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IN THE COMPETITION

Case No. 1110/6/8/09

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

Wednesday, 1st July 2009

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
LORD CARLILE OF BERRIEW QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

and

COMPETITION COMMISSION

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Nicholas Green QC and Mr. Mark Hoskins QC (instructed by Herbert Smith LLP) appeared on behalf of the Applicant.

Mr. John Swift QC, Mr. Paul Harris, Mr. Ben Rayment and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Jowell and Miss Sarah Love (instructed by Nabarro) appeared on behalf of the potential Intervener.

1 THE PRESIDENT: Good Afternoon. I think that we have two main issues to deal with, namely
2 the questions of intervention and related matters, and then the usual timetabling problems.
3 Before we get on to those, can I just make two disclosures, speaking entirely for myself,
4 two of the witnesses whose witness statements are included with the defence are known to
5 me. The first, Simon Jones is a member of the fairly recently formed CAT User
6 Committee; I have become acquainted with him at least on one occasion through that. Also,
7 Mr. David Saunders was, until recently, the Head of Competition Policy at what was then
8 BERR – the Department for Business Enterprise and Regulatory Reform – now BIS, and I
9 became acquainted with him because BERR was and BIS is the sponsoring Department for
10 the Competition Service. I think those are the only disclosures we need to make.
11 Shall we deal first with intervention matters? As we understand it nobody objects to
12 Ryanair's application to be an intervener, but there are issue as to the scope of the
13 intervention, and the terms on which any intervention should be granted. Shall we deal
14 with that first? Mr. Jowell, do you want to kick off – is that convenient? I do not mind
15 who starts really. I think the issues really are whether you should be allowed to intervene
16 on ground 1 as well as ground 2, there is no issue in relation to ground 2, and as to what
17 documents you should be entitled to see.

18 MR. JOWELL: Yes, Mr. President. Mr. President, Members of the Tribunal, I should stress at
19 the outset that we have no desire whatsoever to prolong matters unnecessarily, or to rack up
20 unnecessary costs. We would, in fact, positively invite directions for sequential
21 submissions so as to facilitate the avoidance of any duplication in this matter. We wish to
22 proceed with all the expedition and cost effectiveness that characterises our client's business
23 generally. (Laughter)

24 LORD CARLILE: No excess baggage! (Laughter)

25 MR. JOWELL: Exactly.

26 THE PRESIDENT: We have got that one out of the way now; it has been building up!

27 MR. JOWELL: Yes. It has been conceded by both sides that we have sufficient interest to
28 proceed here as an intervener and that is quite obvious in the sense that we are not just one
29 of the largest airlines in England and Europe, but also we are the largest single customer at
30 Stansted Airport, which will be one of the airports which will be divested if the Competition
31 Commission's report is upheld.
32 We also participated in the proceedings before the Competition Commission and so there
33 cannot be any sensible suggestion that we are not directly affected and clearly have
34 sufficient interest to intervene in principle. Despite this, it is suggested by BAA that we

1 should be subjected to, I think, three forms of censorship. First, it is suggested that on the
2 first issue we should not be permitted to make any submissions at all, which seems to us to
3 be tantamount to saying effectively that if the proceedings had solely involved that first
4 ground we would not be granted permission to intervene.

5 The second type of censorship that is suggested is that in relation to the evidence effectively
6 we should not have any of it. We should only see that which is in the public domain.

7 The third type of censorship which is proposed is that we should not be entitled in any event
8 to put in any factual submissions of our own or expert evidence of our own in relation to the
9 second ground, and it is proposed that the Tribunal should make those orders at the outset
10 now. It will not surprise the Tribunal to learn that we resist all three and that they should all
11 be rejected really out of hand.

12 On the first, the principle is that as a party that is directly affected by the decision in
13 question and whose vital interests are on the line as a result, we should have the right to
14 make submissions in defence of what we believe is the correct course for the Tribunal to
15 take, subject of course to any sensible case management proposal. That is the standard
16 procedure in judicial review generally, and that is the standard procedure in this Tribunal.
17 If I may hand up one recent authority that may assist, copies have just been provided to the
18 parties. It is a very recent judgment of the Tribunal (differently constituted) in the *Barclays*
19 *Bank* application. It related to an application for permission to intervene which was hotly
20 contested. In that case there were four interveners, three of whom received permission to
21 intervene, and one who did not. I will simply, if I may, direct the Tribunal to the final
22 paragraph, para. 11, in which the terms and conditions were considered. If I may just invite
23 the Tribunal briefly to read that paragraph?

24 THE PRESIDENT: Yes. (After a pause) Yes. It is the last bit I imagine?

25 MR. JOWELL: Exactly. The submission there was made that an intervener should not be
26 permitted to advance new grounds or new argument, and the Tribunal there commented that
27 that was so draconian as to make intervention altogether pointless and cannot have been
28 contemplated by the rules. What is suggested here I think goes one stage beyond that
29 because it is suggested that we should not, on one of the grounds, be entitled to make any
30 submissions whatsoever, so it goes beyond what was described by the Tribunal as
31 “draconian” in that case.

