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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1239/4/12/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 June 2015

Before:

HODGE MALEK QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

AER LINGUS

Potential Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

Miss Alison Berridge (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

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

1 LORD PANNICK: Good morning, sir.

2 THE CHAIRMAN: Good morning, Lord Pannick.

3 LORD PANNICK: I appear with Brian Kennelly for Ryanair. The CMA is represented by
4 Alison Berridge. Aer Lingus is represented by James Flynn and Daniel Piccinin.

5 THE CHAIRMAN: Before you start, I would like to say something.

6 LORD PANNICK: Yes, please, sir.

7 THE CHAIRMAN: Ryanair's challenge is grounded on whether there has been a material change
8 of circumstances since the Competition Commission's final report dated 28th August 2013.
9 Reliance is placed on the offer from IAG for the shares in Aer Lingus. I would like to
10 mention two matters. The first is that I have been advising BA's treasury department in
11 connection with payment of over-flight charges in an Asian country. Secondly, I have a BA
12 Executive Club card as well as similar loyalty cards from a number of airlines that I fly
13 with. I do not consider that either matter presents any conflict or affects my ability to deal
14 with this case.

15 LORD PANNICK: I am very grateful to you, sir, for mentioning those matters. My immediate
16 reaction is precisely the same as yours as to the relevance, if any, of these matters, but I
17 ought just to turn round and see that those behind me and Mr. Kennelly agree. That is our
18 position.

19 THE CHAIRMAN: Thank you. Aer Lingus?

20 MR. FLYNN: Absolutely, no problems, sir.

21 THE CHAIRMAN: CMA?

22 MISS BERRIDGE: No, not for us either.

23 THE CHAIRMAN: Lord Pannick, please proceed, thank you very much.

24 LORD PANNICK: I am very grateful to you, sir. Sir, you have seen the context in which this
25 challenge is made. You have already summarised the nature of the challenge. Sir, you will
26 also have seen that our earlier challenge to the CMA report, which failed in this Tribunal
27 and failed in the Court of Appeal, is the subject of a pending application for permission to
28 appeal to the Supreme Court. That application remains pending, although an indication has
29 been given by the Supreme Court that we can expect a determination one way or the other
30 in the near future.

31 THE CHAIRMAN: When you say the near future, are we talking about a matter of weeks?

32 LORD PANNICK: Yes, as I understand it. I think that Aer Lingus have been in contact with the
33 office of the Supreme Court?

1 MR. FLYNN: Yes, sir, and we had an email from the Registry of the Supreme Court, which says
2 that the application had been transferred to the panel of Justices who will consider it, and an
3 answer is expected in early July.

4 THE CHAIRMAN: I have seen your application for interim measures, and my view is, subject to
5 hearing everyone else, I would not want anything to occur now that pre-empts that decision
6 of the Supreme Court, but we will come back to that a bit later.

7 LORD PANNICK: Indeed. I have got three topics on my list. The first is Aer Lingus's request
8 for permission to intervene, which I would not expect to take ----

9 THE CHAIRMAN: I have got my list as well.

10 LORD PANNICK: Shall I give you my list?

11 THE CHAIRMAN: Yes, let us see if it is one and the same list.

12 LORD PANNICK: I have got permission to intervene, expedition and date for the substantive
13 hearing which covers timetable, and matters of that sort, and any question of interim relief.
14 That is my list.

15 THE CHAIRMAN: That is fine. Effectively, my list is longer, but it covers everything that you
16 have said. The first is forum, which I have to deal with as a matter of formality, the second
17 is the Rule 16 intervention, the third is expedition, the fourth is the time estimate for the
18 appeal, the fifth is the dates for the appeal, the available dates, the sixth is the CMA defence
19 and Aer Lingus's statement of intervention, or whether we are just going to have skeleton
20 arguments instead, and whether or not they intend to adduce any evidence. The seventh is
21 timetable for submissions, the eighth is bundles, and the ninth is your Rule 61 application
22 for interim relief. Those are the items that I have on my list. Has anyone got any other
23 items for today's agenda? No.

24 Shall we just start off with the Rule 18 point. I presume everyone is happy for these
25 proceedings to be treated as proceedings in England and Wales within the meaning of Rule
26 18?

