

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1239/4/12/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

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

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

AER LINGUS GROUP PLC

Intervener

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H E A R I N G

APPEARANCES

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

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

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

1 THE CHAIRMAN: Lord Pannick, you are on your own today, but everyone else seems to have
2 made it, despite the reservations about today's date.

3 LORD PANNICK: I am sure it is your experience, sir, that normally, when a date is set, most
4 people do, in fact, turn up. It is the hard core here today. It is me on behalf of Ryanair,
5 Mr. Beard and Mr. Williams on behalf of the CMA, and Mr. Flynn and Mr. Piccinin on
6 behalf of Aer Lingus.

7 I have got three topics on my agenda: first, I wanted to bring the Tribunal up to date on
8 developments since the last hearing. The reason for that is to explain why there is no
9 application for any stay or any other interim relief today. Secondly, there is the question of
10 costs. Thirdly, there is the question of an application for permission to appeal.

11 As for developments, there have been four: first of all, Ryanair last week formally accepted
12 the IAG offer for the shares in Aer Lingus, and my clients, Ryanair, have announced that
13 they will be supporting the IAG bid at the Aer Lingus EGM at ten o'clock tomorrow. That
14 is the first development.

15 Secondly, happily the European Commission announced yesterday that it has cleared the
16 bid. I do not know whether the Tribunal saw that, or whether you want copies of the
17 announcement, or whether you will take it from me.

18 THE CHAIRMAN: I will take it from you. I saw it on the internet anyway.

19 LORD PANNICK: Thirdly, the Supreme Court on Monday, less happily, refused permission to
20 appeal in the challenge to the CC----

21 THE CHAIRMAN: Did they give any reason for that?

22 LORD PANNICK: Only the standard reasons that there was no justification for a further appeal:

23 "Permission be refused because the application does not raise a point of law of
24 general public importance which ought to be considered by the Supreme Court at
25 this time, bearing in mind that the case has already been the subject of judicial
26 decision and reviewed on appeal."

27 That is the standard wording.

28 THE CHAIRMAN: Fair enough, so it does not clarify anything.

29 LORD PANNICK: No, it took them four months, but that is a matter for them, not for this
30 Tribunal. That is the third matter.

31 The fourth matter is that it may be that this letter came through to this Tribunal from the
32 CMA. If not, I will hand up copies.

33 THE CHAIRMAN: I have just been given a letter dated 15th July.
34

1 LORD PANNICK: That is the one. It is a letter of today's date. The guts of it is on the second
2 page in the penultimate paragraph:

3 "Furthermore, in light of Ryanair's letter informing the CMA of its intentions to
4 accept IAG's offer, its public statements to the Stock Market to that effect, and the
5 decisions above, the CMA Remedy Group has decided that it will not take further
6 steps at this time to nominate one or more persons to act as a Divestiture Trustee in
7 accordance with Article 5.9 of the Order.

8 Should the divestment that the CMA has approved not result in an Effective
9 Divestment, for whatever reasons, and in the absence of a suitable nominee from
10 Ryanair, the CMA will proceed to nominate one or persons to act as a Divestiture
11 Trustee in accordance with the terms of the Order."

12 So very sensibly, if I may say so, the CMA accepts that there is absolutely no purpose
13 whatsoever in proceeding at this time to appoint a trustee, but, equally sensibly, no doubt,
14 they have reserved the right to proceed along that path if - and we hope that it does not
15 occur - the offer does not proceed, for whatever reason.

16 THE CHAIRMAN: There is always a risk, is there not, that the offer will not proceed for one
17 reason or another?

18 LORD PANNICK: Yes, one cannot foresee.

19 THE CHAIRMAN: You are saying that Ryanair is not going to be one of those reasons.

20 LORD PANNICK: No, Ryanair has committed itself publicly to accept the offer, to support the
21 offer at the EGM tomorrow morning at ten o'clock. There are other reasons, no doubt, why
22 the matter may not proceed, and if, unhappily, that is so then the CMA have reserved their
23 rights. I do not complain about that, but it explains why, in support of my application for
24 permission to appeal, whether it be granted or not, I do not need to make any further
25 application to this Tribunal for any relief.

