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IN THE COMPETITION

Case No. 1185/6/8/11

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

Friday, 7 October 2011

Before:

THE HON. MR. JUSTICE SALES
(Chairman)

WILLIAM ALLAN
JOANNE STUART

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

and

THE COMPETITION COMMISSION

Respondent

Supported by

RYANAIR

Potential Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

Mr. Daniel Beard QC and Mr. Alan Bates (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Paul Harris QC (instructed by Nabarro) appeared on behalf of the potential Intervener, Ryanair.

1 THE CHAIRMAN: Yes, Mr. Green?

2 MR. GREEN: I appear today with Mr. Martin Chamberlain. Mr. Beard QC and Mr. Bates appear
3 for the Competition Commission and my learned friend, Mr. Paul Harris QC, appears for
4 Ryanair.

5 There is one matter I think Mr. Beard wishes to raise with the Tribunal about confidentiality
6 of certain issues.

7 THE CHAIRMAN: Yes.

8 MR. GREEN: I do not think it is going to be a problem, but I think some matters have gone into
9 the public domain very recently which might ease discussions which might otherwise need
10 to be held in camera.

11 THE CHAIRMAN: Well perhaps if Mr. Beard just explains that to me.

12 MR. BEARD: First of all, Sir, members of the tribunal, an apology on behalf of the Competition
13 Commission that the written submissions you received yesterday were late. It was not
14 possible to finalise them before yesterday due to the developments that were going on and,
15 unfortunately due to my being in court, it was not possible to file them until afterwards.
16 The issue that was the subject of consideration and a decision on the part of the Competition
17 Commission relates to the sequencing of the remedies that had previously been set out in
18 the 2009 report, had been subject to further consideration in the course of the 2011
19 Decision, but were further subject to consideration thereafter.

20 As a sensible and conscientious public authority, the Competition Commission is always
21 concerned to consider carefully points made to it about its decisions and arguments made in
22 litigation. It was the experience it suffered in the first round of this litigation that meant it
23 was conscious that matters have not always been dealt with as speedily and expeditiously as
24 might have been hoped, indeed, there have been substantial delays which mean that the
25 remedial structure set out in the 2009 report has not been fulfilled and of course it is the
26 very delay in that first process that has left us in the position where a consideration invited
27 by the Competition Commission of material changes of circumstances have resulted in the
28 2011 Decision.

29 Over the summer BAA suggested that the Competition Commission should simply reverse
30 the sequence of divestment that had been stated previously, i.e. Stansted and NA Scottish
31 Airports. There would be a degree of overlap in the sales processes but that was the order.
32 At that time the Commission obviously said that would be wholly premature pending any
33 appeal actually being lodged and confirmed to actually being brought. But having received
34 the notice of application and the application for interim relief the Commission has given

1 careful consideration to the process and has reached a decision that it would be appropriate
2 in all the circumstances to reverse the sequencing of the remedies, and invite BAA to accept
3 undertakings that the Scottish Airport would be divested first and that Stansted would be
4 divested second with a degree of overlap between the two processes. I can perhaps explain
5 further later more generally why that has been the decision reached, but obviously that has
6 consequences for today and, in particular, for any need to consider arrangements relating to
7 an interim relief application.

8 THE CHAIRMAN: Yes, I follow the significance of the interim relief application. You say a
9 decision has been made, but on a quick perusal of the Act is that not subject to consultation?

10 MR. BEARD: A decision to propose to accept undertakings which would be in a different order
11 from those that were reflected in the 2011 decision would, of course, be subject to
12 consultation. There is a statutory consultation scheme in schedule 10 of the Act and that
13 will obviously be undertaken in relation to those arrangements, but the decision is as a
14 remedial step the Competition Commission proposes to accept undertakings with the
15 sequence of divestments reversed so, yes, there will be consultations; yes, it will be in line
16 with the terms of the statutory scheme.

