Case No: C3/2010/0589; C3/20100596
Neutral Citation Number: [2010] EWCA Civ 1097
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM
THE COMPETITION APPEAL TRIBUNAL (MR JUSTICE BARLING, LORD CARLILE OF BERRIEW QC, MS SHEILA HEWITT)
REF: 11106809

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2010

Before :

LORD JUSTICE MAURICE KAY
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE JACOB
and
LORD JUSTICE PATTEN

- -

Between :

Competition Commission	**Appellant**
- and -	
BAA Limited	**Respondent**
Ryanair Ltd	**Intervener**

- -

Mr Jonathan Sumption QC and **Mr Ben Rayment** (instructed by **Treasury Solicitors**) for the **Appellant**
Lord Pannick QC and **Mr Mark Hoskins QC** (instructed by **Herbert Smith LLP**) for the **Respondent**
Mr Daniel Jowell and **Ms Sarah Love (**instructed by **Nabarro LLP)** for **Ryanair Ltd (Intervener)**

Hearing dates : 23 and 24 June 2010

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Judgment

Lord Justice Maurice Kay :

1. On 29 March 2007 the Office of Fair Trading (OFT) made a reference to the Competition Commission (the Commission) for a market investigation into the supply of airport services in the United Kingdom pursuant to section 131 of the Enterprise Act 2002 (the 2002 Act). The OFT expressed the view that if the Commission were to find that an adverse effect on competition (AEC) existed, there was a reasonable prospect of appropriate remedies being available, including divestiture of some of the airports operated by BAA Ltd (BAA). In April 2007 the Commission appointed a six member panel (the Panel) to carry out the investigation. One of the six members was Professor Peter Moizer. On 19 March 2009, the Commission published its Report. It found that BAA's common ownership of airports in south-east England and Lowland Scotland gives rise to AECs. It adopted a package of remedies including divestiture by BAA of Gatwick and Stansted airports and also one of Glasgow and Edinburgh airports. BAA appealed to the Competition Appeal Tribunal (CAT) pursuant to section 179 of the 2002 Act. It alleged apparent bias on the part of Professor Moizer.

2. The allegation of apparent bias was based on the following circumstances. Professor Moizer has acted since 1987 as one of three external advisers to the Greater Manchester Pension Fund (the Fund). The Fund is administered by Tameside MBC. That council's functions in maintaining the Fund are delegated to the Pension Fund Management Panel (PFMP) which comprises local councillors from the ten local authorities within Greater Manchester. The same ten local authorities own the issued share capital of Manchester Airport Group plc (MAG), which in turn owns and operates Manchester airport as well as other airports in the United Kingdom. MAG played an active role in the Commission's investigation in the course of which it made both written and oral submissions which related to the future business of BAA. On 17 April 2007 the Commission made a disclosure (the 2007 Disclosure) in relation to the interests of panel members. It referred to Professor Moizer's advisory role with the Fund. On 20 August 2008 the Commission published its provisional findings and a notice of possible remedies, including the divestiture of Gatwick and Stansted. On 17 September 2008 BAA announced its intention to sell Gatwick. On 26 November 2008 the Fund and MAG met to discuss the Fund's possible involvement with MAG in a purchase of Gatwick. Professor Moizer was not at the meeting. On 2 December 2008 Professor Moizer received a telephone call from within the Fund regarding a potential investment in an airport. He brought the call to a rapid end and says that he did not know that it was to have referred to a possible investment in Gatwick. On 16 December 2008 the Commission was notified that MAG and the Fund were interested in the purchase of Gatwick. The following day the Commission published a provisional decision on remedies indicating that it was minded to require the divestiture of Gatwick. On 9 January 2009 at a meeting of the Panel it was brought to Professor Moizer's attention that the Fund was involved in a potential bid for Gatwick as part of the MAG consortium. On 14 January 2009 the Panel met, with Professor Moizer present, in order to discuss BAA's response to the provisional decision on remedies and the suitability criteria for potential purchasers. By a letter dated 6 February 2009 BAA wrote to the Commission referring to its limited knowledge of Professor Moizer's connection to the Fund and asking for further detailed information. Professor Moizer continued to attend meetings of the Panel until 17 February 2009. After 20 January (when the Commission learnt that the MAG consortium had made a bid for Gatwick) he was subject to quarantining to the extent