26 THE CHAIRMAN: Yes, I understand that.

27 LORD PANNICK: That is the point. Those are the developments. I do not think I have missed
28 any developments. Those are the developments that have occurred.

29 That takes me to the second matter which is costs. We must pay the CMA's costs, to be
30 assessed, if not agreed. Mr. Beard has indicated there would be an application. I have
31 indicated to him it is not opposed.

32 THE CHAIRMAN: I just make the order that your clients pay the costs of the CMA, and if they
33 cannot be agreed then they can be assessed?

1 LORD PANNICK: Yes. Less agreeably, if I can put it like that, my friend Mr. Flynn wants to
2 apply for the costs of Aer Lingus. It is traditional on these occasions, these
3 Ryanair/Aer Lingus occasions, for Mr. Flynn to make an application for costs. If I may say
4 so, it has been traditional in the previous two rounds for that application not to succeed.

5 THE CHAIRMAN: Has it ever succeeded?

6 LORD PANNICK: No.

7 THE CHAIRMAN: We gave detailed reasons last time round.

8 LORD PANNICK: You did.

9 THE CHAIRMAN: I have reminded myself of what I said last time, so it is really down to
10 Mr. Flynn to speak now to see whether he can show there is at least some difference
11 between the last occasion and today to justify costs. I accept that you have got the basics in
12 the sense that you were successful. I accept that you added value, and we can go and
13 discuss what that was. I also accept that you did not duplicate what was being done by
14 Mr. Beard on behalf of the CMA. What we need to explore is: what more is there to take
15 your case out of the norm?

16 MR. FLYNN: Precisely. If we can take those as the starting point, indeed that is part of the
17 tradition. I think it is also accepted that, of course, the Tribunal has the power in its
18 discretion to award us our costs. The principal difference between this fourth application
19 and the previous ones is, I would say, that it arises in the particularly acute context of the
20 IAG bid and the tight timetable that that imposes, which placed particular strains on all the
21 parties, including Aer Lingus. This is in a context where, of course, Ryanair made the
22 application knowing the terms of the bid. They had not changed. Indeed, they could not
23 change because IAG had committed itself to a particular price. If Ryanair had said last
24 week that it was intending to accept the bid, as it says now, and wishes to pursue the
25 litigation for reasons of precedent setting and questions of principle, we might have taken a
26 different attitude. That is, of course, of less concern to Aer Lingus, whose interests in this
27 case have always been the pragmatic, and what I would call the realistic, ones of trying to
28 relieve itself of suffering the effects of the SLC that the CC found, and which has now been
29 upheld all the way to the Supreme Court. It is more of the same but with added intensity
30 and criticality, in that it had the potential for derailing what has, in practice, been the best
31 opportunity arising since this case began for Aer Lingus to free itself of the Ryanair 'yoke'
32 if I can put it that way.

33 I probably cannot usefully add to that, sir.

1 THE CHAIRMAN: Thank you very much. Mr. Flynn, before we forget, there are three
2 possibilities on this. The first possibility is that you get no costs at all; the second
3 possibility is the one that you have asked, that you get an order for costs to be assessed; and
4 the third possibility is what the Tribunal has done on a couple of occasions, which is to give
5 you a percentage. Is there anything you want to say?

6 MR. FLYNN: Sir, no. If you consider that a percentage of our costs is appropriate for particular
7 reasons - I would obviously be saying that everything we did was in that context - if you
8 judge that there is an element of that which you can say was normal intervention and there
9 is an element that is intervention-plus, then I think I would just have to leave that to the
10 Tribunal's discretion.