17 THE CHAIRMAN: And I rather understood from the Ryanair submissions that they may be
18 making representations in the course of the consultation designed to dissuade the
19 Competition Commission from ----

20 MR. BEARD: They may well do. They may well reflect upon the process and decide that
21 although they do not like it that is not ----

22 THE CHAIRMAN: The only reason for making that point is just to note that it is not necessarily
23 a fixed feature of the landscape for us that there will be this reversed sequencing.

24 MR. BEARD: Well it is not necessarily a fixed feature, but the Commission having reached that
25 conclusion obviously the Commission will consider any representations that have been
26 made, but if there were any difficulties it is a matter that they have directed their minds
27 carefully to of course. If people came forward during the consultation and objected to it they
28 have the power to bring a challenge, but it would effectively be an autonomous challenge,
29 albeit linked in subject matter to these proceedings.

30 So for the purpose of these proceedings I think perhaps it is as close to a fixed feature as is
31 maybe, and of course the Commission does have the power to make orders if there were any
32 issue in relation to BAA quibbling about particular terms on the undertakings. There would
33 be a slightly different consultation period that would apply there in relation to an order but
34 that power lies with the Commission.

1 THE CHAIRMAN: Thank you very much. Mr. Green, what I was going to do was to have
2 handed 'round a provisional timetable that we have drawn up in light of the submissions
3 that we have received from all parties. I will just say a few words to explain our thinking
4 behind it, and then we were going to retire for 10 to 15 minutes just to allow everyone to
5 digest it, but we thought it would be helpful in terms of focusing debate about the way
6 forward.

7 MR. GREEN: Yes, thank you.

8 THE CHAIRMAN: The first point I should note is actually an omission because I should have
9 picked up from the Ryanair skeleton argument, the point about the parties and Ryanair
10 formulating and agreeing arrangements for disclosure, so treat that as written in as the first
11 point, and according to the timetable proposed by Ryanair, so essentially it is sorted out by
12 11th October.

13 At the moment our provisional view is that it is premature to tell whether Ryanair should be
14 allowed to intervene orally. We simply do not have enough information to be able to
15 determine whether such an intervention will be good use of the court time or not, so that is
16 our provisional view at the moment but you will see that we have built in a liberty to apply
17 when the position becomes clearer; if submissions are to be made by Ryanair there will be
18 scope for that.

19 Paragraph 2 I think picks up the point made by BAA that, of course, Ryanair is one
20 prospective intervener, there may be others, and that needs to be swept up; that seemed
21 sensible to us. Then into the timetable as it affects the parties: the Competition Commission
22 have until 31st October. We understand there is no problem about them meeting that.
23 Ryanair to file and serve its statement of intervention by 7th November. At the moment
24 subject to submissions which may be made, we think that that gives Ryanair sufficient time
25 both to digest the position of BAA and to see and, so far as necessary modify what they
26 want to say in the light of what the Competition Commission says.

27 Paragraph 5: if there is to be an application for Ryanair to make oral submissions that
28 should come in at that point and then they will know what both sides are saying and will be
29 able to frame their application. If an application is made we think 14th November for the
30 other parties to comment on that and we will make a decision on that on the papers so that
31 Ryanair will know in good time whether or not they need to brief counsel for the hearing.
32 Then BAA file and serve its skeleton argument and any evidence in reply by 18th
33 November. Again, that seems to us to be adequate time after whatever comes in from the
34 Competition and Ryanair. Then the Competition and Ryanair file and serve respective

1 skeleton arguments by 25th November. Obviously, if Ryanair do not have liberty to
2 intervene orally what is described here as a skeleton argument will be their written
3 submissions.

4 Then agreed bundles by 30th November, and the hearing be listed in the week commencing
5 5th December, which I think accommodates the point made by Herbert Smith about counsel
6 availability. What I have put in square brackets at the end is relevant to the debate I was
7 having with Mr. Beard. It did seem to us that it might be sensible to have that as a long stop
8 possibility, a day set aside – hopefully put in counsel’s diaries as well as ours – just in case,
9 contrary to what Mr. Beard was saying, there is a change of what appears to be the position
10 provisionally at the moment and just in case therefore BAA feels it does need to make an
11 interim application.

