



Neutral citation [2010] CAT 11

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1110/6/8/09

Victoria House
Bloomsbury Place
London WC1A 2EB

30 March 2010

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
LORD CARLILE OF BERRIEW Q.C.
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

- supported by -

RYANAIR LIMITED

Intervener

JUDGMENT (COSTS)

I. INTRODUCTION

1. The judgment which we now give relates to the disputed question of costs and in particular BAA's application for costs against the Commission. No costs order is sought by or in respect of Ryanair.
2. In this judgment, which is unanimous, we adopt the same abbreviations and terminology as in the main judgment in this case given on the 21 December 2009 ([2009] CAT 35) ("the Main Judgment"). The Main Judgment contains the background to this matter, and the present judgment should be read with it and also with the Tribunal's judgment on relief and permission to appeal handed down on 25 February 2010 ([2010] CAT 9) ("the Relief Judgment").
3. In the Main Judgment the Tribunal upheld BAA's application for review of the Report on the ground of apparent bias, whilst rejecting BAA's second ground of challenge, which alleged that the Commission had not complied with the requirements of proportionality in certain respects. The Tribunal left over the question of relief to be determined following further argument, in the absence of agreement between the parties.
4. In the event BAA and the Commission were able to reach agreement on the terms of the relief they considered appropriate, and Ryanair did not object to those terms. The terms were approved by the Tribunal which accordingly made an order quashing those parts of the Report which address the adverse effects of, and remedies for, BAA's common ownership of various airports, and remitting the matters in question back to the Commission with a direction to reconsider and make a new decision in accordance with the Tribunal's ruling. As a result of the parties' cooperation on these matters, other findings contained in the Report were able to stand without it being necessary to consider whether they were affected by the Tribunal's conclusion as to apparent bias. It was also agreed that the remittal should not take effect pending the outcome of any appeal.
5. As far as the question of costs is concerned, the Relief Judgment (and the Tribunal's consequential order) recorded the understanding of all sides that this issue would be

dealt with by the Tribunal following our receipt of written submissions from BAA and the Commission. As with the issues of relief and permission to appeal, the parties have indicated that they are content for the Tribunal to resolve this issue without any further oral hearing.

II. TIMETABLE FOR SUBMISSIONS AND OTHER MATTERS RAISED IN CORRESPONDENCE

6. On 18 February 2010 the Tribunal wrote to the parties' solicitors setting out a timetable for the lodging of written submissions, and requesting both BAA and the Commission to supply to the Tribunal a schedule of their respective costs broken down under certain specified heads. By letter from its solicitors dated 26 February 2010 BAA questioned whether in view of the fact that BAA was only claiming costs in relation to the apparent bias issue (on which it succeeded) and not in relation to the proportionality ground (on which it lost) BAA's costs schedule needed to cover the latter. BAA also questioned whether, conversely, the Commission's schedule needed to cover its costs of resisting the apparent bias ground, as the Commission was arguing for "no order for costs" on the basis that it had succeeded on proportionality and these costs offset the costs claimed by BAA in respect of the apparent bias issue. In its response dated 3 March 2010 the Tribunal indicated its preference for cost schedules containing the data originally requested, but stated that if the preparation of such schedules would involve significant costs which would not be incurred in any event (for example as part and parcel of the process of invoicing fees) then an informed estimate of the amounts in question would be acceptable both in respect of BAA's costs of the proportionality issue and the Commission's costs of the apparent bias issue.

III. COSTS SCHEDULES

7. Each party submitted its cost schedule on 19 March 2010. The schedules indicate that BAA's total costs in the proceedings are £1,521,545 excluding expert witness fees and £1,774,163 including those fees. The Commission's total costs are £158,609.

- In relation to apparent bias the total costs can be broken down as follows:

- BAA: Herbert Smith's charges for pre- and post-judgment work: £641,761; counsel's fees (assuming 60% of the fees pre-judgment were in respect of this issue): pre-judgment £215,518; post-judgment £32,450. This would result in total costs of £889,729 for apparent bias.
 - The Commission (including post-judgment costs): £92,014 made up of £19,246 solicitors' fees and £72,768 counsel's fees.
- In relation to the proportionality ground the costs are:
 - BAA: Freshfields' charges of £488,137, counsel's fees of £143,678 (on the basis of an assumed 40% of counsel's work), and expert witness fees of £252,618. This would make a total of £884,433 including witness expenses or £631,815 excluding them.
 - The Commission: £66,594, made up of solicitors' charges of 13,486 and counsel's fees of £53,108.
8. Therefore it appears that, leaving out of account the charges made by the expert witness engaged by BAA in relation to the proportionality ground (the Commission did not instruct an external expert but did the necessary work in-house), BAA's costs are greater than the Commission's by roughly a factor of ten whether one looks at the total costs or the costs of each issue separately.