32 The general principle is that it is simply not a pre-condition for intervention that you should
33 have some factual evidence of your own that you have to bring to the feast, that is not a
34 condition of intervention and it should not be, because what is really involved in this type of

1 application it is effectively a judicial review and the points are largely points of law –
2 almost always – it is generally not about contested points of fact, and so the submissions of
3 any intervener will largely be on points of law, and that is so in this case as well. As we
4 have not seen the defence we do not know the extent to which there are factual
5 discrepancies between the accounts of the two parties.

6 Essentially, the question of whether there is an appearance of bias is a question of law not a
7 question of fact.

8 THE PRESIDENT: You are interested in the outcome of the judicial review.

9 MR. JOWELL: Indeed, and having that interest in the outcome we are entitled to intervene and,
10 as an intervener, to make submissions.

11 THE PRESIDENT: I do not think we need you to spend too much time on this point because we
12 will hear what Mr. Green says about it.

13 MR. JOWELL: Very well. The second type of censorship suggests, as I mentioned, that we
14 should not be entitled to see the evidence, and again we say this is contrary to basic
15 principle, that if you are a participant in a hearing – if you are able to participate – you
16 cannot do so in the dark, you have to be able to see the evidence that is relied upon. The
17 only basis upon which it is suggested that we should not see the material is confidentiality.
18 But there is a proportionate way in which that can be dealt with, which is by suitable
19 confidentiality undertakings that I believe we will come to further in the agenda. We have
20 actually drafted a proposed confidentiality order that the Tribunal might want to consider
21 later.

22 THE PRESIDENT: Shall we park confidentiality just for the moment?

23 MR. JOWELL: Yes.

24 THE PRESIDENT: Then the third point that is made against you is that you should not be
25 allowed to put in any evidence whatever happens.

26 MR. JOWELL: We say there are two points to that. First, that it is manifestly premature because
27 we can scarcely be excluded from putting in our evidence until we have seen their evidence,
28 and to know what is the target that we would be aiming at. Secondly, it seems to be quite
29 wrong in principle, because they having relied upon that evidence, actively relied upon it,
30 how can it then be both immune from scrutiny and also immune from us being permitted to
31 put in further evidence in response. My learned friend, I understand he says: “Well, we are
32 only relying on this expert report by way of illustration”. That may be the case but it may
33 be that we also wish to comment upon that illustration and we may need expert evidence or
34 factual evidence to do so, but at this stage we simply do not know.

1 THE PRESIDENT: I think probably at this stage, Mr. Jowell – that is very helpful – we will see
2 what Mr. Green has to say on these issues.

3 MR. GREEN: Can I first deal with the issue of whether they should be permitted to participate in
4 relation to ground 1?

5 THE PRESIDENT: Yes.

6 MR. GREEN: So far as that is concerned, their own application to intervene (para.10) makes it
7 clear that their only real interest in this case is ground 2. Indeed, the submissions of Mr.
8 Jowell a moment ago demonstrate that their particular interest is in acquisition of Stansted
9 if, and insofar as it ever becomes available. They have a commercial interest in the
10 outcome of the case and their application makes it clear that it is the proportionality point
11 that they have expressed concern and interest in; that is evident from para. 10 of their
12 application to intervene.

13 We served a copy of the notice of appeal on Ryanair a couple of weeks ago – 24th June
14 – and they filed their skeleton a day later. They accept in their skeleton that it would be
15 difficult to envisage that they would file any factual evidence in relation to the first ground,
16 and when one contemplates the first ground in the light of the defence it is pretty clear that
17 there is no real dispute between the parties on the law relating to apparent bias, the issue
18 between the parties is as to the facts and even there, although we are in the process of
19 digesting the Competition Commission’s defence, it is fairly clear what actually happened.
20 The issue is therefore one of fact and submissions largely about the fact and the inferences
21 one draws from it. As to those, that concerns very largely the relationship between BAA
22 and the Competition Commission. Ryanair is an officious bystander in relation to that. It
23 has nothing factually or evidentially which it can add to that particular analysis as it is laid
24 bare in the application and the defence. So there is no reason why Ryanair should interfere
25 in this aspect of the case. We accept that from their commercial perspective they have
26 submissions to make about the second ground and we can address that in a moment, but so
27 far as the first ground is concerned, they manifestly are officious bystanders – loud,
28 officious bystanders – and they will simply add to the effort which is engaged by the
29 principal parties in making submissions about that issue. One can be certain of that.
30 Now, the Competition Commission is going to address its interest, it is the Competition
31 Commission in respect of which the apparent bias allegation is made. They are there to
32 protect their position; it is their employees, or their consultants, their commissioners whose
33 conduct is in issue and they are the proper party to defend their position, they do not need

1 the assistance of Ryanair in that regard. So we do not think it is sensible case management
2 to bring Ryanair into ground 1, we accept they have a role to play in respect of ground 2.