27 LORD PANNICK: Yes.

28 THE CHAIRMAN: Thank you. The second item is intervention, so perhaps Mr. Flynn can just
29 briefly outline that?

30 MR. FLYNN: Sir, you will have seen our skeleton argument for this hearing, which was in two
31 parts: the first contained an application for permission to intervene. We are the subject of
32 the SLC, we would say we are the subject of the takeover bid which has motivated the
33 Ryanair application. We have been admitted to intervene in all the previous cases. I do not
34 know if you require any further information?

1 THE CHAIRMAN: No, that is fine. Any observations on that? No. I grant under Rule 16
2 Aer Lingus's application for permission to intervene on the basis that it is their shares which
3 are in issue, and they were here last time. Last time they were helpful in the submissions
4 they raised. I am pleased to say that permission is granted on that.

5 On your application, Mr. Flynn, are you intending to adduce any evidence?

6 MR. FLYNN: Sir, I do not think that we would be adducing any detailed evidence at this point.
7 Our role is really, as usual, to support the CMA and assist the Tribunal in any way we can.
8 The particular factors that are relevant to this case I think will be the circumstances of the
9 IAG bid. We have already produced extracts from the offer document. It may be that there
10 are other matters of that kind, but I do not imagine that we would be intending to adduce
11 any detailed evidence.

12 THE CHAIRMAN: You say 'detailed', I just wanted to know whether or not there is going to be
13 any evidence, because that may affect the timetable?

14 MR. FLYNN: I think probably everything that we need to say can be said on instructions when
15 attaching documents to the skeleton argument or statement of intervention, whichever it
16 turns out to be. I do not imagine that we would need a witness statement, and I certainly do
17 not imagine we would be producing anything in the nature of the expert evidence in
18 proceedings of this kind, so I think not, sir.

19 THE CHAIRMAN: Lord Pannick, the next topic is expedition. Clearly you want expedition for
20 the reasons you have explained.

21 LORD PANNICK: Yes, we all want expedition.

22 THE CHAIRMAN: I presume everyone else agrees, and I direct that there will be expedition in
23 this matter.

24 The next question is, what is your time estimate for the appeal? I have got my own views,
25 but what is yours at the moment?

26 LORD PANNICK: One day will suffice. It may take less than a day, but I think one day is a
27 realistic estimate.

28 THE CHAIRMAN: The only point on that is that if we are going to deal with a contested interim
29 relief application, I would like to deal with that after we have heard the submissions on the
30 main appeal. I was thinking of perhaps starting, let us say, at two o'clock on the first day,
31 have your submissions, then deal with the submissions of the submissions of the CMA and
32 Aer Lingus the next morning, perhaps a bit longer, if need be, and then deal with your Rule
33 61 application.

34 LORD PANNICK: Yes. That assumes that there will be an application for an interim relief.

1 THE CHAIRMAN: I agree, but I just want to have the ability to deal with that, if need be.

2 LORD PANNICK: Can I just ask, sir, why not start at ten o'clock in the morning and we may
3 finish on the first day?

4 THE CHAIRMAN: I can explain why, and I will tell you the dates which are available and then
5 we can work backwards. The two dates are the Thursday and Friday of next week. So it is
6 the 2nd and 3rd. I am envisaging that we have the CMA submissions and evidence on the
7 Monday; we have Aer Lingus on the Tuesday; we have yours by close of business on the
8 Wednesday. You serve the bundles on the Wednesday evening. Then I can spend
9 Thursday morning going through those bundles and be ready at two o'clock to hear your
10 submissions, and then we would finish on Friday. That is what I am currently thinking.

11 LORD PANNICK: The disadvantage of that is that, as I understand it, the CMA team are not
12 available, certainly Mr. Beard is not available, and I think Mr. Flynn is not available next
13 week.

14 THE CHAIRMAN: On that, given the urgency of the matter, it is hard enough to find any dates
15 where sufficient members of the Tribunal can hear this. There will be no dates available for
16 the week after.

17 LORD PANNICK: There are no dates available in the week of the 6th?

18 THE CHAIRMAN: No, so it has to be next week.

19 LORD PANNICK: If that is the practicality then we will live with it, but my friends may have
20 submissions. I can be there on the 2nd and 3rd.