IV. THE PARTIES' RESPECTIVE POSITIONS ON COSTS

9. In summary, BAA claims from the Commission BAA's costs of the apparent bias issue, and submits that there should be no order for costs in respect of the proportionality issue. It submits that in the present case there would not be any real difficulty in adopting an issue-based approach because BAA instructed different solicitors for the two issues, and is only claiming for the costs of those solicitors who acted in relation to the apparent bias ground. Although there would be an apportionment to make in respect of counsels' fees, BAA submits that 75% would be a fair reflection of the work done by counsel on this issue. Alternatively, BAA contends that if the Commission is held to be entitled to its costs of the proportionality issue then BAA should still benefit from a

substantial costs order given, in particular, what it submits to be the weightier nature of the apparent bias ground. As to assessment, BAA submits that in view of the heavy and complex nature of these proceedings concerning very high stakes for BAA, the Tribunal should not make a summary assessment of BAA's costs as it did in *Tesco v Competition Commission* [2009] CAT 26, but should send the matter for a detailed assessment by a costs officer.

10. The Commission contends that the Tribunal should make no order as to costs, as the Commission won on proportionality and BAA won on apparent bias. Alternatively, if a split order is appropriate and the Tribunal took the view that the apparent bias issue was the weightier of the two main grounds, then the Tribunal should consider awarding BAA a small proportion of its apparent bias costs reflecting a netting off of the two notional orders. In any event the Commission submits that no order in BAA's favour should require actual payment pending the Commission's application to the Court of Appeal for permission to appeal and any subsequent appeal. In relation to assessment, the Commission would prefer the Tribunal to carry this out in the light of the parties' costs schedules.
11. In their written submissions both BAA and the Commission have each deployed a number of arguments in support of their respective positions. Naturally we have considered carefully all the points put to us even if we do not refer to all of them specifically below.

V. THE TRIBUNAL'S DECISION

12. In establishing that the Report is affected by apparent bias, and in overcoming the Commission's contentions (made as alternatives to the denial of apparent bias) that any such apparent bias had been waived by BAA or was not such as to "taint" the other decision-makers, BAA has succeeded in its challenge. As a result, certain parts of the Report (identified by agreement between BAA and the Commission) have been quashed and the relevant matters referred back to the Commission for reconsideration and a new decision.
13. In these circumstances the principles set out by the Tribunal in *Tesco v Competition Commission* [2009] CAT 26 (paragraphs 25-33) in relation to applications such as the

present, indicate that as a starting point an award of costs in favour of BAA is likely to be appropriate. Does the fact that BAA failed on the proportionality ground mean that the Tribunal should make no order as to costs and allow the costs of each party to lie where they fall, as the Commission contends in its primary submission? In our view there are two main reasons why this approach would not meet the justice of the case.

14. First such an order would not reflect the real outcome of these proceedings. BAA challenged the validity of the Report's conclusions on two discrete grounds and succeeded on one of them. In terms of the relief obtained BAA probably achieved as much as it could have hoped for in this application.
15. Second, contrary to the Commission's submissions it is in our view clear that the allegation of apparent bias was the major ground of BAA's application. This ground (including the related issues of waiver and "tainting" of the other decision-makers) took up more of the hearing time, and a correspondingly larger part of our judgment. Although the legal principles to be applied were reasonably well-established, the factual background, which it was necessary to consider in some detail from several viewpoints, was quite complex, spanning a number of years and various relationships. Furthermore this ground was also wider in its potential scope than the proportionality ground, as apparent bias could be seen as calling into question all findings of the Group, or at least all the findings which were adverse to BAA.
16. It is true, as the Commission points out, that the initial scope of the proportionality ground was whittled down in the course of the proceedings so that by the time we reached the hearing its scope was limited to an argument that certain considerations had not been taken into account properly when the Commission was determining the timing of divestitures. In particular one substantial element of the proportionality argument as originally formulated, namely BAA's contention (based on Mr Falkner's expert report) that the divestitures would result in an increased cost of capital for the London airports which had not been considered by the Commission, was dropped by BAA after the Commission's defence had been filed. Nevertheless the proportionality ground, even at its fullest extent, was still limited to an attack on the remedy of divestiture, and at its narrowest to a challenge to the timing of that remedy.

