



Neutral citation [2011] CAT 27

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1174/4/1/11

Victoria House
Bloomsbury Place
London WC1A 2EB

13 September 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
MICHAEL BLAIR QC
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- v -

OFFICE OF FAIR TRADING

Respondent

- supported by -

AER LINGUS GROUP PLC

Intervener

JUDGMENT ON APPLICATION FOR PERMISSION TO APPEAL AND STAY

Introduction

1. The Tribunal handed down its judgment in these proceedings on 28 July 2011 (“the Main Judgment”). In the present ruling the Tribunal adopts the same abbreviations and terminology as are used in the Main Judgment. The background is set out in the Main Judgment, with which this ruling should be read.
2. In the proceedings a single issue fell to be determined by the Tribunal, namely whether, as Ryanair contended, the OFT had by 17 September 2010 become time-barred from referring to the Competition Commission under section 22 of the Act Ryanair’s acquisition of a minority shareholding in Aer Lingus. The Tribunal decided that issue in favour of the OFT, who was supported by the intervener Aer Lingus.
3. By a written application dated 5 August 2011 Ryanair seeks permission to appeal that decision to the Court of Appeal. Further, in the event that the Tribunal grants permission to appeal, the company also asks the Tribunal to stay its decision pending such appeal.
4. On 7 September 2011 the OFT and Aer Lingus lodged written submissions opposing both of Ryanair’s applications.
5. Ryanair lodged submissions in reply on 12 September 2011.
6. None of the parties has requested an oral hearing, and Ryanair has indicated that it is content for these matters to be determined without one. The Tribunal does not consider that an oral hearing is necessary.

Permission to appeal

7. Ryanair’s application for review was brought before the Tribunal under subsection 120(1) of the Act. Decisions of the Tribunal in relation to such applications can be challenged under subsections 120(6) to (8) of the Act which provide for appeals to (in this case) the Court of Appeal. Any such appeal requires the permission of the

Tribunal or the Court of Appeal and, by virtue of subsection 120(6), must raise a point of law.

8. In considering whether to grant permission when, as here, sitting in England and Wales the Tribunal applies the test in Civil Procedure Rules (“CPR”) rule 52.3(6):

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

9. As to whether there is a real prospect of a successful appeal, the arguments relied upon in Ryanair’s application for permission to appeal in relation to each of the three proposed Grounds were ventilated in the course of the substantive hearing, carefully considered by the Tribunal, and dismissed for the reasons set out in the Main Judgment. Only in relation to the matter referred to in paragraph 48 of Ryanair’s Request for Permission to Appeal (under proposed Ground 3) did the Tribunal reach its conclusion with some hesitation: see paragraphs 128 to 130 of the Main Judgment. However, as explained in paragraph 127, the outcome of the proceedings did not depend on that conclusion. The Tribunal is not satisfied that the proposed appeal would have a real prospect of succeeding in relation to the findings which were determinative of the outcome.
10. Nor has Ryanair convinced us that there is any other compelling reason for an appeal to be heard.
11. It is true that the specific subject matter of proposed Ground 1 (namely the operation of the duty of sincere cooperation in the context of the EU and national merger regimes) does not yet appear to have come before the ECJ. However, as we pointed out in the Main Judgment, the principles relating to the application of that duty are well-established by the ECJ in the case law to which we referred. That case law also makes clear that the scope and effect of the duty are dependent on the specific factual and legal context of each case (see paragraphs 87 and 132 of the Main Judgment). The problem which arose here was the result of the interrelationship of EU law and certain legislative provisions which are specific to the United Kingdom, in the context of very particular circumstances. There is no reason to believe that the facts of the present

case are likely to be replicated often or at all, so as to make it desirable that the Court of Appeal should have a chance to consider the proposed Grounds regardless of the merits. Still less is the problem encountered here likely to occur elsewhere in the EU.

12. In these circumstances we unanimously refuse permission to appeal. The application may be renewed to the Court of Appeal within 14 days pursuant to CPR rule 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling, along with the written submissions identified at paragraphs 3, 4 and 5 above, should be placed before the Court of Appeal.

Ryanair's application for a stay pending appeal

13. Ryanair's application for a stay of the Tribunal's decision is made contingently upon permission to appeal being granted (see paragraph 55 of Ryanair's Request for Permission to Appeal). Accordingly the application does not arise for consideration. Presumably the matter could be revisited in the event that the application for permission were to be renewed in the Court of Appeal.

The President

Michael Blair

Graham Mather

Charles Dhanowa
Registrar

Date: 13 September 2011