Neutral citation [2015] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1239/4/12/15

15 July 2015

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR COLIN MAYER
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

AER LINGUS GROUP PLC

Intervener

Heard at Victoria House on 15 July 2015

RULING (COSTS AND PERMISSION TO APPEAL)

APPEARANCES

Lord Pannick QC (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared for the Applicant.

Mr Daniel Beard QC and Mr Rob Williams (instructed by CMA Legal) appeared for the Respondent.

Mr James Flynn QC and Mr Daniel Piccinin (instructed by Cadwalader, Wickersham & Taft LLP) appeared for the Intervener.

1. This ruling uses the same terms and abbreviations as used in the Tribunal's judgment of 15 July 2015 ([2015] CAT 14) ("the Judgment").

COSTS

2. Following our Judgment dismissing Ryanair's application to challenge the MCC Decision and the Final Order, Aer Lingus now applies for its costs of the application as intervener.

3. The general position of this Tribunal in respect of interveners' costs is that ordinarily no order for costs is made in favour of interveners. The rationale for that is 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. The Tribunal needs to have a good reason for departing from that general position.

4. As regards the Tribunal's previous decision on costs in the third appearance of Ryanair before this Tribunal in this matter, which is in [2014] CAT 6, the Tribunal dismissed a similar application by Aer Lingus in terms set out at paras. 12 to 14 of that ruling, which we do not need to repeat here.

5. As we made clear to James Flynn QC, representing Aer Lingus at the hearing, in order to award his client's costs we needed to be satisfied that there was a material difference between the position as set out in that ruling and the position today.

6. Before getting to the stage of considering whether or not there is good reason to depart from the ordinary position, in our view there are at least three elements that need to be satisfied:

   (1) that the position of the intervener was successful (that is satisfied in this case);

   (2) that the submissions of the intervener have added value to the hearing (quite clearly, that is satisfied here); and

(3) that the intervener did not duplicate the submissions of the respondent (Aer Lingus has not duplicated).

7. However, there has got to be something more. Mr Flynn says there are, in fact, two, perhaps three, matters which are in addition to what the Tribunal considered last time round, in [2014] CAT 6. He points out that Aer Lingus's intervention arises in an acute context in which the bid for Aer Lingus by IAG put particular strain on all parties, including Aer Lingus. Mr Flynn further points out that the intensity and the criticality of the position was that Ryanair's application for review had the potential of derailing the best opportunity that Aer Lingus had to, in effect, rid itself of the Ryanair 'yoke'.

8. We do not like to look at the matter in those terms. We consider that the application of Ryanair was a legitimate one, and one that it was entitled to make in the confines of the jurisdiction given by this Tribunal.

9. We do not consider, in the circumstances, that there is sufficient ground to depart from the decision the Tribunal reached on the last occasion and from the general principle to not award interveners' costs. We do have some sympathy for Aer Lingus. We appreciate that it has incurred significant costs in relation to this intervention, but those costs have been incurred to protect its own position, and Aer Lingus is a well-resourced party which can afford to bear those costs.

PERMISSION TO APPEAL

10. This is an application by Ryanair to appeal against our Judgment, which we handed down this morning. The proposed grounds of appeal are as follows:

(1) The CMA failed to recognise that, or properly consider whether, the IAG bid was a "material change of circumstances" for the purposes of section 41(3) of the Enterprise Act 2002. The CC's Final Report of 28 August 2013 had stated that Ryanair's shareholding in Aer Lingus would deter another airline group from bidding for Aer Lingus. Applying the test stated by the Tribunal at para. 110 of the Judgment, the change was material "in the sense that it may result in a different decision on remedy". It may well have had an impact on remedy because had the CC been

finalising its Report at a time when the IAG bid was being considered, the CC may well have been prepared to accept the undertakings offered by Ryanair (in particular not to oppose such a bid and to agree to sell its stake, as has now occurred), and indeed had the IAG bid been successful at that time, divestment would have been unnecessary.