11 THE CHAIRMAN: Thank you. Lord Pannick, can you help me on this?

12 LORD PANNICK: Only this, the context of the IAG bid and a tight timetable have no relevance
13 whatsoever to whether or not Aer Lingus are entitled to their costs of this application. This
14 is not an application that either in law or in fact is about "derailing" the IAG bid. The IAG
15 bid was the context in which Ryanair were making this application, but that is not being
16 suggested to be the legal basis for our application. I saw the factors today are exactly as
17 they were last time round when you, sir, said at para.14----

18 THE CHAIRMAN: Let me find that.

19 LORD PANNICK: It is tab 9 of the bundle that we had last time. If the members of the Tribunal
20 want to look at it, it is the main bundle at tab 9, p.460. It starts at p.459 under the heading
21 "Costs", and the substance of the reasoning is at para.13 on p.460 where the Tribunal refers
22 to the general position that interveners should bear their own costs. At para.14, you, sir,
23 said that the position of Aer Lingus was not fundamentally different from that of other
24 targets of hostile M&A activity.

25 Secondly, although you found Aer Lingus' contribution helpful on certain issues:

26 "... we did not consider it to have been so exceptionally helpful as to justify a
27 departure from the general position.

28 (3) We do not consider that it is appropriate to take account of the costs that
29 have been incurred more broadly by Aer Lingus in resisting Ryanair's unsuccessful
30 attempts to acquire it."

31 You went on to say that Ryanair had not been indulged beyond its statutory rights:

32 "The Tribunal has not entertained any challenge by Ryanair that went beyond the
33 confines of the jurisdiction conferred on the Tribunal by the Act."

34 I would submit that remains very much the case.

1 I am not, of course, suggesting that Aer Lingus did not have good reason from their
2 perspective to be here, but that is not the issue. The question is whether we should pay for
3 it.

4 THE CHAIRMAN: Trying to look at the difference between last time and this time, I will be
5 open with you, Lord Pannick, in the sense that their contribution was of real assistance this
6 time, and I think more assistance, in the scheme of things, than last time. That is the first
7 point.

8 The second point is that there was an element of intensity, which I do accept, which meant
9 that it was all hands to the pump and everyone was working together very sensibly. I am
10 not going to criticise anyone on costs. I just have to reflect on whether or not the
11 cumulative effect of those two factors makes any difference. I am wholly unpersuaded that
12 I am going to revisit what I said at para.14(3) in particular and say that this was a torpedo by
13 Ryanair. That is not going to wash. I do have to look at those two points dispassionately
14 and come back to you.

15 LORD PANNICK: Of course. I would submit that on the first point, the main thrust of the
16 defence of the CMA's position was by Mr. Beard. My friend added, with great respect,
17 very little. He helped the Tribunal in relation to the Irish Takeover Rules. That was, again
18 with great respect, hardly a major issue.

19 THE CHAIRMAN: His written submissions were helpful on the context and the movement, it
20 was helpful.

21 LORD PANNICK: No doubt, and you, sir, will have to form a judgment in relation to that.

22 As to the intensity of the matter, the reality is that Aer Lingus were always going to be here,
23 as they have been present on the previous occasions. They must have an expectation based
24 on the previous three occasions that their desire to be here, and their real commercial good
25 reason to be here, is not going to entitle them or lead them to recover costs. Is a matter for
26 your judgment, sir, I have said what I want to say.

27 THE CHAIRMAN: Yes. I need to consult with the others and then come back with a view.
28 Mr. Flynn, is there anything more you would like to say?

29 MR. FLYNN: Only a brief reply to what is actually my application: para.14(3), that was last
30 time. I did not make anything of the points that are made in there. It will obviously be for
31 your judgment whether we were helpful this time, or more helpful than last time.

32 THE CHAIRMAN: You were.

33 MR. FLYNN: I can only say that there are a couple of quotations in the judgment which suggest
34 that at least a point may have been helpfully encapsulated for the Tribunal.

1 As to the commercial matters, as I have already said, if Ryanair want now to carry on
2 litigating as far as they can on points of principle, the incentives for Aer Lingus to
3 participate may actually be quite different when Ryanair is no longer a shareholder. So it is
4 a relevant point, in fact, the context in which this application was made.