12 At the moment the Tribunal is not disposed to make directions to enable that to happen
13 because I rather take the point that it seems unlikely at the moment although not impossible.
14 But if you have a date from the Tribunal that everyone can work towards I would have
15 thought that if, contrary to expectation, there does need to be such a hearing it ought to be
16 possible as soon as that becomes clear for a timetable to be set up working towards a date
17 which will be organised in this week.

18 As I say, that is just provisional thinking from us in the light of all the representations we
19 have received. We think it is probably sensible now to give you, let us say, 15 minutes, so
20 we will come back in at 25 past, unless there is anything anyone wants to say immediately?

21 MR. GREEN: That is fine.

22 THE CHAIRMAN: Very well, we will come back at 25 past 2.

23 (Short break)

24 MR. GREEN: Thank you for the time. We are in agreement with the suggestions. I do not think
25 there is anything between us and the CC on it, I think Mr. Harris for Ryanair may have one
26 or two points to make about it. So far as BAA is concerned, we are content with the
27 sequence of events.

28 THE CHAIRMAN: Right, thank you. Can I just check, before you sit down, the proposed order
29 will now build in (i) and (ii) from the Ryanair list since this, in terms of the confidentiality
30 ring I anticipate will be very much a re-run of somewhere where you have been before.

31 MR. GREEN: Oh yes.

32 THE CHAIRMAN: You do not anticipate any difficulties about doing that.

33 MR. GREEN: No.

34 THE CHAIRMAN: Very well. Shall I hear Mr. Beard next and then Mr. Harris?

1 MR. BEARD: Thank you very much, sir. In relation to the timetabling Mr. Green is right in the
2 sense that although we proposed a hearing the week before and we, on counsel's side, have
3 some difficulties in the week of 5th December, if the hearing were to be on
4 Monday/Tuesday, with a spill over into Wednesday – because we think this is really a two
5 day case not a three day case, but we quite understand that enough time needs to be left,
6 then it would be feasible for us. If it started on Tuesday going to Thursday that would
7 create difficulties for us.

8 THE CHAIRMAN: I think at the moment we will be able to accommodate you on that.

9 MR. BEARD: I am most grateful to the Tribunal. The second point to make related to what was
10 raised earlier. For the Tribunal's reference a press release has been made in relation to the
11 Decision so I will perhaps pass copies of that up to the Tribunal so that you have it for
12 reference.

13 THE CHAIRMAN: Thank you. Subject to you being satisfied on the hearing dates you are
14 content with the proposed ----

15 MR. BEARD: Yes, I have to say our position is that in relation to oral submissions by Ryanair,
16 they appeared last time and made useful oral submissions –not repetitive – a presumption
17 that they should be able to do so again seems to us perfectly reasonable, and therefore the
18 stage in here requiring them to make an application may be otiose.
19 The only other point to make would be in relation to reserving a date in the week
20 commencing 31st October we quite understand the sense in doing that. We thought it might
21 be sensible if solicitors amongst the parties liaised as to when dates might be sensible
22 during that week, taking into account, for example, the statutory consultation process that is
23 going to be undertaken.

24 THE CHAIRMAN: That is what I envisaged. Nothing is fixed there but it seemed to us looking
25 at the BAA skeleton, just in terms of if things do not change what might be necessary.

26 MR. BEARD: We entirely understand the sense of it ----

27 THE CHAIRMAN: That would accommodate that.

28 MR. BEARD: -- and would just clarify how we take it forward.

29 THE CHAIRMAN: Yes, so as I understand it you do not actually object to the way we are
30 proposing to deal with Ryanair at the moment. You have put down your marker that ----

31 MR. BEARD: Yes, I imagine Mr. Harris may have a little more to say?

32 THE CHAIRMAN: Yes, Mr. Harris.

1 MR. HARRIS: Sir, thank you. I would like to address you briefly on two matters. The first is
2 the question of oral intervention in addition to written intervention, and secondly, some
3 observations about the dates and the proposed timetable.