3 THE PRESIDENT: They have clearly got an interest in the outcome. If the only ground was
4 ground 1 you would not suggest they were not interested in the outcome, would you?

5 MR. GREEN: No, they are interested in the outcome, but that does not necessarily mean to say
6 they ----

7 THE PRESIDENT: It would not be a sufficient interest, you say?

8 MR. GREEN: It is not a sufficient interest and it is not an interest which, as a matter of case
9 management, needs to be recognised in relation to ground 1. Many, many companies, other
10 than Ryanair – everybody, central operators, airlines, people who supply goods, commodity
11 services to BAA, potential purchasers – all have an interest in the outcome, that is the
12 general morass of people who engage in the airline industry of the United Kingdom, but
13 Ryanair does not have a particular or specific *sui generis* interest in the outcome in the
14 same way that BAA and the Competition Commission do.

15 If one draws an analogy, and it may not be precise, but for example before the CFI it is
16 never said that merely having a commercial interest in the outcome is one which entitles
17 you to intervene, one has to show ----

18 THE PRESIDENT: Why is their interest sufficient in relation to ground 2 and not in relation to
19 ground 1 then?

20 MR. GREEN: Because that goes to the commercial aspect of their own business, it goes to
21 whether or not the remedy of a disposal of a particular asset in which they are interested
22 should, in fact, be required to be made. They have expressed an interest very cogently, very
23 publicly about Stansted, and the proportionality, the remedy is right at the heart of the
24 commercial concern that Ryanair has expressed and, indeed, it is clear from the documents
25 they have submitted to the Tribunal already that that is their sole interest. It is opportunistic
26 for Mr. Jowell to say they have a great interest in ground 1, they never have expressed it
27 until now, if that be so. So we do say there is a distinction between ground 1 and ground 2.
28 It is for the Competition Commission to defend its position, we are now beginning to see
29 the totality of the evidence. We have seen that the Competition Commission strongly
30 defends its position and we will take that head on during the hearing and in the course of
31 our reply. There is no great dispute as to what the legal principles are, it is the inferences
32 one draws from the facts, and that is not something which, with the greatest respect to Mr.
33 Jowell, his client needs to meddle in. So far as we are concerned, our submission is that
34 they should be limited to ground 2 not ground 1.

1 Can I deal with the question of evidence. Mr. Jowell did not differentiate, when he made
2 his submission about evidence, between ground 1 and ground 2. If you decide that they
3 should be permitted to participate in ground 1, one should consider what evidence is
4 relevant there. The real issue between the parties concerns the expert report of Mr. Falkner
5 and that goes to ground 2 not ground 1. We can deal with it now or perhaps we can park
6 that and deal with it when we deal with issues relating to ground 2, I do not know what is
7 most convenient?

8 (The Tribunal confer)

9 THE PRESIDENT: Mr. Green, Mr. Jowell, it would probably help everyone if we gave a very
10 quick decision on that point, and then you know where you are in relation to the other
11 matters.

12 MR. GREEN: Thank you.

13 (For Ruling see separate transcript)

14 MR. GREEN: In light of your ruling, can I suggest then that the way to deal with disclosure of
15 documents to Ryanair is as we have suggested in the note that we sent earlier?

16 THE PRESIDENT: Yes.

17 MR. GREEN: We will provide the documents to Ryanair with very limited redactions. We have
18 identified what the redactions are and the Tribunal has already had a bundle of documents
19 which have identified redactions, they are very limited and I think you will see that on no
20 basis could they be said to impact upon anything arising out of ground 1. We would
21 propose therefore simply to provide the documents in relation to ground 1 annexed to our
22 application with those very limited redactions. I think you have seen the redactions first of
23 all concern extracts from transcripts of certain confidential and private Competition
24 Commission hearings.

25 THE PRESIDENT: Which paragraph of your note are you looking at?

26 MR. GREEN: Paragraphs 8 and 9.

27 THE PRESIDENT: These documents, some of them have been supplied in redacted form
28 already, presumably, to Mr. Jowell and his solicitors?

29 MR. GREEN: Not yet, no.

30 THE PRESIDENT: Not yet, I see.

31 MR. GREEN: Obviously we were waiting for the Tribunal's ruling as to whether they were
32 permitted to intervene at all.

33 THE PRESIDENT: You are therefore suggesting that there be, as it were, a third version; that
34 there be a less redacted version? Presumably there are redacted versions already?

1 MR. GREEN: Well, the Competition Commission, of course, does not have a redacted version
2 they are entitled to see everything.

3 THE PRESIDENT: No, sure.

4 MR. GREEN: And there are certain categories of redaction that we need to make in order to
5 supply documents to Ryanair. They will not be remotely prejudiced by these because they
6 do not have any bearing upon the ground 1 issue, they are extraneous commercially
7 sensitive matters.

