there is an air of unreality in BAA's submission that the Commission did not conclude that there was

"strong substitutability". If the Commission had not been satisfied that there was, at the very least, a significant degree of substitutability, it would have made no sense for it to have required BAA to divest itself of Stansted. The Tribunal should be very slow to conclude that the proper interpretation of a report is one which would lead to the conclusion that the Commission had arrived at a perverse result, where the remedy would be inconsistent with the interpretation placed upon the Commission's earlier conclusions.

12. Paragraph 61 of the Tribunal's judgment very briefly summarises in part of a single sentence the conclusions reached by the Commission in a lengthy section of the 2009 report. As such, it is a perfectly adequate summary of the Commission's conclusions as to substitutability. When the point was put to Mr Green during the course of his oral submissions, he accepted that in its 2009 report, the Commission had concluded that there was indeed strong substitutability. However, he then submitted that this conclusion in the 2009 report had been based on the premise that capacity constraint would be reduced by the provision of additional runway capacity, and the Tribunal had failed to appreciate that the position had changed in this respect by the time of the 2011 report.

13. In my judgment, there is no force in that submission. I have referred to the fact that there is no criticism of the manner in which the Tribunal summarised the contents of the 2009 and 2011 reports, save in the limited respect alleged in ground 2. The Tribunal was well aware of the MCC found by the Commission. In paragraph 58 of its judgment, the Tribunal set out the Commission's summary (in appendix A to the 2011 report) of the likely areas of benefit:

> "In summary, we consider that there are many sources of long-term benefit likely to begin in the near future from the divestiture of Stansted even in the absence of any new runway development. Service quality improvements, capital cost efficiency savings, operating cost efficiency savings and price competition are likely to be significant sources of benefits and these benefits are likely to be developed and sustained for at least 30 years."

14. The short answer to ground 2 is that the Tribunal in paragraph 61 of its judgment did not misconstrue what the Commission had said about substitutability in section 3 of the 2009 report.

15. I turn to ground 1. In his oral submissions, Mr Green described this ground as the "time cost" point. For my part, I confess that despite Mr Green's helpful submissions I found it difficult to pin down precisely what this "time cost" point really was. The Tribunal summarised its understanding of the point in paragraph 71 of the judgment:

> "Mr Green submits that the Commission failed properly to take into account a significant cost to BAA when carrying out the proportionality analysis leading to the conclusion that divestment of Stansted should be required. Mr Green accepted that the Commission devised a timetable for disposal which would give BAA a full and fair opportunity to market Stansted in an effective way so as to be able to obtain a fair market price for it. However, he submits that the Commission failed to make any

allowance, as it should have done, for the facts that BAA is to be subjected to a loss of freedom of choice about whether or when to sell and that economic prospects are poor at the moment, so that BAA will suffer by having to sell Stansted in poor market conditions rather than being able to wait until conditions improve, in the hope of getting a better price."

16. The Tribunal thought that this was a new point which had not been raised by BAA in the consultations leading up to the 2009 and 2011 reports, and it said in paragraph 75:

"In our view, it is not now open to BAA on this review to seek to introduce a wholly new submission and new expert evidence regarding a new head of alleged loss arising from a requirement to divest itself of Stansted and on a timetable less relaxed than it would like or choose. The new head of loss now proposed was not clear or obvious, nor was it to the mind of the Commission on the basis of its own consideration when it reached the decisions in the 2011 report. Therefore, there was no call for the Commission to consider this allegation of loss when reaching its decisions in the 2011 report and no legal obligation upon it to do so of its own motion. On the contrary, BAA was best placed to make representations about its own likely losses and the Commission was entitled to look to it to explain what losses it contended it would suffer and to support its contentions with relevant evidence. Having failed to present the Commission with any contentions or evidence regarding this alleged head of loss at the relevant time, it is not now open to it to complain that the Commission acted unlawfully by failing to address it."