5 THE CHAIRMAN: Unusually, we will rise for a few minutes, just to see where we are on that.

6 (Short break)

7 (For Ruling see separate transcript)

8 LORD PANNICK: I am grateful, sir.

9 Sir, the final matter I have for today is our application for permission to appeal.

10 THE CHAIRMAN: Let me just find your piece of paper. What do I need in front of me, your
11 proposed grounds?

12 LORD PANNICK: Yes. I have also got one authority which I want to show you one paragraph
13 of. My friends have our proposed grounds and they have our authority. Those are the two
14 grounds upon which we seek permission to appeal. I will read them out, sir, if you want
15 me, but I anticipate that the Tribunal has had an opportunity to read them.

16 I say that the meaning and application of s.41(3) is a matter of general importance, and there
17 is, so far as I am aware, no authority at the level of the Court of Appeal on this subject. I
18 apprehend that my friends will or may say that this is simply a question of the application of
19 s.41(3), and not a matter of its interpretation. That is why I invite the Tribunal's attention to
20 this authority in which Mr. Beard appeared for the successful appellant, the OFT. As the
21 Tribunal will see from para.1 the issue was whether this Tribunal (Mr. Marcus Smith
22 presiding) was right to find that there were exceptional circumstances justifying an
23 extension of time for appealing a decision of the OFT. Mr. Smith decided, and the Tribunal
24 decided, that there were. It was a case where other people had appealed, and successfully
25 appealed, and someone who had not appealed then wished to get---

26 THE CHAIRMAN: I know the case quite well.

27 LORD PANNICK: I am grateful. The only relevant passage for present purposes is para.27. At
28 para.27 Lord Justice Vos, speaking for the Court of Appeal, says:

29 "The third general factor relates to the Respondents' submission that this appeal
30 can only be on a point of law, and the OFT has not challenged any of the legal
31 principles set out in the CAT's Ruling. This is perfectly true, but, as Lewison LJ
32 said in granting permission to appeal, the OFT's argument is that the CAT failed
33 properly to apply those legal principles to the facts of this case. If it had made
34 such an error, that too would be an error of law. It is true that the CAT was

1 exercising a discretion, but if the CAT exercised that discretion on the wrong basis,
2 that would also be an error of law.”

3 That is what we rely upon in support of the contention that it is no answer to our contention
4 that these are important issues on which there is no authority, that it is a question of the
5 application of s.41(3).

6 I would only add this: each of the previous rounds in this dispute has been considered by the
7 Court of Appeal on substantive appeals. The first one, I think this Tribunal refused
8 permission to appeal, and the Court of Appeal granted permission. The second one, this
9 Tribunal granted permission. The third one, you, sir, granted permission on some
10 grounds----

11 THE CHAIRMAN: Two grounds.

12 LORD PANNICK: -- two grounds, and the Court of Appeal allowed a third ground.

13 THE CHAIRMAN: That is right.

14 LORD PANNICK: In my submission, this is an appropriate matter to go to the Court of Appeal,
15 or rather at least for permission to appeal to be granted. Whether it is taken up I have no
16 idea. That may depend on what happens in the future.

17 THE CHAIRMAN: I understand that, yes.

18 LORD PANNICK: That is my submission.

19 MR. BEARD: Permission to appeal is opposed by the CMA. The Tribunal well has the law. It is
20 Rule 58 of the Tribunal Rules. Appeals are only on a point of law. The relevant test that is
21 applied by analogy is the CPR test in CPR 52.3(6).

22 The simple point here is that there is no point of law. Indeed, there was not real debate
23 about the relevant legal test to be applied. As the Tribunal itself observes in para.109 of the
24 judgment, at the hearing Ryanair and the CMA appeared to be broadly in agreement as to
25 the relevant terms of ‘material change of circumstances’. That is then set out at para.110,
26 how the Tribunal phrases the test. It is then described in para.111 as having been applied in
27 the MCC decision on an irreproachable basis, and in particular the Tribunal quotes para.51
28 of the MCC decision, the application in the Final Report as to “whether there had been any
29 changes of circumstances that materially affect the analysis and conclusions in the Report”,
30 a quote that is drawing on para.78 of the Tribunal’s judgment.