4 Taking them in that order I have six short reasons why the suggestion that is being made in
5 this draft about limiting us to written representations should not be pursued. First, my client
6 is known, if not notorious, for being a paragon of commercial efficiency, and the same
7 extends to its presentation of legal submissions, it is not ever unduly prolix, indeed, it is
8 known for being vehemently opposed to any excess baggage.

9 THE CHAIRMAN: My difficulty at the moment is I cannot be sure that you are going to say
10 anything additional and useful beyond what the Competition Commission has said.

11 MR. HARRIS: That is another of my reasons. The problem, we respectfully submit, with the
12 proposal is it is precisely because you cannot be sure that you should wait until – as should
13 the parties – you see what we do propose to advance by way of intervention.

14 THE CHAIRMAN: Usually it works the other way around with interveners, they explain what
15 they are going to bring to the party and then the court evaluates whether it is worthwhile
16 taking up court time to allow that to happen.

17 MR. HARRIS: I accept that that is done on occasion, certainly in our experience on this side in
18 this Tribunal is that it is often not done like that and permission is given to intervene both
19 orally and in writing. If it transpires that people are not adhering to their duty to be succinct
20 and non-duplicative, then at that stage somebody, whether it be the Tribunal of its own
21 volition or one of the parties says: “Okay, well let us limit you in some respect” that may be
22 only written or to oral. We would say that given that normal past practice in this Tribunal
23 that should be the approach here. But there is an additional series of reasons in this case
24 beyond just normal behaviour, which is that we have a proven track record in this very
25 litigation of not overstepping the boundaries of what is properly due in and from an
26 intervener.

27 On the contrary we have a proven track record in this very litigation of having been
28 substantially of assistance to the Tribunal and the higher courts both in writing and orally.
29 Furthermore, that was in a case that was not expedited, but our experience again – and I
30 respectfully urge this upon the Tribunal – is that in a case where there is expedition,
31 particularly pretty tight expedition such as this, oral hearings are often of extreme use. In
32 those circumstances there is quite often more of an interchange with counsel, more things
33 can be learned, or submissions can be developed further, and in those circumstances we
34 respectfully say that the presumption should be that we start with what I would describe as

1 the normal and wider permission, but if in due course that needs to be circumscribed, to be
2 honest, we will be the first to volunteer circumscription, because it is not in our interest to
3 be unduly prolix.

4 THE CHAIRMAN: Well why do you not volunteer now? Why do you not accept the door is not
5 shut on you, you can come back when we know what everyone is saying on all sides, and
6 we can have a focused debate with you saying “The Competition Commission is not making
7 this point, it is an important point and we will make it.

8 MR. HARRIS: We would say it introduces an additional level of applications and work into the
9 heart of an expedited timetable, which would be unusual, and we would certainly submit not
10 helpful in a case where there is expedition and a great deal of work to be done in a short
11 time period. So that is the answer to the specific point that you put to me.

12 If, for instance, BAA or, for that matter, the Commission takes the view that having seen
13 what we put in in writing and, notwithstanding our proven track record in this exact
14 litigation that somehow there is duplication or a lack of necessity for certain forms of
15 evidence or submissions, then I am quite sure they can tell us that and either we will agree
16 or there can be a direction on the papers from the Tribunal. But the course that this
17 Tribunal is suggesting since, I respectfully submit, we are almost bound to want to be at
18 least present so as to develop submissions as and when we feel necessary in response to the
19 Tribunal is that we are introducing a step that is bound to be taken up, whereas on my
20 proposal there is a step that may never need to be taken up, a step of extra work that may
21 never need to be taken up.

22 THE CHAIRMAN: Except that it is quite likely that if you do intervene that will lead to
23 argument about whether it is helpful or not.

24 MR. HARRIS: It may or may not be likely. You see, given our proven track record, we
25 respectfully say that in this case – of all cases – BAA know that Ryanair is a party that is
26 not going to be coming and saying things unnecessarily. We have never done so; nobody
27 has ever suggested that we have done so. On the contrary, the CC has just made the
28 submission that we have been jolly helpful, and one can see that from the judgments in
29 earlier rounds of this litigation. So, for that reason, we say there is an extra level of
30 workload in this particular context which is not helpful.

