Neutral citation [2012] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1196/4/8/12

B E T W E E N :

RYANAIR HOLDINGS PLC

Applicant

-v-

COMPETITION COMMISSION

Respondent

- supported by -

AER LINGUS GROUP PLC

Intervener

ORDER (COSTS)

UPON the Tribunal handing down its judgment on 8 August 2012 ([2012] CAT 21) (the "Judgment")

AND UPON Aer Lingus Group plc ("Aer Lingus"), on 29 August 2012, applying for an order that Ryanair Holdings plc ("Ryanair") pay its costs (the "Aer Lingus Application")

AND UPON the Competition Commission (the "CC"), on 31 August 2012, applying for an order that Ryanair pay its costs (the "CC Application")

AND UPON reading the subsequent submissions by Ryanair opposing both applications and the submissions in reply by each of Aer Lingus and the CC

AND HAVING REGARD TO the Tribunal's jurisdiction as to costs set out in rule 55 of the 2003 Tribunal Rules

IT IS ORDERED THAT:

1. The Aer Lingus Application be refused.

2. The CC Application be granted and Ryanair pay the CC's costs, such costs to be subject to detailed assessment on the standard basis if they are not agreed.

REASONS

1. This Order adopts the terms and definitions used in the Judgment.

The Aer Lingus Application

2. Aer Lingus seeks its costs of participating in this proceeding as an intervener. It recognises that the Tribunal's "general position", including in the context of applications made under section 120 of the 2002 Act, is that there should be no general expectation that a successful intervener will be entitled to its costs (see *British Sky Broadcasting Group plc v (1) Competition Commission (2) The Secretary of State* [2009] CAT 20, paragraph 22). Aer Lingus submits that, in this case, the Tribunal should depart from this general position.

3. The Tribunal is not persuaded that any of the reasons given by Aer Lingus, whether individually or cumulatively, provides a sufficient basis for awarding Aer Lingus its costs.

4. First, Aer Lingus relies on its position as a "victim of the anticompetitive effects" of Ryanair's acquisition of the Minority Holding in Aer Lingus. In our view, this does not accurately reflect the position. In making a reference to the CC, the OFT did not make a final decision as to the effects of Ryanair's acquisition of the Minority Holding. This is made clear by paragraph 309 of the OFT's decision, quoted in the Aer Lingus Application, which states that "it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition ..." (emphasis added). The CC's investigation will determine whether or not the Minority Holding has led to a substantial lessening of competition but even at that point it will not, in our view, be accurate to describe Aer Lingus as a "victim" of Ryanair's conduct (Aer Lingus' clear belief that it has been commercially disadvantaged by the Ryanair's stake in it notwithstanding). We agree with Ryanair that Aer Lingus' suggested analogy between its position and the position of the intervener in *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21 (see paragraphs 22 and 23) is misplaced.

5. Secondly, Aer Lingus contends that its submissions were helpful, successful and not duplicative of those made by the CC. We agree. Those factors, however, are not sufficient to displace the Tribunal's general position. The Tribunal will always expect interveners to seek to avoid duplication in their submissions. As should be clear, the "general position" identified in paragraph 2 above that an intervener should not expect to recover its costs is premised on the intervener being successful (or at least the party it intervenes in support of being successful). Thus we do not see how the CC's and Aer Lingus' success is to be taken into account as a reason for diverging from the

"general position" when that success is, of itself, a necessary part of the "general position".

6. Thirdly, Aer Lingus submits that because it was awarded its costs as an intervener both before the Court of Appeal, in the *Ryanair* C/A Decision,[1] and the Supreme Court in the subsequent (and unsuccessful) application by Ryanair for permission to appeal, it would be anomalous for Aer Lingus not to be awarded its costs now. It is to be noted, however, that there was no order as to costs before the Tribunal in the proceedings that gave rise to the *Ryanair* C/A Decision.[2] In any event, we are not persuaded that the orders of two different courts, in a different case, exercising different costs jurisdictions from that which exists under the 2003 Tribunal Rules is sufficient reason for departing from the Tribunal's general position.