17. If that was a correct conclusion, it is a complete answer to this ground of appeal.

18. Mr Green submitted, however, that the "time cost" point was not a new point. In his submissions in reply, he confirmed that BAA was not contending that the fact that any sale would be a sale under compulsion would result in a loss "per se". The fact that the sale would be a sale under compulsion would lead to a loss "only if it was coupled to a short timetable for divestiture". He submitted that the point was a "timetable point", which BAA had raised both in its challenge to the 2009 report and in its representations in the consultation on the 2011 report.

19. The difficulty with that submission is that if this was not a new point, and it is simply a timetable point which was raised by BAA in its representations to the Commission in 2009 and 2011, then the Tribunal considered the timetable issue in its 2009 judgment, [2009] CAT 35. In paragraph 206 of that judgment, the Tribunal described the issue as follows:

"The issue raised by BAA in this Ground is whether, in setting the timescale for the divestiture of Gatwick, Stansted and Edinburgh/Glasgow airports, the Commission properly applied the proportionality principles. BAA submits that, having recognised that the proposed divestitures would have a significant impact on BAA and that the timescale for divestment was a material consideration in the proportionality exercise which the Commission was bound to undertake, the Commission failed to conduct any analysis of the impact that the timescale would have on BAA, and failed to weigh that impact against any effect that a longer timescale would have on the effectiveness of the

divestiture remedy and in particular on when the benefits of that remedy would materialise. BAA submits that if the Commission had considered these matters it may well have come to a different decision; for example, it might have decided that it was not proportionate to require BAA to divest three airports in such a short timescale."

20. Having set out the parties' submissions on this issue, the Tribunal said in paragraph 249:

> "There is no doubt that on more than one occasion in the course of the Investigation BAA brought the risk of loss of value through timing issues to the Commission's notice. It would have been extraordinary if the Commission had not taken that risk on board: it is obvious that in the context of a compulsory sale the shorter the period allowed for the disposal the less freedom the vendor has to refuse a prospective purchaser's first offer or generally to attract suitable buyers into the market, and that this can clearly have an impact on the proceeds realised. Nor does the Commission dispute that the risk of such loss is a relevant factor of which account must be taken when considering the time-frame, and its proportionality. Did the Commission properly weigh these factors?"

21. In the succeeding paragraphs of its judgment, the Tribunal answered "Yes" to that question. In paragraph 259 it concluded:

> "If the aim of the Commission was to eliminate as far as possible the risk of depleted proceeds, as we have found, then it is not really surprising that the Report does not contain a qualitative or quantitative estimate of the loss which might be sustained if the Commission's objective had been different. For on this basis there would be no loss to put in the weighing scales, assuming that the Commission has accurately calibrated the timing so as to achieve its aim; the latter assessment would be a matter falling within the margin of appreciation of the decision-maker unless the decision were irrational or flawed on some other ground justiciable in judicial review. Equally, if the time already allowed was in the Commission's view sufficient to avoid significant loss, it is not surprising that the Commission did not ask itself whether, if more time was allowed, it would cause detriment to the realisation of the benefits."

22. BAA did not challenge that conclusion by way of cross-appeal to the Court of Appeal. Mr Green submitted that BAA were not in a position to do so, because this was a finding of fact by the Tribunal. But it seems to me that if the "time cost" point is a good one, namely that even if the timescale for the required sale of Stansted is calibrated so as to afford BAA an appropriate opportunity to obtain a fair market value for its asset, that is not good enough, and an additional period of time must be allowed in order for the divestment remedy to be proportionate, then it was a good point in 2009, and if BAA wished to contend that this was a legal flaw in the 2009 report, it should have cross-appealed against the Tribunal's conclusion in paragraph 259 of its 2009 judgment.

23. The challenge in these proceedings is of course to the 2011 judgment of the Tribunal. In paragraph 33 of its skeleton argument, BAA explained why it did not submit

evidence "relating to the quantum of the loss attributable to the fact of a forced sale" to the Commission:

"As far as it was aware, the loss had already been quantified by the Commission and found to be either nil or de minimis, and the Tribunal [in 2009] had upheld the Commission's reasoning in this respect."