21 THE CHAIRMAN: That will be my pleasure, Lord Pannick!

22 LORD PANNICK: No, it will be my pleasure!

23 THE CHAIRMAN: Let us hear what the others say.

24 LORD PANNICK: I say that for the benefit of my colleagues, so they can hear, that it does leave
25 a very, very tight timetable, an enormously tight timetable.

26 THE CHAIRMAN: Of course it does. This is a case that no one is unfamiliar with. You have
27 put in detailed submissions, which are very helpful. This is not a case where there is going
28 to be a huge amount of evidence. The CMA have already had a couple of shots at this,
29 because you have had the provisional findings and the final findings. I would be surprised
30 if fresh arguments come out of all of this, but they may do. I think that is the timetable we
31 can stick with unless someone can persuade me otherwise.

32 LORD PANNICK: I am not opposing that, sir.

1 MR. FLYNN: Neither are we, sir. I am not, myself, available on the Thursday, but we are not
2 putting that forward as any kind of objection. Mr. Piccinin will be here. I may or may not
3 be able to be here on the Friday, but Aer Lingus will be represented.

4 THE CHAIRMAN: Yes, that is fine. CMA?

5 MISS BERRIDGE: As Lord Pannick indicated, Mr. Beard is not available on the Thursday at all.
6 He is in some difficulties on the Friday, but that does look more possible. If it were
7 possible to manage the entire hearing on the Friday, that would be considerably better from
8 the perspective of the CMA.

9 THE CHAIRMAN: I cannot risk an overrun. What I will direct then is that we have only the
10 submissions of Lord Pannick on Thursday afternoon, and then we start off at ten o'clock on
11 Friday with the CMA.

12 LORD PANNICK: Can I make a proposal, and it is this: at some time next week, perhaps on
13 Wednesday, Ryanair has to clarify whether it does wish to make an interim relief
14 application. If the answer is that it does not, then can we start on the Friday?

15 THE CHAIRMAN: No problem at all.

16 LORD PANNICK: We can finish the case on the Friday, and we will not need Thursday
17 afternoon. The Tribunal will have the whole of Thursday to look at the material. Indeed
18 that may speed up the hearing. That is my proposal. We should make our position clear by
19 close of play on Wednesday, or at some other time that you think is appropriate on
20 Wednesday.

21 THE CHAIRMAN: If you can tell us by four o'clock on Wednesday whether or not you are
22 intending to pursue an application for interim relief. If you are, then we start at two o'clock
23 on Thursday. If you are not we start at ten o'clock on Friday.

24 LORD PANNICK: Thank you very much.

25 MISS BERRIDGE: We would like to propose that the date by which Ryanair should make its
26 decision on the interim relief application be brought forward to give the CMA the maximum
27 opportunity to be ready to respond, if that is necessary, on Thursday and Friday.

28 THE CHAIRMAN: Lord Pannick, there is a request that - I am not going to make a direction on
29 this - if you do make your decision prior to four o'clock on Wednesday that you notify
30 earlier.

31 LORD PANNICK: I am perfectly happy to agree that four o'clock is the deadline, and we should
32 use our best endeavours to notify earlier, if we can.

33 THE CHAIRMAN: Yes, I think that is fair. So we have dealt with the time estimate. The time
34 estimate is one day, but one and a half days if we are dealing with interim relief.

1 LORD PANNICK: Yes.

2 THE CHAIRMAN: We have dealt with the dates for the appeal. The next question is really for
3 me to address the CMA as to how they propose to deal with the submissions. Are they
4 intending to adduce any evidence? If so, what? Are they proposing that their skeleton
5 arguments stand in lieu of a formal defence? I do not want duplication.

6 MISS BERRIDGE: Thank you. As indicated in our submissions, we propose a single round of
7 pleadings. Whether it is skeletons or a defence is immaterial. We do propose to adduce
8 some short evidence, which would relate to the suggestion made by Ryanair that there has
9 been a practice by the CMA of not enforcing divestment obligations during appeal
10 proceedings.

11 THE CHAIRMAN: That is fine. I cannot see any objection, if you want to put that evidence in.
12 What I will direct is that by 4 pm on Monday, you file your skeleton argument, which will
13 also stand as your statement of defence, together with any evidence. What I suggest you do
14 is that you do it all by way of a separate bundle. So instead of one having to prepare one
15 composite bundle you just have your own separate bundle with everything that you want in
16 there but do not duplicate anything in the bundle that we already have.