31 In those circumstances, there is not actually a point of law in dispute. There certainly is not
32 an arguable point of law. There is no real basis for considering that any appeal on these
33 matters would be successful. There is no other compelling reason.

1 As for *Somerfield*; *Somerfield* was obviously a vastly different case. In the sections to
2 which Lord Pannick referred, and in particular para.27, consideration of the general factors
3 is being undertaken in relation to the exceptional circumstances test. There is nothing in
4 this part of the Court of Appeal judgment that is suggesting a radical reworking of the
5 permission to appeal test that somehow, when law is being applied to facts and there is a
6 dispute about that application, it amounts to a point of law.

7 It is worth stressing the final sentence of that paragraph:

8 “It is true that the CAT was exercising a discretion, but if the CAT exercised that
9 discretion on the wrong basis, that would also be an error law.”

10 What is being said here by the Tribunal is that the CMA exercised the discretion, but did so
11 on the right legal basis, indeed on an agreed legal basis in these circumstances.

12 THE CHAIRMAN: Mr. Beard, if you look at the grounds of appeal, it is all in terms of what the
13 CMA failed to do, or did do, or whatever. The Court of Appeal is an appeal from our
14 decision. Should they not be attacking our decision as well at the very minimum?

15 MR. BEARD: You would have thought that would be the starting point because it is your
16 decision that is appealed from. Of course, unlike in the position in the High Court, it is, in
17 fact, the Tribunal’s decision, rather than the order that is appealed from here. It does not
18 change the fact that you do not step backwards through to the CMA’s Final Report and have
19 a second go at it. Indeed, that to some extent reflects the error that is being lapsed into by
20 Ryanair in these circumstances by reference to the contentions that s.41(3) and the
21 application of it give rise to an arguable point of law.

22 I do recognise that in the proposed grounds of appeal there are references to the fact that
23 this is concerned with the Tribunal’s judgment, but actually they recognise that there was
24 agreement with the Tribunal’s approach in relation to the relevant test. Indeed, the
25 reference half way through the first paragraph:

26 “Applying the test stated by the Tribunal at paragraph 110, the change was
27 material ...”

28 referring to para.110, there is no issue taken with that.

29 So it is not clear that there is actually any challenge to the Tribunal’s analysis at all in that
30 regard.

31 In the circumstances, this is not a borderline case on permission to appeal, it is one where
32 plainly permission should not be granted. If permission is to be refused, there are further
33 matters upon which I would ask to make submissions in relation to any renewed application
34 that might be made to the Court of Appeal.

1 THE CHAIRMAN: That is fine, thank you very much. Mr. Flynn, is there anything you would
2 like to say?

3 MR. FLYNN: No, sir, Aer Lingus opposes permission. I do not think I can add anything useful.

4 THE CHAIRMAN: Lord Pannick, is there anything else you would like to say?

5 LORD PANNICK: Yes, two points. First of all, sir, you made the point that the attack should be
6 on the decision of this Tribunal. I accept the criticism. I would wish to add as para.3 of the
7 proposed grounds that this Tribunal erred in law in failing to adopt the reasoning set out
8 above. That is the respectful criticism of this Tribunal. That is my answer to that point.

9 THE CHAIRMAN: I am not criticising you for this, because you did it very quickly in a very
10 short period of time.

11 LORD PANNICK: I did, but I take the point, the challenge has to be to this Tribunal. That is my
12 challenge, that this Tribunal erred in law in failing to adopt the reasoning set out above.

13 THE CHAIRMAN: Yes, that is fine.

14 LORD PANNICK: The other point, Mr. Beard says there is no point of law. That is why I
15 showed the Tribunal para.27 where the Court of Appeal accepted his submission for the
16 OFT, and the acceptance that it is an error of law if, on the facts, the CAT, the Tribunal, has
17 failed properly to apply the undisputed legal principles to the facts of the case. Plainly, that
18 requires us to satisfy the Court of Appeal that our interpretation of the background
19 circumstances is the relevant one, but is a complicated matter. It is an important matter. It
20 arises in a context where there is no governing law. We say it is appropriate for permission
21 to be granted. That is my submission.