24. Thus on its own case, BAA knew that the Commission's view (which the Tribunal had accepted in 2009) was that provided the timescale for sale was accurately calibrated so as to enable the market value of the asset to be obtained, there was no further loss to be put in the balance in the proportionality exercise. If BAA disagreed with that position, it should have said so in terms and supported its representations to the Commission with evidence in its responses to the two rounds of consultation leading up to the 2011 report. Based upon an exchange of letters between BAA's solicitors, Herbert Smith, and the Treasury Solicitor acting on behalf of the Commission, Mr Green submitted that there had been a change of position by the Commission and that this somehow explained BAA's failure to adduce evidence about this topic. In a letter dated 15 November 2011, Herbert Smith referred to BAA's defence and said:

"From our reading of the defence, we now understand that the Commission did not conduct any specific quantitative or qualitative assessment of the scale or scope of the loss which BAA might sustain as a result of being required to sell Stansted according to the divestiture timetable adopted. For example, the Commission conducted no analysis of the sort carried out by Mr Thun and received no report or analysis such as is set out in Professor Gregory's report. The explanation for this given in the defence is at paragraph 119, viz that there was no loss at all to BAA of being forced to sell under the conditions set out in the divestiture order."

25. The Treasury Solicitor's reply on the following day said in part:

"... in any event, as set out in the defence, the Commission does not accept that there is any detriment to BAA arising specifically from the divestment timetable. As noted above, the timescales confirmed in the 2011 decision essentially replicated those selected in the 2009 report. Those timescales had always been accepted by BAA as sufficient to enable it to market the divestment airports effectively. There was no good reason for anticipating that effective divestment processes conducted within commercially realistic timescales would not enable BAA to obtain market value for its assets at the times when they were sold. Accordingly, there was no loss to BAA arising from the timescales laid down in the divestment timetable and therefore the Commission did not carry out an exercise of seeking to assess (whether quantitatively or qualitatively) the extent of any such loss, whether in the 2009 report or the 2011 decision. To seek to assess the extent of a non-existent loss would have been futile."

26. I confess that I do not understand the "change of position" allegation. Far from being a change of position, it seems to me that the Treasury Solicitor's answer is simply a repetition of the point that had been made by the Commission and endorsed by the Tribunal in 2009, namely that if the Commission accurately calibrated the timing of a sale, "there would be no loss to put in the weighing scales". There is simply no point in

seeking to assess, whether quantitatively or qualitatively, a non-existent loss. The suggestion that BAA was somehow under the mistaken impression that a qualitative analysis of its loss had been undertaken by the Commission, which was neither referred to in the 2009 report nor disclosed by the Commission at any stage in the 2009 proceedings, and that this undisclosed qualitative analysis was the "calibration" to which the Tribunal was referring in paragraph 259 of its judgment, is not credible. In 2009 BAA was challenging the lawfulness of the 2009 report. The Tribunal concluded that on a fair reading of the report the Commission had weighed the factors that were relevant to the issue of proportionality. The Tribunal further concluded that since the Commission's aim, in calibrating the timescale for a sale, was to eliminate so far as possible the risk of depleted proceeds, there would be no need for a quantitative or qualitative estimate of the loss which BAA might have suffered if the Commission's objective had been different.

27. In a nutshell, therefore, either the "time cost" point is a new point, in which case it was too late to raise it before the Tribunal in 2011, or it is a repetition of the timescale point which had been raised in 2009 by BAA and rejected by the Tribunal. Of course it is true that the proportionality of the timescale had to be reconsidered in 2011 in the light of the MCC since 2009, but that was precisely what the Commission did in very considerable detail in paragraphs 311 to 339 of the 2011 report. That reasoning is not challenged in these proceedings. In reality, whether the "time cost" point is a new point or a variant of the old "timescale" point is of no practical consequence, because the fact remains that BAA, by its own admission, did not submit evidence relating to the quantum of the loss attributable to the fact of a forced sale in its representations to the Commission in 2011. It did submit evidence in support of its contention that the timescale for a sale should be longer than the Commission had directed in 2009, but the Commission considered that evidence and rejected it.