8 Now, we would propose that we send the documents to them. They should thereby see that
9 there is nothing of relevance in the redactions. If they have an issue we would suggest in
10 the first instance they come back to us and explain what it is and see if something can be
11 agreed. If it cannot be agreed and they wish to persist in seeking disclosure of the redacted
12 material they should then make an application but we very much doubt it because, as we
13 have identified in the note, and I think the Tribunal has already had the documents in a
14 bundle so you will have been able to see what is actually described as confidential bias.
15 There really is nothing in those redactions which should have any bearing upon ground one
16 at all.

17 THE PRESIDENT: I do not have them all in mind at the moment, I am afraid.

18 MR. GREEN: There are three categories. First, there are certain short transcripts of hearings
19 before the Competition Commission.

20 THE PRESIDENT: Mr. Green, just cutting across this, the normal way would be to let external
21 counsel and solicitors see the unredacted versions and then if an issue arises as to whether
22 they need – why is that a problem here?

23 MR. GREEN: The redacted material is so irrelevant that we cannot see that they would be
24 remotely prejudiced and we would prefer – some of this information is very, very sensitive
25 and we would providing it to the legal advisers of someone who is a vociferous objector and
26 complainant of BAA and has a direct interest in BAA's future existence.

27 THE PRESIDENT: That is often the case though?

28 MR. GREEN: That is often the case, I fully accept that, but my client would strongly prefer in the
29 first instance that they see the redacted version. If they have a problem come back to us, we
30 may be able to agree. We rather expect that they will realise that there is nothing in the
31 redactions which are of relevance. If they think otherwise, there can be a sensible
32 discussion between solicitors and we think that should resolve matters. So we would ask
33 you to accept that in the first instance we provide the redacted documents, and then leave a
34 process to occur if it becomes necessary whereby any disputes can be resolved.

1 LORD CARLILE: I have a common lawyer's problem about reading into what is behind the
2 blacked out material and find it difficult to understand the objection to external lawyers
3 who, I take it are accepted to be in good faith, looking at the full version to judge whether or
4 not there should be an application, I must confess at first blush, Mr. Green.

5 MR. GREEN: I understand the issue and we are, of course, cognisant of it.

6 THE PRESIDENT: If Mr. Jowell says his clients are willing to go through an extra stage in this
7 process, which would ideally be carried out pretty quickly, because one is keen not to make
8 it more drawn out, then that might be a different matter.

9 MR. GREEN: My Lord, if they see the documents then they will be able to form a view as to
10 their relevance, and we do think when they see the excised, redacted documents it should be
11 evident that they have nothing to do with the issue.

12 THE PRESIDENT: Mr. Jowell, I do not know whether you have had a chance to take instructions
13 on this? I do not know how soon you got this note?

14 MR. JOWELL: I will take instructions, if I may. (After a pause): Sir, the position is this, we are
15 simply puzzled as to why external lawyers should not be permitted, subject of course to any
16 confidentiality ring, to see the unredacted material and it is logically impossible to know the
17 relevance or not of something that is blacked out.

18 THE PRESIDENT: It may be, or it may not be. It may be.

19 MR. JOWELL: It is likely to be.

20 THE PRESIDENT: We do not know exactly, as far as I know, what will be blocked out.

21 MR. JOWELL: Part of what is concerning us, I think, is that there is something of a contradiction
22 between the written submissions of BAA at paras. 9 to 11, the thrust of which is that there is
23 nothing in these redactions that Ryanair could add to – that is the way it is put – not that it is
24 irrelevant, but there is nothing that we could add to it. Of course, they say that about a lot
25 of things including the expert report. But Mr. Green today has indicated that they may be
26 wholly extraneous things which have nothing to do with this application, so they are
27 effectively not relying upon them for their application. That may be a different issue, but
28 then they would need to make clear that neither they, nor the Competition Commission are
29 relying upon those blacked out passages in any way and that they do not bear upon anything
30 relevant in any way. If that were the case then possibly we could accept the redactions, but
31 I am not sure that has been made clear, so at the moment we are just simply puzzled as to
32 why external solicitors and counsel should not see the unredacted material.

33 MR. GREEN: I understand Mr. Jowell's position. We did send to the Tribunal on 1st June a
34 bundle which had these documents. I can give you one example where we have identified

1 and highlighted in yellow the material, it concerns, for example, an internal issue relating to
2 pensions and is a sensitive reference in a document to an internal BAA pension matter.
3 Now, it is pretty evident from the document that it cannot conceivably relate to the bias
4 issue. That is the sort of matter which our client is concerned about.

5 THE PRESIDENT: Well I can see, but I cannot see why there would be a problem provided
6 undertakings are given. Quite frankly the normal way of dealing with this is for external
7 counsel and solicitors to take a view on whether it could have any bearing and, having given
8 appropriate undertakings, take it from there. It is just going to draw out the process.
9 Mr. Swift, were you trying to “put your oar in”, as it were?

10 MR. SWIFT: Yes, not just for that. Good afternoon, Sir.

11 THE PRESIDENT: Good afternoon.

12 MR. SWIFT: Yes, we are strongly in favour of the direction you are minded to go in, this is the
13 normal course of events. Also, when one is in the Commission’s position and Ryanair is in
14 as an intervener, it makes sense for the future conduct of this case that Ryanair is presenting
15 its arguments on the same factual material that the Commission has. This is a most peculiar
16 position that in certain aspects that Ryanair is half blind.