that he was not involved with matters relating to the Gatwick sale. Following a statement on 23 February 2009 by the Commission's chief executive that Professor Moizer should stand down immediately, Professor Moizer formally stood down on 3 March. The Report of the Commission was published on 19 March. In the event, Gatwick was ultimately sold on 20 October 2009 to a purchaser with no connection with MAG or the Fund.

3. Before the CAT (Barling J as President, Lord Carlile of Berriew QC and Ms Sheila Hewitt) the Commission and Ryanair Ltd (Ryanair) as intervener sought to resist the allegation of apparent bias. In a judgment running to 98 pages the CAT considered numerous issues including whether BAA had waived its right to object to any apparent bias and whether there was a relevant perception that Professor Moizer might have influenced the Panel in relation to its deliberations, thinking and ultimate conclusions by reason of any apparent bias.

4. The CAT upheld BAA's appeal on apparent bias and by an order of 25 February 2010 quashed the decisions, findings and reasoning of the Commission contained in the Report relating to the common ownership of airports by BAA. It referred the matter back to the Commission for reconsideration.

5. The central findings of the CAT are set out in the following extracts from the judgment:

> "Summarising the Tribunal's findings on this aspect of the case, the fair-minded and informed observer would conclude in the light of the material facts (1) that from late October 2007 until he stood down from the Investigation there existed a real possibility that Professor Moizer was biased in favour of MAG and (2) that from 2 December 2008 until he stood down from the Investigation there existed a real possibility that Professor Moizer was also biased in favour of the Fund." (paragraph 136)
>
> "There is … no question of BAA having waived the apparent bias before 26 January 2009, whether impliedly or otherwise." (paragraph 172)
>
> "BAA did not waive its right to object to Professor Moizer's apparent bias which existed from October 2007 and we must therefore consider what impact that apparent bias had upon the other members of the Group, who were his co-decision makers." (paragraph 181)
>
> "In our view the fair-minded and informed observer would conclude in the light of the material facts that there was a real possibility that, as a result of Professor Moizer's influence within the Group from October 2007 till February 2009, the deliberations, the thinking and the ultimate outcome of the Investigation were affected by bias."

6. I emphasise that at no point during the proceedings in the CAT or in this Court has it been suggested that Professor Moizer was affected by actual bias. The case has always been put on the basis of apparent bias.

7. By the grounds of appeal pursued in this Court, the Commission, again supported by Ryanair, contends that apparent bias was not made out because the connection between Professor Moizer and the Fund was too remote to be material; alternatively, that any connection had no operative effect and/or did not contaminate the other members of the Panel; and, in the further alternative, that BAA waived its right to object to any apparent bias.

1. Apparent bias

8. Before turning to the law on apparent bias and its application in this case, it is appropriate to set out the matters to which the CAT thought that the informed and fair-minded observer would have particular regard. It listed the following matters (at paragraph 123):

> "(a) that Professor Moizer, as a chartered accountant and professor of accounting, and having sat on other Commission inquiries, was well aware of the importance of impartiality, and of the public perception of impartiality, on the part of the members of the [Panel];
>
> (b) that the Fund has no separate corporate identity; it sits within the 10 local authorities making up Greater Manchester, one of which (Tameside MBC) has had delegated to it the role of administering the Fund; there is further delegation of the Fund's management to the Management Panel made up of councillors from the same 10 local authorities; this Panel, which has duties equivalent to those of a pension fund trustee, is assisted by the Advisory Panel; day to day administration is carried out by a Director of Pensions;
>
> (c) that the administrators of the Fund are subject to rules and fiduciary duties which require them to have regard to the suitability and diversification of investments and to take proper advice in relation to investment decisions;
>
> (d) that Professor Moizer has been a fee-paid adviser to the Fund continuously since about 1987, attending quarterly joint meetings of the Management and Advisory Panels, and giving advice at other times as and when required, sometimes frequently; that his advice and comments are sought on whatever issues happen to arise, and would be sought on an investment such as Gatwick 'as a matter of course'; that Professor Moizer is very well regarded by those whom he

advises at the Fund; he is trusted and highly influential, a 'wise man'; his influence is such that he has virtually a power of veto over a proposed investment; his role is effectively at 'officer' level in the Fund;