31 Last, but not least, two additional points: we find it difficult to comment now on the precise
32 nature of what we are going to put forward in the intervention because we have not seen an
33 unredacted copy of the even BAA’s application, let alone its underlying evidence, but what

1 we can say is that when we see it, we are extremely conscious of our duties, and we do not
2 propose to duplicate and we will be succinct.

3 Last but not least, I think one of the things that you said in introducing the timetable was
4 possible subsequent need to brief counsel that might be avoided in the event that oral
5 permission to intervene is either not sought or not given. In context that is not going to
6 happen because if Ryanair wishes to have counsel for a hearing in the week beginning 5th
7 December they are going to have to brief counsel now come what may.

8 THE CHAIRMAN: That will be a matter for ----

9 MR. HARRIS: We accept that. For all those reasons we would say that a reversal of the normal
10 sequence would not be helpful or desirable in this case.

11 THE CHAIRMAN: Yes.

12 MR. HARRIS: Turning now to submissions on the proposed timetable, I have three things to say,
13 if I may above and beyond obviously what I have said about the oral permission point.
14 Point 4 – we would respectfully ask for a few more days beyond 7th November. That date
15 only gives us seven days from receipt of the Commission’s defence and for us that is the
16 critical document, because we are supporting that defence. There is no suggestion that we
17 are going to be involved, obviously, in the drafting of that defence and it is very important
18 to us, precisely so that we can comply with our duties of succinctness and non-
19 duplication ----

20 THE CHAIRMAN: I had got the impression, I thought it was from your skeleton argument, that
21 you were already talking to the Competition Commission?

22 MR. HARRIS: No, we have been able to talk to them in the last 24 hours about matters arising
23 out of the CMC, but not as to the substantive defence at all. Although on the last occasion
24 there was not such a degree of expedition, nevertheless there was a month between the
25 defence being filed by the CC and us putting in our statement of intervention, we just
26 respectfully say that seven days is too little, we would ask for 11th November. I would note
27 that if you were to change that and give us to the 11th there is still a full week before, on
28 point 7, BAA has said it can file its skeleton argument, and that ought to be plenty of time
29 within an expedited process.

30 It also ought to be of greater benefit to both this Tribunal and BAA and the CC if we have
31 more time so that we can render more succinct what I hope will also be a succinct first draft.
32 The second point is that for the same reasons at point 8 of this draft we would like a few
33 days after the CC has filed its skeleton argument for us to file ours, for the exact same

1 reasoning that we want to make sure there is no duplication and the only way we can make
2 sure is to see those first and then digest it.

3 THE CHAIRMAN: So is your proposal that we shave some time off the CC then for that?

4 MR. HARRIS: No, my proposal is that we get, say, two days, to 27th November – I am not quite
5 sure what day of the week that is – subject to checking the days of the week. Perhaps we
6 should say Monday, 28th, rather than what must be Friday, 25th. It is difficult to see, that
7 just involves us doing extra work over the weekend, so it is difficult to see how that impacts
8 upon the other parties anyway.

9 THE CHAIRMAN: Yes.

10 MR. HARRIS: Then last, but not least, I appreciate nothing in the square brackets at the end is
11 going to be set down about a hearing on the interim relief application, if any, I would
12 simply just note for the record that Ryanair is likely to be very centrally involved in any
13 such application if it ever takes place, and that week is very difficult for me, I shall be in
14 trial that week, but since nothing is going to be set down it may be that the parties can ----

15 THE CHAIRMAN: The intention is that a particular date will be identified, so if you are not
16 available Ryanair will need to identify someone who can be here.

17 MR. HARRIS: I understand. Sir, unless I can be of further assistance?

18 THE CHAIRMAN: No, thank you.

19 MR. HARRIS: Thank you.

20 THE CHAIRMAN: Let us hear Mr. Beard next, and then Mr. Green. Is there anything additional
21 that you want to say, Mr. Beard, in the light of what Mr. Harris has said.