17 The other matter, there have been some references by Mr. Green to Ryanair as such, and
18 maybe I can speak from experience, I am quite sure that in the course of these proceedings
19 Ryanair will act in accordance with the tight controls imposed by its experienced solicitors
20 and its counsel. Anyway, I shall say no more on that at the moment.

21 THE PRESIDENT: Thank you for that. Shall we roll this up into the other submissions then?
22 Are there other ----

23 MR. GREEN: It may be helpful, if you are inclined to require disclosure that we simply agree
24 there is going to be a confidentiality ring and get on with it.

25 THE PRESIDENT: I think that would be the best.

26 MR. GREEN: We will just get on with it. That then brings us, I think, to ground 2, unless there
27 are other matters in relation to ground 1 which need to be dealt with.

28 MR. JOWELL: There is a suggestion that we should be barred from producing any factual
29 evidence.

30 THE PRESIDENT: Are you maintaining that? They do not know what they want to produce yet
31 because they have not seen anything.

32 MR. GREEN: That is in relation to ground 2, there is a much more specific issue in relation to
33 ground 2. It may or may not be academic, we can come to it. In relation to ground 1 I am
34 not certain that there can conceivably be any further evidence.

1 THE PRESIDENT: It seems unlikely but I think probably they want to formally reserve their
2 position until they have seen the documents.

3 MR. GREEN: Yes, well we obviously will have to formally reserve our position in relation to
4 anything they say.

5 THE PRESIDENT: Yes, of course, there is always liberty to apply. So now you want to come on
6 to the documents in relation to ground 2, and evidence in relation to ground 2?

7 MR. GREEN: Yes, and again it may be academic because we do not know what they want to do,
8 but it is first, whether they should be entitled to serve fresh economic evidence in response
9 to Falkner; and, secondly, whether they should see Falkner – they are two interrelated
10 questions.

11 So far as the issue on ground 2, that they should be entitled to adduce new evidence, as you
12 know from para. 89 of our application, the Falkner Report is served as an illustrative
13 document only; it is not, quite clearly, a document the Tribunal will have to rule on.

14 THE PRESIDENT: But if you are going to rely upon it, it is very difficult, is it not, to exclude at
15 least at this stage the possibility that people might want to comment on it?

16 MR. GREEN: Well it depends on what is mean by comment on it in terms of fresh evidence.
17 You will have seen that the Competition Commission has decided not to serve any evidence
18 of its own in response to Falkner.

19 THE PRESIDENT: Yes.

20 MR. GREEN: You will have also seen from their defence that they say in para. 120 that it is
21 irrelevant and pointless, they do not accept even it is a relevant document which should be
22 referred to, they say it should not detain you at all; that is their position.
23 The real risk is this, that if Ryanair decides to adduce responsive economic evidence, then
24 they are essentially moving away from the judicial review process. We put it in simply to
25 illustrate the sorts of things that the Competition Commission should have considered. We
26 are not saying that Falkner is correct or incorrect, we are simply saying it is illustrative of
27 the sorts of matters that in the proportionality context the Competition Commission should
28 have considered. The Competition Commission itself does not want to respond to it,
29 indeed, they say it is not relevant. If we get a responsive economic expert evidence from
30 Ryanair what we are going to then have is essential collateral litigation about the merits or
31 demerits of Falkner on a judicial review which arises between Ryanair and BAA, not
32 between the Competition Commission. We know what the Competition Commission says
33 because it is set out in their defence, they do not say a great deal about it, they dismiss it,
34 they do the Mandy Rice-Davies: “They would say that wouldn’t they? Well, dismiss it, not

1 relevant” and they have some comments about it, they say that it is not something which
2 really adds up, it is shaky, etc. So they are not going to address with evidence. If we get
3 new evidence from Ryanair then the ball game changes quite dramatically, we get into
4 satellite or collateral dispute between ourselves and Ryanair. That is going to change the
5 nature of the dispute.

6 THE PRESIDENT: Well it may be the Commission will adopt it. If they decide to put it in
7 evidence maybe the Commission will say: “Actually, we agree with that.”

8 MR. GREEN: Well, I do not know if that is appropriate or proper for them to adopt an
9 intervener’s evidence when they themselves have said it is “irrelevant, pointless and need
10 not detain the Tribunal at all.”

11 THE PRESIDENT: Well we know that the emphasis of submissions can shift somewhat from
12 time to time in the course of proceedings.

13 MR. GREEN: Heaven forbid!

14 MR. SWIFT: Sir, if Mr. Green is going to refer to para. 120 of the defence, he might at least read
15 out the whole paragraph. We say:

16 “For legal purposes no part of the Falkner report is admitted. Nevertheless, the
17 Falkner report makes a number of assertions on which BAA relies in the notice of
18 application that can be shown to be manifestly ill-founded. For all its apparent
19 complexity far from supporting BAA’s case the Falkner Report merely confirms
20 the shaky foundations on which it is based.”