(e) that for many years the same 10 local authorities have also owned all the shares in MAG, which owns and operates Manchester Airport and certain other UK airports; that between them these 10 local authorities appoint two members to the Board of MAG from among their councillors; that the local authorities also exercise control over MAG's business through a shareholder committee, which can constrain the acquisition of assets and the making of other transactions by MAG, and which receives regular reports from MAG's Board on its business plans, investments and financial results; that there are other connections between MAG and the Fund or between MAG and its local authority owners including: the grant of dividends by MAG to its shareholders, substantial lending to MAG by at least one of the shareholders, and substantial pension contributions by MAG to the Fund (circa £250million);

(f) that the connection between the Fund and MAG is sufficiently close that it could lead the Fund to make a type of investment it would otherwise be highly unlikely to make;

(g) that in 2002 the Commission's legal adviser considered that Professor Moizer's links with MAG, through its local authority owners, were such that the Commission would not have appointed him to the 2002 Manchester QR whose decisions would affect a significant part of the revenue of Manchester Airport for the following five years; and that therefore that he should not be put in a position where it would be possible for him through joint meetings between the two 2002 Inquiry Groups, indirectly to influence the outcome of the Inquiry which concerned MAG;

(h) that in 2002 Professor Moizer himself had been sufficiently concerned about his links with MAG to raise the issue with the Commission at that time;

(i) that in making the reference to the Commission in March 2007 the OFT had limited the scope of that reference so as to require the Commission to focus on BAA and the airport services that it supplied in the UK; that the OFT had identified BAA's common

ownership of Heathrow, Gatwick and Stansted in England, as well as of Glasgow and Edinburgh in Scotland as being a likely cause of adverse effects on competition and on airline customers and consumers who used BAA's airports; and that the OFT had expressly envisaged divestiture of BAA's airports as a possible outcome of the investigation;

(j) that as a large airport operator with a number of UK airports to its name MAG and all other airport operators in the UK, and even beyond, could be regarded at least to some extent as competitors."

9. I shall have to refer to some of these matters in a more detailed context later.

The law on apparent bias

10. There is no dispute as to the relevant legal principles. In *Porter v Magill* [2002] 2AC 357, Lord Hope expressed the objective test as follows (at paragraph 103):

> "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

11. In *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, Lord Hope returned to the attributes of the fair-minded and informed observer. He said (at paragraphs 2 to 3):

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the

> headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

12. Further elucidation was provided by Richards LJ in *National Assembly for Wales v Condron* [2006] EWCA Civ 1 573 (at paragraph 50):

> "The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision."

13. It is common ground that the question whether, on the facts found by the CAT, apparent bias exists is a question of law: *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, per Lord Hope at paragraphs 2 to 7. At appellate level, it is for the courts

> "to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias." (*AWG Group Ltd v Morrison* [2006] EWCA Civ 6 per Mummery LJ, at paragraph 20)

14. It is also pertinent to keep in mind the words of Lord Bingham in *Locabail (UK) v Bayfield Properties Ltd* [2000] QB 451, 472, that, because proof of actual bias is very difficult,

> "the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring to show that such bias actually exists."

15. I return to the circumstances of this case. It is appropriate to consider them by reference to different periods of time.

16. Although the CAT concluded that the proceedings of the Panel were vitiated by apparent bias from October 2007, different considerations arise at different points along the temporal way. It will be recalled that Professor Moizer first became aware of a potential conflict on 2 December 2008 when he received a telephone call from the Fund regarding a potential investment in an airport. I deal first with the period before that telephone call.