(2) Since there was a material change of circumstances, the CMA was obliged by section 41(3) to consider whether the remedy of divestment was still proportionate in the new circumstances. Either the CMA did not properly consider this (because it considered there was no material change of circumstances), or the decision still to require divestment is disproportionate given the less intrusive option of accepting undertakings (plus, if necessary, delaying a decision on whether divestment is needed in case the IAG bid does not proceed), especially as IAG itself asked the CMA not to appoint a Divestiture Trustee.

(3) This Tribunal erred in law in the Judgment in failing to adopt the reasoning set out above.

11. In approaching this application for permission to appeal, we have followed the ordinary practice of the Tribunal, which is to adopt by analogy the test for granting permission to appeal as set out in Civil Procedure Rule 52.3(6):

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

12. We are not satisfied that Ryanair has any real prospect of success on appeal in this matter.

13. Ryanair set out its position as early as 12 February 2015, when it submitted that there had been a material change of circumstances. The CMA took that submission seriously. It went out to consult. It received representations from IAG and Aer Lingus. It issued a preliminary report and that led to the MCC Decision. Whether or not there is a material change of circumstances is

primarily a matter for the CMA, subject of course to the usual grounds for challenge on judicial review, such as irrationality concerns. The CMA carefully considered the submissions of all parties, including Ryanair, and came to the conclusion that there was no material change of circumstances. We have decided that that conclusion was one that the CMA was entitled to reach in its discretion.

14. We do not see anything in Ryanair's grounds, which do not advance the matter much further. We do not consider that there was a significant difference between the parties on the meaning of "material change of circumstances" at the hearing. There was a great deal of agreement between the parties as to what it meant. We dealt with it at paras.109 and 110 of the Judgment.

15. As regards whether the remedy was still proportionate, we have found that a proportionality assessment does not need to be undertaken afresh in circumstances where the CMA has legitimately found that there has been no material change of circumstances.

16. We appreciate that the matter is not straightforward, and that it is a matter that is important to Ryanair, but in the circumstances we are not satisfied that it is for us to grant permission to appeal. If the Court of Appeal finds that it is a matter of importance, it can grant permission itself.

APPLICATION FOR ABRIDGMENT OF TIME FOR RENEWAL OF PERMISSION TO APPEAL APPLICATION

17. This is an application for the Tribunal to abridge time for the purposes of any application for permission to appeal to the Court of Appeal by Ryanair. In relation to Ryanair's previous challenge (in case 1219/4/8/13), the Tribunal directed that time for any renewed application for permission to appeal be abridged such that the renewed application be made to the Court of Appeal within seven days of the date of the ruling pursuant to Civil Procedure Rule 52.4(2)(a).

18. We were invited by the CMA to abridge time to the end of the week, which is 17 July 2015, but the CMA realistically accepted that if Ryanair really did need more time, then it should be extended perhaps until Monday, 20 July 2015.

19. The position of Aer Lingus was more extreme, in the sense that it suggested that any renewed application should be brought within a day.

20. We accept that these cases should be proceeded with expeditiously, and that there should be some abridgement. On the other hand, we want to ensure that, if and when Ryanair submits its papers, they are on a properly considered basis, and that Lord Pannick QC (for Ryanair) has had the opportunity not only to satisfy himself as to the grounds and the skeleton argument, but that he receives proper and considered instructions from his client.

21. In those circumstances, we abridge time and direct that any renewed application for permission to appeal should be brought before the Court of Appeal by 2pm next Wednesday, 22 July 2015.

22. While we do not have the power to require the Court of Appeal to deal with any application for permission expeditiously, we would obviously appreciate that the Court of Appeal deal with any application as quickly as is reasonable. The Court of Appeal has many other matters to deal with, but one would hope that it would be able to deal with this by the end of term, 31 July 2015.

ORDER

23. It is ordered that:

    (1) Ryanair pay the CMA's costs of defending the application for review on the standard basis, to be assessed if not agreed.

    (2) Aer Lingus's application for the costs of its intervention be refused.

    (3) Ryanair's application for permission to appeal the Judgment be refused.

    (4) Any renewed application for permission to appeal the Judgment before the Court of Appeal be brought by 2pm on 22 July 2015.

Hodge Malek QC | Clare Potter | Professor Colin Mayer

Charles Dhanowa OBE, QC
(*Hon*)
Registrar

Date: 15 July 2015