17. Therefore BAA won on its major ground, and none of the points raised by the Commission in its written submissions would render it fair simply to treat the respective costs of the two issues as notionally cancelling each other out, which is what “no order for costs” would imply.
18. BAA, in contending that it should receive all its costs of the apparent bias issue whereas the Commission’s costs of proportionality should lie where they fall, argues that the latter issue only arose as a result of a “failure to set out relevant and necessary reasoning clearly” in the Report. In support BAA refers to the Tribunal’s decision on costs in *Celesio v Office of Fair Trading* [2006] CAT 20, paragraphs 37-40 and 50-52. However the position was significantly different there. After the relevant decision of the OFT in that case had been challenged in the Tribunal, a witness statement was lodged providing further explanation of the process by which the OFT had reached that decision. The Tribunal stated that it was only in the light of the witness statement that the OFT decision could properly be understood. That is not the case here, where no supplementary explanation was submitted by the Commission and where the Tribunal was able to conclude that the Commission had taken account of relevant considerations by reference to the contents of the Report alone.
19. In our view to give BAA all its costs of the apparent bias ground whilst allowing the Commission’s costs of the proportionality issue to lie where they fall would be unfair to the Commission. The Commission’s success on a discrete and important, albeit somewhat less substantial, issue in the proceedings needs fairly to be reflected in the costs award.
20. One possible course might be to award each party the costs of the issue on which it has won. However neither party argues for such an approach, and it would be likely to give rise to the need to allocate specific costs to specific issues, which is discouraged by CPR r 44.3(7). Although the difficulties of allocation would be reduced to some extent by BAA’s use of different solicitors for the two issues, the same counsel were used by BAA for both issues, and the Commission’s legal team were not differentiated by issue.
21. The fall-back position of each party is that BAA should receive an award of costs based on a proportion of its costs (see paragraphs 9 and 10 above). In this regard the Commission understandably argues that the proportion should be small and based on

the costs of apparent bias, whereas BAA seeks “a substantial costs order”. Arguably the conventional means of reflecting the fact that BAA has failed on the proportionality ground whilst being the overall “winner” in the sense of achieving most or all the relief sought, would be to award BAA an appropriate proportion of its overall costs. Although this would avoid the need to attribute counsel’s fees to any specific issue, it might conceivably involve a need to examine the costs incurred by BAA in relation to the proportionality issue, in respect of which different solicitors were instructed, as well as a controversial expert witness. That should clearly be avoided if possible.

22. In all the circumstances we have decided that the following, which is a modified version of BAA’s preferred approach, will best serve the interests of justice. BAA should receive 75% of its reasonable and proportionate costs of apparent bias. For the avoidance of doubt there should be included in these costs the post-judgment costs relating to relief, permission to appeal and costs issues. So far as solicitors’ charges are concerned the costs which will need to be assessed are clearly those of the solicitors who were separately instructed to deal with the apparent bias issue. So far as counsel’s fees are concerned, in order to avoid the difficulties of attribution to which reference has been made we consider that the assessment should be carried out on the basis that 60% of BAA’s counsel’s fees were in relation to work on the apparent bias issue. In our view this percentage, rather than the 75% suggested by BAA, represents a fair apportionment as between the two main issues.
23. We have given consideration to how the amount of the costs in question should be assessed, and in particular whether we should assess them ourselves (summarily or otherwise) or order that they should be subject to detailed assessment by a costs officer. In the end we have decided that the latter is appropriate here. In *Tesco* (above) the Tribunal felt able to carry out a summary assessment and award a lump sum to the successful party using the costs incurred by the unsuccessful party as a benchmark. In doing so the Tribunal made clear that a lump sum award on that basis would not necessarily be appropriate in other cases and emphasised the considerable flexibility afforded by rule 55 to achieve a just result in each individual case. In the present case there are a number of factors which make a comparison between the two sets of costs, such as that carried out in *Tesco*, more problematical. These include the fact that here, unlike in *Tesco*, each party succeeded on one of the two substantive grounds of

challenge, and that here one party instructed an external expert to deal with certain issues whereas the other party did the necessary work in-house. Furthermore, wide as the disparity was between the two sets of costs in *Tesco*, in this case it is even wider and we have come to the conclusion that in all the circumstances a full and expert assessment is required. In so ordering we should not be taken as indicating that the amount incurred by BAA in relation to the apparent bias issue is necessarily disproportionate to the issues involved. The remedy of divestiture challenged by BAA in these proceedings is one which would undoubtedly have a dramatic impact on BAA and its business, and there was a great deal at stake for that company.

24. We will therefore order that the costs to be awarded to BAA in accordance with our conclusions at paragraph 22 above are to be subject to detailed assessment on the standard basis by a costs officer of the Senior Courts Costs Office pursuant to Rule 55(3) of the Tribunal Rules if not agreed.
25. We do not propose to order that any payment of costs be stayed pending the Commission's renewed application for permission to appeal or any subsequent appeal. Such an order would be at odds with the grounds on which the Tribunal refused permission, and there is no suggestion that payment of costs would have a significant or any impact on the Commission's fulfilment of its statutory functions. Nor is there any reason to apprehend that in the event of a successful appeal BAA would be unable to repay an amount of costs paid to it by the Commission.

The President

Lord Carlile

Sheila Hewitt

Charles Dhanowa
Registrar

Date: 30 March 2010