17 Mr. Flynn, I propose the same for you, so we will not have a statement of intervention, your
18 skeleton argument will stand as your statement of intervention; that, and any evidence, is to
19 be served by 4 o'clock on Tuesday.

20 MR. FLYNN: Perfect sense, sir.

21 THE CHAIRMAN: Thank you. Lord Pannick, your skeleton I propose at 4 o'clock on the
22 Wednesday and, at the same time, you lodge the bundles with all the authorities.

23 LORD PANNICK: Yes.

24 THE CHAIRMAN: As regards your Rule 61 application, I do not think we need to say anything
25 further about that at this stage, but I am very alive to the points you have raised about this,
26 and I have already indicated at the beginning of this hearing that I do not expect the CMA to
27 do anything that, let us say, pre-empts the decision of the Supreme Court, and I do not
28 expect them to immediately appoint a Divestiture Trustee while I am still considering this
29 matter. They can make submissions on that next Friday but for now, this is just an
30 indication, I am not making a formal ruling. If there is a Rule 61 application obviously we
31 would need to consider whether or not this is a case for cross-undertakings in damages, and
32 whether or not any potential relief can be satisfied by appropriate undertakings being
33 offered by the CMA, but I am going to be flexible about this, I am not making any formal
34 ruling on it today.

1 LORD PANNICK: So, as I understand it, sir, you are indicating to the CMA that the Tribunal
2 would not expect the Divestiture Trustee to be appointed while this Tribunal is considering
3 the substance of the application and pending the decision of the Supreme Court?

4 THE CHAIRMAN: Correct.

5 LORD PANNICK: Thank you.

6 THE CHAIRMAN: That is my indication, it is not binding. I appreciate it is only junior counsel
7 today and I am not making any order, and this will be revisited again next Friday.

8 LORD PANNICK: Your indication, sir, and the CMA's reaction is plainly very important to the
9 question of what we will say before 4 o'clock on Wednesday, so it is very helpful to have
10 that indication.

11 THE CHAIRMAN: Yes.

12 MISS BERRIDGE: Can I just clarify that?

13 THE CHAIRMAN: Of course.

14 MISS BERRIDGE: Yesterday we wrote a letter to Ryanair, copied to the Tribunal where there
15 was a proposal that steps preliminary to the appointment of a Divestiture Trustee but
16 stopping short of appointment of a Divestiture Trustee should proceed while these
17 proceedings continue. Does your indication suggest that those matters should not go ahead?

18 THE CHAIRMAN: No, I have not said that at all. I am only talking about the actual appointment
19 of a Divestiture Trustee and what I am saying is, having read the application of Lord
20 Pannick, my current thinking is I do not expect to see a Divestiture Trustee being appointed
21 in any event prior to me dealing with this next Friday, and I will revisit the question if need
22 be by then.

23 MISS BERRIDGE: Thank you.

24 THE CHAIRMAN: I thought that was clear enough to begin with.

25 LORD PANNICK: Thank you, sir.

26 THE CHAIRMAN: Any other matters? Thank you very much for everyone's help today. So we
27 are back at 10 am on Friday, unless you are pursuing your application in which case we are
28 back at 2 o'clock on Thursday. One thing that I would like you to address in your skeletons
29 is exactly what you mean about "material" and the consequences of it. Your position has
30 not been entirely consistent in your correspondence, and it looks as though the CMA are not
31 necessarily addressing the same issue in the same way. I think it is really important
32 everyone focuses on what they are actually suggesting – what constitutes something
33 material, and what are the implications for it, because on one simplistic level you can say
34 that it is only material if, in fact, it means that the CMA should adjust its decision in any

1 way, or it may mean, and I think this is what you say, that if there is a change of
2 circumstance it is material if it is something that they need to explore, to see whether or not
3 they need to change their order. I think there is a subtle difference between the two and I
4 am not sure if you are talking on the same wavelength. It may be that once we see
5 everyone's skeleton arguments, you all agree as to what the appropriate test is, whether it is
6 one or the other or a third version. But I think it is really important that in the submissions
7 people focus on that issue, because I need more help on that.

8 Thank you very much.

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