22 MR. BEARD: Not in the light of Mr. Harris' submission. If Mr. Harris and Miss Love want to
23 commit themselves to the joys of drafting a skeleton argument, or amending it over the
24 weekend of 26th/27th we have no objection at all to that, but we would object if there were
25 time being shaved off for our skeleton argument.

26 THE CHAIRMAN: Well they are not proposing that, they are proposing to sacrifice their
27 weekend.

28 MR. BEARD: Well that is selfless and noble and we applaud that. Other than that we do not have
29 any issues in relation to their comments.

30 THE CHAIRMAN: Thank you. Yes, Mr. Green?

31 MR. GREEN: Just three points. So far as Ryanair having extra time, I have no problem with
32 that. It may result in sequential changes to the bundling, if we could have an extra day to do
33 bundles of authorities and documents to be relied upon.

34 THE CHAIRMAN: If we extend that time I cannot believe that anyone will have difficulty.

1 MR. GREEN: We will do it as soon as we can, it goes without saying. So far as oral submissions
2 are concerned, our original concern, and the reason why we suggested that it should be
3 taken in stages was because of para. 21 of their request for intervention in which they, to
4 our minds, indicated that they were minded to put in evidence, and they were minded to do
5 what they have done in the past which was to add to the burden of the hearing. I do not
6 agree that everything that was said on the last occasion was necessarily useful, but there we
7 are. We would simply suggest you stick to the timetable. They are really not prejudiced. If
8 they have a good case to make for oral submissions they will be granted permission.

9 THE CHAIRMAN: Very well. We will rise for five minutes just to consider our views and then
10 come back in.

11 (Short break)

12 THE CHAIRMAN: There were four proposed adjustments to the draft directions. In relation to
13 the proposed oral intervention by Ryanair, for reasons we have already indicated we think
14 that the direction should remain as in the draft, in other words, if Ryanair in due course do
15 want to intervene they will have to make an application explaining why.

16 Secondly, on point 4, Ryanair asked for additional time. After consideration we do not think
17 that they should have additional time. They will have had BAA's full case from 11th
18 October, that is the primary document that they need, and we think that the seven days after
19 getting the Competition Commission's defence will be enough time for them to adjust their
20 statement of intervention in the light of that.

21 So far as the third point is concerned, additional time was asked for by Ryanair for their
22 skeleton argument or written submissions. We think there is sense in that and we extend
23 that time to 28th November, and everyone was in agreement there should be a consequential
24 knock-on of a day for the bundles.

25 We will draw up the order to reflect those matters and it will be issued later today I would
26 imagine.

27 MR. BEARD: I am most grateful. There were just two other matters that I wanted to clarify with
28 the Tribunal. One was in relation to confidentiality which was raised on the agenda. BAA
29 prepared and circulated a draft confidentiality ring order that was referred to earlier. On a
30 first look that all looks very sensible, we will double check it but I imagine that will be dealt
31 with and personnel identified properly and we will do that as soon as possible, so that the
32 process can roll on.

33 The other matter is merely to put down a marker because one of the issues that is raised on
34 the agenda is: "are there any evidential issues arising. There has been one evidential issue

1 arisen relating to the first report of Nicholas Thum. We have raised in correspondence a
2 question on what basis this material has been put in, given that this is an appeal in name,
3 and a judicial review in form. Obviously this is a substantial document that has been
4 included and we raised the question of how that fitted with the rules in *ex parte Powis*
5 which are familiar in the Administrative Court. We had a response on 30th September
6 saying that is relevant to ground 4 only on an illustrative basis showing what sort of
7 exercise could have been undertaken, some option pricing modelling for identifying
8 detriment. If that is what is being used only for then it is unlikely there is going to be any
9 issue arising and it can be dealt with in submissions. We are going to clarify one or two
10 things in correspondence but I thought it was right, given that was on the agenda, just to
11 note it for the Tribunal.

12 THE CHAIRMAN: Right. It does not sound as though there is any ruling required from us on
13 that point.

14 MR. BEARD: None today.

15 THE CHAIRMAN: Very well. Is there anything anyone else wanted to say? Very well, thank
16 you very much to all the parties.

17 _____