21 And the numbers in para. 89, which are of course redacted for confidentiality purposes
22 illustrate the scale of the issue.

23 THE PRESIDENT: Thank you. We are looking into the crystal ball, Mr. Green, are we not at the
24 moment? We do not know whether they are going to seek to put in evidence and they will
25 not know that until someone sees it.

26 MR. GREEN: What we would suggest is that if they wish to put in evidence they should make an
27 application. It either should be agreed because they very specifically identify precisely
28 what it is that could be remotely said to be relevant, or they should make an application
29 identifying what it is that they wish to serve new evidence about so that it can be properly
30 confined and it does not risk opening up new disputes which are not seriously in existence
31 between ourselves and the Competition Commission; that would be one way of controlling
32 what is potentially an opening of the floodgates to new evidence.

33 THE PRESIDENT: The first hurdle to get over is that someone needs to see the documents do
34 they not?

1 MR. GREEN: Yes.

2 THE PRESIDENT: So that is the first thing. No one will know what they want to say about it.

3 MR. GREEN: (After a pause): We are happy for the Falkner Report, on reflection, to go into a
4 properly constructed ring so that they can then see it. We think that once they have seen it
5 they can then either address it on its face, as the Competition Commission has. If they wish
6 to put in new evidence then we think that rather than opening the floodgates to new
7 evidence they should make an application so the Tribunal can control where the new expert
8 evidence arises and then risks – because if they put in evidence then there is a probability
9 that we would wish to put in counter evidence.

10 THE PRESIDENT: Mr. Green, the normal way of doing it and for the moment I am struggling to
11 see why we should do it in any different way is that when they put in a statement of
12 intervention – we will deal with obviously the timetabling for that – at some point they will
13 put in a statement of intervention, they are required to append to that normally speaking any
14 witness evidence of fact or expert evidence they wish to rely upon. It is not uncommon for
15 people to say they should not put this in, it is not admissible, or it is irrelevant and we
16 normally deal with it in that way rather than try and predict in advance what they should be
17 allowed to put in evidence. There may be cases where that would be appropriate but I am
18 not sure that we are very sympathetic to the idea here that we should set down some
19 conditions in advance, or require them to make an application to put in what they normally
20 require to do with their statement.

21 MR. GREEN: The difference, I think, between this case and other cases is that they are an
22 intervener. Normally, the position you have described is the plain, normal position between
23 the principal parties. It may also be the case in merger cases, sometimes when you have
24 two parties merging or someone trying to block a merger you do get a much more direct
25 clash between the parties. But here we are talking about a quite distant third party, not
26 really differentiated from other third parties which might otherwise have intervened,
27 potentially wishing to put in new economic expert evidence. That is the difference.

28 THE PRESIDENT: Well, is there anything else on this point that you wanted to say?

29 MR. GREEN: No.

30 THE PRESIDENT: So rather than just have a series of small rulings shall we go on to whatever
31 the next issue is? We can deal with it in a judgment if you like ----

32 MR. GREEN: No.

33 THE PRESIDENT: You can see which way the wind is blowing on that one. (Laughter)

1 MR. SWIFT: If you were to go to a judgment, Sir, you would find support in the Tribunal Rules
2 at 16(9) and (10) which describes precisely what the statement of intervention shall contain,
3 including a schedule listing documents, copies and written statements.

4 THE PRESIDENT: Yes, thank you very much, I knew it was somewhere.

5 MR. JOWELL: Sir, if I may raise one point at this stage which is that it will be necessary just to
6 consider whether we wish to expand any confidentiality ring in order to include an external
7 third party expert.

8 THE PRESIDENT: I think that is something we would probably want to meet that one when it
9 arises.

10 MR. JOWELL: Very well, but I think that does underline the fact that if we need to make the
11 separate application, even on paper, for that, then to have to make a further application to
12 them and adduce the evidence would be most cumbersome.

13 THE PRESIDENT: I suppose you are thinking aloud. It may be that when you come to make
14 your application to expand the ring beyond the normal, to include if that be the case an
15 external expert, inevitably you are likely to have to state why you want to do that.

16 MR. JOWELL: That is true, Sir, although the difficulty again is it is putting the cart before the
17 horse in a way, because until the economist – and as I understand it Mr. Falkner is an
18 economist now – until the economist has seen what Mr. Falkner has done it is difficult to
19 know whether he can add anything useful or not.

20 THE PRESIDENT: I suspect there are those in your team, including yourself, who will probably
21 be able to take a view.