7. Finally, Aer Lingus argues that policy and justice considerations militate in favour of an order awarding it its costs. Aer Lingus relies in particular on the fact that Ryanair knew, when it made its Application, that Aer Lingus would "inevitably" intervene and that Ryanair has "an exceptional propensity to make unfounded challenges" to decisions. We do not agree that these factors form a sufficient basis for an award of Aer Lingus' costs. The Tribunal's general position in relation to interveners' costs is concerned to strike a balance between not discouraging legitimate interventions and not unduly encouraging interventions which may have implications for the expeditious conduct of proceedings to the detriment of the main parties. In the event, as Aer Lingus itself states, it would "inevitably" have intervened in this case and the award or not of its costs would not have altered this fact.

8. For these reasons, the Tribunal is unanimously of the view that the Aer Lingus Application should be refused.

The CC Application

9. As Ryanair points out, the CC Application was submitted out of time. By way of a letter dated 8 August 2012, the Tribunal directed that any costs applications were to be filed and served by not later than 4pm on 30 August 2012. In the event the CC Application was only served on 31 August 2012. By way of a letter dated 6 September 2012, the Treasury Solicitor, who acted for the CC in these proceedings, informed the Tribunal that, after all due enquiries had been made, there was no record of receipt by him of the Tribunal's letter. We have no reason to doubt that explanation and note that the Treasury Solicitor acted promptly in making the, admittedly brief, CC Application only one business day after the expiry of the deadline came to light.

10. Whilst we note Ryanair's submission that time is often of the essence in merger review cases, we do not accept that that is as readily applicable to costs applications as it is to the substantive phase of such proceedings (and indeed the application for permission to appeal phase, if any). Whilst parties

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1 *Ryanair Holdings plc v Office of Fair Trading* [2012] EWCA Civ 643.

2 Case No. 1174/4/1/11 *Ryanair Holdings plc v Office of Fair Trading.*

are of course required to comply with deadlines set by the Tribunal, strict adherence to such deadlines would serve no purpose in circumstances where a party, through no fault of its own, is not aware of, and could not ascertain by other means (this was not a deadline imposed, for example, by statute), the relevant deadline. We therefore reject Ryanair's submission that the CC Application ought not to be considered because it was submitted out of time.

11. The CC Application seeks the CC's costs on the basis that the CC was not only successful in defending its Decision against Ryanair's application under section 120 of the 2002 Act but in fact succeeded on all substantive points. As is clear from paragraph 21 of the Tribunal's ruling on costs in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, and the case law there cited, the "appropriate starting point in section 120 [of the 2002 Act] applications [is] that a successful party would normally obtain a costs award in its favour". The Tribunal also recognised at paragraph 19 that it is "axiomatic that all such starting points are just that...and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly."

12. In the particular circumstances of this case, however, the Tribunal sees no reason to arrive at a finishing point different from the "starting point" identified in *Merger Action Group*.

13. Ryanair argues that the CC's conduct, first, in missing the deadline for making a costs application and, secondly, in submitting only a very brief application, mean that the CC Application should be refused. We do not agree. We have addressed the reason why the CC missed the deadline above and we do not see how it could be said that Ryanair has suffered any prejudice or been caused any unfairness by the delay of one business day. Furthermore, although the application was brief, this appears to have been due to efforts to make the CC Application as quickly as possible once the missed deadline came to the Treasury Solicitor's attention. It noted the two salient points, namely that the CC had been successful and was indeed successful on all substantive points. We do not consider that the length of a party's submissions, made under time pressure, should be determinative.

14. Ryanair further argues that it acted reasonably and promptly in bringing its Application and that the CC implicitly acknowledged this by agreeing not to impose any penalties under the Section 109 Notice. Whilst the Tribunal may take account of the conduct of all parties in relation to the proceedings under rule 55(2) of the 2003 Tribunal Rules, Ryanair's reliance on its own conduct is not in our view a sufficient basis for refusing the CC Application in the circumstances of this case. We found that the CC and Aer Lingus were plainly right in their reading of the *Ryanair* C/A Decision (see paragraph 80 of the Judgment) and we do not consider that there is any reason to depart from the starting point that the CC should have its costs.

15. Finally, we note that Ryanair cannot be said to have brought a public interest challenge, in the sense of paragraph 38 of *Merger Action Group*. It was

acting entirely in its own commercial interests. We make no criticism of it in that regard, but it is a factor to be borne in mind in deciding whether the CC, as an entirely successful public-law defendant should, or should not, have its costs. The Tribunal is of the unanimous view that the CC should have its costs.

Marcus Smith Q.C.
Chairman of the Competition Appeal Tribunal

Made: 8 November 2012
Drawn: 8 November 2012