22 THE CHAIRMAN: Thank you very much.

23 (The Tribunal conferred)

24 (For Ruling see separate transcript)

25 THE CHAIRMAN: Thank you very much.

26 MR. BEARD: I am grateful, sir. The additional matter is a matter the Tribunal indicated was on
27 the agenda for today, and that is in circumstances where permission is refused, whether or
28 not there should be an abridgement of time by the Tribunal, as the lower court, pursuant to
29 CPR 52.4(2)(a). I do not know whether you have a copy of the White Book. We have one
30 spare White Book with us.

31 THE CHAIRMAN: I have one.

32 MR. BEARD: Would you like another one passed up?

33 THE CHAIRMAN: Another one passed up, so we can share it. (Same handed)

34 MR. BEARD: It is not a highly contentious test, but just so the Tribunal has the wording:

1 “(1) Where the appellant seeks permission from the appeal court it must be
2 requested in the appellant’s notice.”

3 THE CHAIRMAN: We abridged time last time, did we not?

4 MR. BEARD: You did.

5 THE CHAIRMAN: So we have clearly got jurisdiction. Lord Pannick, do you accept we have
6 got jurisdiction to abridge time?

7 LORD PANNICK: Yes, sir.

8 MR. BEARD: Sir, I am grateful. It was just so you have the reference for it.

9 THE CHAIRMAN: Can we just hear from Lord Pannick as to what he feels is a realistic time----

10 MR. BEARD: We were going to ask by the end of the week.

11 LORD PANNICK: That is an unrealistic time. It is unrealistic as a matter of practicality.

12 THE CHAIRMAN: Let us just talk about the practicality. When do you think, with all due
13 expedition, you could get this application ready for the Court of Appeal?

14 LORD PANNICK: The end of next week would be a reasonable time. I say that because there is
15 actually no urgency at the moment in relation to this matter for two reasons: first of all,
16 because of the new circumstances that I indicated at the outset. At the moment the bid is
17 proceeding in the normal way, and there is no reason to think that it is not going to succeed.
18 Secondly, and more importantly, the ones who are at risk are Ryanair, not the CMA. The
19 reason for that is that there is no interim relief whatsoever at the moment.
20 It is entirely open to the CMA, should the IAG bid collapse, to proceed in the way that they
21 have indicated in their letter, unless - Ryanair make an application to the Court of Appeal
22 for urgent interim steps to be taken.

23 Sir, although it would be practical for us to make an application at the end of next week, I
24 invite the Tribunal to take no steps in relation to abridgement of time. If, as I say, the IAG
25 bid collapses, then we have no protection, no special protection, unless we move the Court
26 of Appeal. If my clients wish to pursue an appeal, and that is a matter for them in the light
27 your judgment on the substantive matter and your judgment today, we would need to do so
28 urgently to stop the CMA from proceeding along the divestment route.

29 That is my understanding. If I have misunderstood that, Mr. Beard will say so, but I do not
30 understand the need for him to seek to abridge our time.

31 THE CHAIRMAN: Let Mr. Beard finish his submissions and you can come back. That is very
32 helpful. I just wanted to know what you were saying the earliest opportunity you thought
33 you could get your submissions in, and your answer is the end of next week.

34 LORD PANNICK: Yes, sir.

1 THE CHAIRMAN: Which I think is clearly too long. Last time I gave you seven days, and that
2 was a much more substantial application. Yes, Mr. Beard?