22 MR. GREEN: I think that is all that arises in relation to Ryanair. I think what it means is that the
23 point in time at which they wish to seek to expand the ring, and the solicitors will negotiate
24 the ring, Herbert Smith have already got the draft and they can circulate that in due course,
25 or shortly. At that point then ----

26 THE PRESIDENT: At the moment one envisages the ring will include external counsel and
27 solicitors.

28 MR. GREEN: Yes, that is right.

29 THE PRESIDENT: And then one will take it from there.

30 MR. GREEN: Absolutely. I think that probably is a satisfactory solution to the question of
31 expert evidence anyway.

32 So far as the next matter is concerned, there is a confidentiality issue relating to the
33 Competition Commission's defence, you will have seen there are a number of excisions in
34 particular from Professor Moizer's statement, and obviously we need to see that content. I

1 am not certain whether it needs to go into a ring or if it is confidential from us and Ryanair,
2 or what?

3 THE PRESIDENT: Mr. Swift, I envisage that everything that is claimed to be confidential at the
4 moment would go to the members of the ring and some of these things that are claimed to
5 be confidential often turn out to be not to be confidential at all. But at the moment I think
6 for the sake of convenience we just treat it as being confidential, it goes to the ring and then
7 we move from there.

8 MR. SWIFT: Yes, the information which has been redacted is information which relates not to
9 the Competition Commission at all but to Professor Moizer's advisers.

10 THE PRESIDENT: Paragraph 22, while you are on your feet, Mr. Swift, of BAA's latest note,
11 refers to material which is confidential to Ryanair not currently redacted. I am afraid I did
12 not have time to take a view about what that was referring to, but I do not know whether it
13 is something that we need to ventilate now or not?

14 MR. SWIFT: I will have to take instructions on that. We will be serving obviously a
15 confidential version of the defence, and those redactions will be undertaken, those that refer
16 to the confidential information of BAA, that is for the purpose of producing the
17 confidential ----

18 THE PRESIDENT: That is still in process?

19 MR. SWIFT: That is in process.

20 THE PRESIDENT: Yes, well thank you for raising it. Does that take us on to timetable then?
21 Have we dealt with confidentiality? I think in view of what you have said, as long as the
22 other parties are happy we will make an order along the lines that you will produce, as it
23 were, for the Tribunal's approval, a confidentiality ring draft order.

24 MR. GREEN: Yes.

25 THE PRESIDENT: In the usual way, and then we may need to indicate when that should be done
26 by and that can normally be done very quickly, can it not?

27 MR. GREEN: Yes, and Herbert Smith will circulate a draft very, very soon – tomorrow.

28 THE PRESIDENT: The other parties probably have not seen it yet?

29 MR. JOWELL: They have not, but it is based on the previous confidentiality rings.

30 MR. GREEN: Herbert Smith will circulate their draft.

31 THE PRESIDENT: Well perhaps you could circulate drafts to each other.

32 MR. GREEN: At least I am a party in this regard! Anyway that is a detail.

1 THE PRESIDENT: Then it can be set up, and we can approve it fairly quickly, and people can
2 give the undertakings that they need to give, and there are already the versions that we need
3 to put into the ring. Is that okay then for that?

4 MR. GREEN: Yes, I think that is everything except for timetable.

5 THE PRESIDENT: Timetabling, yes. We have obviously had our diaries out, and I think an
6 indication has already been made that the week we are looking at is the week commencing
7 19th October, that being I think a Monday. It will be very difficult for us to do it in any
8 other window but I think an indication of those dates was given and there was a general
9 feeling of approbation which is unusual, but perhaps too much to hope for.

10 MR. SWIFT: I should say that that week is fine for the Competition Commission. We do not
11 agree with Mr. Green that this is a three day case, on the other hand we can see that it might
12 go into a third day.

13 THE PRESIDENT: We were surprised at your brevity, I must say, and impressed. It seemed to
14 us that two days was not realistic.

15 MR. SWIFT: Not realistic?

16 THE PRESIDENT: No, but there it is. Three days seemed possibly do-able, we were inclined to
17 allow a bit longer, but obviously we are very much in the hands of the parties at this stage.
18 You have indicated, Mr. Green, that as at present advised there is not going to be any cross-
19 examination, but of course, who knows? That situation could change. Shall we work back
20 through the timetable on the basis that there is a hearing in the week of 19th? I think for our
21 purposes we are probably going to try and reserve most of that week. Are there any specific
22 things you want to draw to our attention? Mr. Swift is looking contemplative?

23 MR. SWIFT: Obviously we filed the defence in the Tribunal only yesterday, and so would not
24 have expected the Tribunal to have read and digested the defence. It was on that basis that I
25 suggested that it would not take the Tribunal more than two days to resolve it.

26 THE PRESIDENT: Your defence was 80-odd pages though, Mr. Swift, it was not a couple of
27 pages.

28 MR. SWIFT: True.

29 LORD CARLILE: So one is bound to observe that possibly the skeleton arguments, when they
30 concentrate on the issues, may be rather shorter than 82 pages, Mr. Swift?

31 MR. SWIFT: It is skeletal.

32 LORD CARLILE: Thank you.

33 MR. SWIFT: If the Tribunal were minded to start on October 20th, to work back from there,
34 would that be a possible?

1 MR. GREEN: We thought we had more flexibility than Mr. Swift, but that is fine. We think
2 three days is do-able, we think it might slip into four. Mr. Jowell is extremely concise, but
3 who knows?