28. In the absence of any evidence from BAA seeking to quantify the loss attributable to the "time cost" point, it is impossible to see how it could have been a significant factor in any proportionality balancing exercise. New or old, the point fails for want of evidence. There is no challenge to the Tribunal's refusal to permit BAA to adduce new expert evidence on the point. I would add, though it is really of no consequence, that the need to adduce new evidence suggests, to me at least, that in truth the point was a new point.

29. The Tribunal concluded that there was a further reason that the point now called the "time cost" point should be rejected. In paragraph 76 of its judgment, the Tribunal said:

> "Secondly, and more fundamentally, where after a market investigation the Commission concludes, in accordance with the principles set out in **Tesco plc** ... that a company must divest itself of a business in order to remedy an AEC and ensures that the company has an appropriate opportunity to realise a fair market price for that business (as the Commission did in this case), there is no further complaint that can properly be made that the action of the Commission is disproportionate. In such circumstances the Commission has found that remedial action must be taken in the form of divestment in order to address the harm to the public interest arising from the AEC and absence of proper competition in the relevant market; the divestment

requirement imposed by it to address that harm will necessarily involve depriving the company of its ordinary freedom of action regarding disposal of that business (that is the very nature of a divestment order or requirement); and provided the company is given an appropriate opportunity to obtain the fair market value for its asset, its interests will have been sufficiently taken into account and protected. Since, in the scenario under analysis, the public interest requires that the company should not continue to own the business and the company is enabled to obtain the fair market value of that business, that requirement satisfies the proportionality test set out in **Tesco plc** and there is no further ground for complaint that the action taken is in any way disproportionate."

30. I respectfully endorse the Tribunal's reasoning in that paragraph of its judgment. BAA's contention that the Tribunal erred in its approach to the assessment of proportionality ignores the fact that proportionality is not to be assessed in a vacuum. Whether a remedy under section 138 of the Act is proportionate must be considered in the context of the statutory scheme as a whole. In accordance with the statutory scheme in the Act, it has been decided that there is an AEC, that action should be taken to remedy it, and that the only effective remedy is a requirement that BAA sells Stansted. That requirement is in the public interest. It is inherent in such a statutory scheme that in order to secure the public interest, BAA will lose its freedom of choice as to whether and when to sell its asset. In that context, providing the timing of the compulsory sale is "calibrated", so as to ensure that BAA does have a proper opportunity to market its property and obtain a fair market price, the remedy will be proportionate. BAA's submission boils down to the proposition that in addition to the period which will give it a proper opportunity to obtain the market value for its asset, it would be disproportionate not to give it a further period referred to by Mr Green during the course of his submissions as "market value plus", in which to market its asset. It is then submitted that the cost to BAA of the loss of this extended period ("the time cost") should be factored into the proportionality balance. But the underlying premise that BAA should be given an extended "market value plus" period in which to market its asset is simply a thinly disguised way of asserting that BAA should not be compelled to sell its asset at a time that is not of its own choosing. But that is precisely what is required in the public interest by this statutory scheme. In obtaining the market value for its property, BAA will be in the same position as the owner of any commercial premises whose property is compulsorily acquired in the public interest under a compulsory purchase order, for example for the construction of a new airport. In neither case, compulsory acquisition or compulsory sale at market value, can it be said that the measure which is required to be taken in the public interest is disproportionate.

31. For these reasons, I for my part would dismiss this appeal.

32. LORD JUSTICE RIMER: I agree.

33. LORD JUSTICE MUMMERY: I also agree.