3 MR. BEARD: It is worth bearing in mind of course that this part of the Ryanair saga has
4 proceeded on a very much accelerated timetable. That timetable has indeed been laid down
5 for the urgent hearing, and we are grateful obviously for a speedy turn around of judgment
6 with a view to matters being disposed of by the end of term, including any matters
7 pertaining to permission----

8 THE CHAIRMAN: Let us work backwards, when is the end of term?

9 MR. BEARD: It is 31st July. So it is effectively two weeks from Friday.

10 THE CHAIRMAN: They are saying 24th July, if at all, and you are saying what?

11 MR. BEARD: We say that we do not see any good reason why, in relation to what is a narrow
12 point upon which Lord Pannick has, albeit urgently, shown the ability to pull together
13 grounds of appeal that are, therefore, ready for submission to the Court of Appeal. No
14 doubt he would wish to refine them. He has obviously the material that was previously
15 prepared for the hearing before this Tribunal. He will be well placed to be able to lodge that
16 application by the end of the week. That will then give the Court of Appeal the opportunity
17 to deal with permission urgently, and we would indeed ask this Tribunal to indicate in
18 abridging time that whilst it cannot, of course, bind the Court of Appeal as to what happens
19 once an appeal notice has been lodged, nonetheless the question of permission requires
20 resolution urgently, and that for it to be resolved this term would be highly desirable.
21 Lord Pannick is not correct in his approach to the next steps in relation to enforcement. He
22 is right that if tomorrow all goes smoothly and the IAG bid passes, then in those
23 circumstances it is likely that enforcement steps are not going to be necessary. We need to
24 make sure that enforcement steps are not unduly delayed if a problem arises. In the
25 circumstances, those enforcement steps would, in the first instance, be the appointment of a
26 Divestiture Trustee. If it has not been suggested by Ryanair in accordance with the terms of
27 the Final Order, which it had not complied with, then the CMA can nominate the
28 Divestiture Trustee, but there begins a process in which a power of attorney is then required
29 of Ryanair.
30 If Ryanair decide they are not going to engage with that Divestiture Trustee process, of
31 course what happens then is that the CMA has to seek enforcement before the High Court.
32 In those circumstances, it is not surprising that Ryanair is not seeking interim relief, because
33 it well knows that, under the terms of the Order, so long as it can live with the prospect of

1 some other Divestiture Trustee being selected by the CMA it does not need to do anything,
2 it will have to face down a potential application in the High Court.

3 The upshot of all of this, of course, is unnecessary delay, further expense being imposed, in
4 circumstances where, if the Court of Appeal determines this permission application briefly
5 in relation to what is a narrow point, none of this needs to arise, and progress thereafter can
6 be made in relation to enforcement on the assumption that the IAG bid is not going through.
7 But it can happen quickly, it can happen during the summer, and there is not an undue delay
8 in relation to this process, which has run on and on and on in relation to these matters.

9 It is for that reason that, as a matter of concern for the proper enforcement of the
10 competition regime, we would ask for a tight abridgement of time to the end of the week
11 and for an indication from this Tribunal requesting the Court of Appeal to deal with these
12 matters before the end of the term.

13 Unless I can assist the Tribunal further, those are my submissions.

14 THE CHAIRMAN: Thank you. Yes, Mr. Flynn?

15 MR. FLYNN: Sir, just to add to what Mr. Beard has said, may I just make essentially two factual
16 points?

17 THE CHAIRMAN: Of course.

18 MR. FLYNN: One is that in correspondence which the Tribunal has reflected on, we said that the
19 deadline should be one day, and that it could be done tomorrow. There is absolutely no
20 reason why not. We have all moved heaven and earth, including the Tribunal, to move very
21 fast, and quite honestly, if it had to be done, it could be done.

22 The reason we said it, my second point, is that of course tomorrow is the closing date for the
23 IAG offer. The less uncertainty there is about what Ryanair's future intentions are the
24 better.

25 Those, I think, are my two short points.

26 THE CHAIRMAN: Thank you very much. Lord Pannick, can we just go back to the question I
27 asked you before about what is a realistic timetable. You have got a well resourced team.
28 You have got Mr. Kennelly, but I do not know what his commitments are.

29 LORD PANNICK: I do not have Mr. Kennelly, that is why he is not here. He is involved in
30 another case in court today, and I think tomorrow as well.

31 THE CHAIRMAN: I appreciate that this is an important case, and I would want you to develop
32 your grounds as well as you can up to your normal standard. If you are pushed into putting
33 submissions in tomorrow, they are not going to be the same quality as if you have had time
34 to look at it properly. I fully understand that.