4 (The Tribunal confer)

5 THE PRESIDENT: Mr. Swift, we would rather start on the 19th, unless you have some
6 insuperable issue that you want to ventilate with us, and even then it may be that we still ----

7 MR. SWIFT: No, let us go for the 19th, we are happy with that.

8 THE PRESIDENT: That means there is a bit of flexibility at the end. So working back from the
9 19th – the next thing that needs to happen is there should be a statement of intervention.
10 How long do you need for that, Mr. Jowell?

11 MR. JOWELL: Sir, we have asked for four weeks from the supply of the unredacted documents.
12 We do not think that that is an extensive period of time in the circumstances. It sounds as
13 though the documents are quite substantial.

14 THE PRESIDENT: Bearing in mind that it has to include any evidence.

15 MR. JOWELL: We would prefer that that period did not straddle the August holiday period too
16 much. It may be necessary to give a little bit of additional time if it does.

17 THE PRESIDENT: Let me just tell you roughly what we have put in as indicative dates. We
18 thought that your statement in intervention should be in by the end of July. Then Mr.
19 Green, you may well want to put in a reply so we need to give you a date for that.

20 MR. GREEN: Could we have towards the end of the first or second week in September, which
21 would be a month before the hearing.

22 THE PRESIDENT: Well we have pencilled in 7th – how does that sound?

23 MR. GREEN: Yes, that is fine, thank you.

24 THE PRESIDENT: The next thing after that, barring accidents, would be your skeleton, would it
25 not?

26 MR. GREEN: Yes, we are happy to do sequential exchange of the order.

27 THE PRESIDENT: So, bearing in mind you would have put in your reply, would another two
28 weeks be about right? It cannot be much more than that, can it, if it is going to be
29 sequential – 21st?

30 MR. GREEN: 21st, yes.

31 THE PRESIDENT: Mr. Swift, would another two weeks be about right? That would take you to
32 5th October for yours. Ryanair would not need so long, so seven days would be 12th
33 October, is that all right? That is what we have in mind, so unless anyone hollers that it is
34 undoable we will draft an order a long those lines and let you have it in draft.

1 MR. GREEN: I think Ryanair's skeleton needs to be in ----
2 THE PRESIDENT: Yes, that would be 12th October.
3 MR. GREEN: 12th, thank you.
4 THE PRESIDENT: Mr. Jowell has not leapt to his feet to say that is impossible.
5 MR. JOWELL: No, 12th October seems possible. The only point we would raise is that if we are
6 to get our material in by the end of July we will need to have the full unredacted versions
7 really straight away. I do not know if it is possible to make an order ----
8 THE PRESIDENT: Well as soon as the confidentiality ring is dealt with – we need to know if
9 there are going to be any problems with that very quickly, but I assume there would not be
10 because we have a pretty well established order now for this.
11 MR. GREEN: I am sure there will not be.
12 THE PRESIDENT: That being so you ought to be able to have it very quickly. I do not know
13 whether there is a mechanism whereby you can have it even quicker – counsel could give
14 undertakings but I think it will happen so quickly anyway that we are only talking about a
15 day or so.
16 There are just two points we have before I throw it open to you. It would be very helpful if
17 we could have a bundle of authorities, say, by the end of July. We will have to put
18 something into the order for bundles; it will be conventional but we may put in an exception
19 for the authorities, so if you could let us have them in a bundle before then. It does not have
20 to be the comprehensive bundle, just whatever you have mentioned up to now in your
21 application and defence that would be extremely helpful.
22 The other matter is it would also be very helpful if at some point – probably by about the
23 same time, the end of July – we could have electronic versions of the pleadings and in due
24 course the skeleton arguments. I think that normally happens anyway, does it not?
25 Normally I think we end up with electronic versions of skeleton arguments but if I could
26 just flag it up.
27 Is there anything else, Mr. Green?
28 MR. GREEN: No, that is fine, and we will procure the authorities and the electronic versions for
29 you.
30 THE PRESIDENT: Thank you very much, and we will let you have a draft order, either later
31 today or first thing tomorrow.
32 MR. SWIFT: In terms of the bundle for the hearing – I am looking across at Mr. Green, BAA
33 will take carriage of that?
34 MR. GREEN: Yes.

1 THE PRESIDENT: We will put something in the order about bundles; it will be the conventional
2 method.
3 MR. SWIFT: Conventional bundles.
4 MR. GREEN: Can we suggest in relation to bundles that we do not duplicate that which we have
5 already produced. I think normally in the CAT we used the bundles which have been
6 provided and we simply add to them sequentially, if that is convenient.
7 THE PRESIDENT: Yes, that would be very helpful.
8 MR. GREEN: Then you can start marking these up without having to then remark the same
9 documents later.
10 THE PRESIDENT: Yes, the understanding would be that the bundles would be done so that we
11 could use our existing bundles.
12 MR. GREEN: Yes.
13 THE PRESIDENT: Thank you all very much for your help.
14 _____