1 I would like some help from you as to what you would say is a realistic timescale for you to
2 put in submissions in the standard that you would consider appropriate for consideration by
3 the Court of Appeal.

4 LORD PANNICK: Can we identify what we need to do? What we need to do is produce
5 grounds, and we have done that. They can no doubt be improved, certainly amended, in the
6 light of discussion today. We also have to produce a skeleton argument. We have to set out
7 all of that. It is not simply a matter of filing grounds of appeal. The skeleton argument
8 needs to analyse the judgment of the Tribunal. It is, as you have already said, complicated,
9 and it will require some time. It is not just a matter of me sitting down and drafting it. It
10 has to be looked at by my solicitors, it has to be approved by the clients. It takes time.
11 I should also say that the idea that we can do it tomorrow does rather assume that those
12 involved have nothing else to do. We all have other commitments. If there were an
13 absolute urgency that someone needs to be released from detention, one could understand
14 the contention that it needs to be done tomorrow. These things do take time.
15 Of course a document could be filed tomorrow or by the end of the week, but it would not
16 be a very good document. Therefore, I suggest - I have asked for the end of next week - if,
17 sir, you think it is more appropriate to identify a time next week, perhaps the middle of next
18 week, a week from today, then, sir, you will say so. That is the first point.
19 The second point I want to make is that to require Ryanair to file a document tomorrow or
20 Friday may be very counterproductive to the interests of Aer Lingus and the CMA, because
21 Ryanair may take the view that they need to urgently, to protect the position, file an appeal,
22 whereas if they have a bit of time to think about this there is at least a possibility that they
23 may not seek to appeal. I do not know, and I need to discuss it with them, and I have not
24 had a chance to do so.
25 I would suggest that it really is not very sensible, unless there is an absolute urgency, to
26 require them, if they are going to appeal, to do it as an instinctive reaction. That is the
27 second point.
28 The third point is that there really is no urgency whatsoever that can justify requiring
29 Ryanair, if they are going to appeal, to do it this week. Mr. Beard said he is concerned
30 about a problem arising, but there is no material whatsoever before the Tribunal or in the
31 public domain that even begins to suggest that Ryanair are causing any difficulty
32 whatsoever. They have publicly committed themselves to this bid, they have publicly
33 committed themselves to supporting it at the EGM tomorrow. Those are the facts, and there
34 is no suggestion, nor could there be, by Mr. Beard or Mr. Flynn to the contrary. It really

1 makes no difference whatsoever to the great scheme of things whether we file an
2 application for permission to appeal to the Court of Appeal this week or next week. I
3 simply cannot understand what the urgency is in relation to that. Of course Mr. Beard and
4 Mr. Flynn would like to see this resolved sooner rather than later. We all would. That
5 cannot, of itself, create an exceptional urgency requiring everybody to file a document
6 within a few days.

7 Those are my submissions, sir.

8 THE CHAIRMAN: Thank you very much. Mr. Beard, anything else you would like to say?

9 MR. BEARD: No. If the Tribunal thinks that Friday is unreasonable we suggest close of play on
10 Monday, so that the team, Clearys and the counsel team, Mr. Jones, Mr. Kennelly,
11 Lord Pannick, are able to review matters, then that is not something upon which we would
12 want to stand on ceremony. We are concerned that this putative application is submitted
13 quickly and can be reasonably considered by the Court of Appeal by the end of term and
14 determined.

15 (The Tribunal conferred)

16 (For Ruling see separate transcript)

17 LORD PANNICK: Thank you, sir, I am very grateful.

18 THE CHAIRMAN: As regards what happens once you get there, we would obviously appreciate
19 that the Court of Appeal, if they consider it necessary, deal with it as quickly as reasonable,
20 but we cannot dictate to the Court of Appeal. They must have lots of other matters to deal
21 with, but one would hope that they would be able to deal with this by the end of term,
22 31st July. Any other issues?

23 LORD PANNICK: No, thank you very much. Thank you for giving judgment, all three of you,
24 so speedily.

25 THE CHAIRMAN: Thank you.

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