October 2007 to November 2008

17. The CAT concluded that the crucial date for the finding of apparent bias was 25 October 2007 when the Commission and Professor Moizer discovered not only that MAG was going to play an active role in the inquiry but also that it was in the market for further airport acquisitions at the right price, including any of BAA's assets that might become available. In this context, the CAT described MAG as "a company

wholly-owned by Professor Moizer's long-standing clients" (paragraph 126). It explained its analysis in these terms (at paragraph 129):

> "Once the fair-minded and informed observer became aware of MAG's participation in the investigation and MAG's aims, he or she would look again at Professor Moizer's connections with that company. Noting that for about twenty years Professor Moizer has been advising its owners, the fair-minded and informed observer would assume that over such a long time there would have been established a very natural regard and loyalty between them. The fair-minded observer would of course take account of the fact … that Professor Moizer is retained to advise in relation to the Fund rather than to advise the local authorities at large; but he or she would also be aware of the realities of the situation: the observer would see Professor Moizer as the trusted and long-standing adviser of the local authorities who own MAG, and who by their presence on its board and through the shareholder committee, play an active role in directing MAG's business strategy (for example, giving clearance for MAG's Gatwick bid, according to press reports in August 2008), and who receive dividends from the proceeds of MAG's airport business. The fair-minded and informed observer would note that these are the same local authorities whose councillors attend meetings of the Fund's panels with Professor Moizer, and whom he regards as his clients."

18. This last point seems to have been conditioned by evidence that in 2002 the Professor had told Mr Jones, the Commission's in-house legal adviser, that, as the adviser to the Fund, he advised the local authorities who, through MAG, also owned Manchester Airport.

19. In my judgment, there is a fault line running through all this. The CAT's description of it as "the realities of the situation" is simply not accurate. Professor Moizer's contractual and professional relationship was not with MAG or the local authorities. It was with the Fund, through its Advisory Panel. The Fund, which does not have corporate personality, is conceptually in the same position as any pension fund. Its assets are vested in trustees and it is managed by a Management Panel. The trustees and the Management Panel owe fiduciary duties to the pensioner beneficiaries and, when acting in relation to the Fund, to no one else. The fact that the members of the Management Panel are also councillors in the local authorities in Greater Manchester does not affect the position. Their fiduciary position within the Fund is not compromised. Neither the legal structures nor the evidence about events in 2007-2008 justified the assimilation of Professor Moizer and the Fund on the one hand with MAG and the local authorities on the other. The "realities of the situation" were otherwise. Moreover, the CAT accepted that, prior to 2 December 2008, Professor Moizer did not know that the Fund was or might become interested in joining the MAG bid for Gatwick. His evidence (and BAA did not seek to cross-examine him) was that when he eventually came to learn of the Fund's potential interest, he was surprised because the size of the proposed investment far exceeded his previous advice about the appropriate level of the Fund's single asset exposure. In all these

circumstances, it was, in my view, wrong of the CAT repeatedly to describe MAG and the local authorities as Professor Moizer's "long-standing clients" when the reality was that only the Fund was his client.

20. It seems to me that the CAT's assimilation of Professor Moizer, the Fund, the local authorities and MAG was materially influenced by what had occurred in 2002. At that time the Civil Aviation Authority, acting under statutory powers, had referred a number of airports to the Commission to determine the maximum level of airport charges. There were two parallel inquiries – one in relation to Manchester and one in relation to BAA (Heathrow, Gatwick and Stansted). Professor Moizer was appointed to the BAA inquiry but not to the Manchester one. A point came when the two inquiries established joint working groups and this caused Professor Moizer some concern because of his relationship with the Fund. This was the context of his conversation with Mr Jones to which I referred in paragraph 18. In due course the Commission's dedicated Manchester inquiry website published the "2002 disclosure". It included the following:

> "Professor Peter Moizer is a member of the inquiry into the BAA Airports. I am writing to you about a financial interest that Professor Moizer has in one of the parties to the Manchester inquiry.
>
> Professor Moizer is one of their external advisers to [the Fund] which is a pooled investment vehicle with a value currently of over £6000 million. His role is to give independent strategic advice on the management of the Fund's investments; he receives a fee for his advice on an ongoing basis. The fund's administering authority is Tameside MBC. Employees of all local and joint authorities in the Greater Manchester area (apart from teachers, police officers and fire fighters) and of many other public bodies have automatic access to the Scheme … The ten local authorities within the Greater Manchester area are the shareholders of [MAG]"

21. The notice went on to describe steps that were being taken to ensure that Professor Moizer would not participate in any of the joint working groups.

22. The CAT considered the 2002 disclosure to be important in relation to 2007 and 2008. It concluded that the fair-minded and informed observer in 2007

> "would consider that, given the discomfort clearly felt by the Professor and the Commission at that time, at least as much discomfort should be felt now, when the Professor was in a better position to affect the interests of MAG than in 2002."

23. It is to be observed that the 2002 disclosure was to a degree inaccurate. It wrongly described Professor Moizer as having a financial interest in "one of the parties to the Manchester inquiry". The Fund was not such a party for reasons I have already explained. It was MAG that was a party.

24. The point now made on behalf of the Commission is that it is not an earlier view within the Commission that is determinative of the issue of apparent bias. It is the court's assessment through the eyes of the fair-minded and informed observer. Moreover, any person or body carrying out a quasi-judicial function will generally act out of an abundance of caution in such circumstances. Defensive steps are taken so as to avoid an allegation of actual or apparent bias and not just because a failure to take them would prove the allegation. In my judgment, there is force in this submission. It is essential to concentrate on what are truly the realities of the situation which should inform the opinion of the fair-minded observer. For these reasons, I do not consider that the 2002 disclosure is fatal to the appellants' case on apparent bias before December 2008.

25. Where does all this lead? I have well in mind the guidance in the authorities relied upon by BAA.

26. I also take cognizance of the fact that the fair-minded observer "is not unduly sensitive or suspicious" (see paragraph 11, above). I am entirely satisfied that, once in possession of the true facts about Professor Moizer's position, the fair-minded observer would conclude that, at all times between April 2007 and 2 December 2008, Professor Moizer was untainted by apparent bias. His relationship was with the Fund and not with MAG or the local authorities. He had no reason to suppose that the Fund was going to consider joining in the MAG bid for Gatwick. He was too remote from MAG and its owners for apparent bias to be a real concern.

The position after 2 December 2008

27. In its judgment, the CAT records that leading counsel then appearing for the Commission (not Mr Sumption QC) "did not really dispute that the fair-minded and informed observer would have identified a real possibility of bias once Professor Moizer knew of the Fund's likely participation in a bid for Gatwick" (paragraph 135). The CAT was clearly satisfied about the apparent bias in favour of the Fund from 2 December 2008 until the Professor stood down in March 2009. Although the appellants have sought to refight that battle, I need say no more than that, subject to the issues of the apparent bias being shown to have been inoperative, waiver and non-contamination of the other five members of the Panel, I consider this conclusion of the CAT to have been correct.

2. No operative effect

28. The Commission advances two discrete arguments which are susceptible to treatment under this heading. However, I shall leave one of them for separate consideration under the heading *Contamination*, below. Here I confine myself to the submission that any apparent bias after 2 December 2008 was and could have been of no operative effect because by September 2008 BAA had decided to sell Gatwick in any event and had made its decision public. That decision continued and there was indeed a sale to a consortium led by Global Infrastructure Partners, in respect of which contracts were exchanged on 20 October 2009 with completion on 3 December 2009.

29. There are difficulties with this submission. Although the Commission can point to material suggesting that the pending investigation may not have been the only reason for deciding to sell Gatwick, there is no doubt that the timing of the decision to sell

and its announcement were conditioned by the Commission's provisional findings. Moreover, although the decision was voluntary at the time it was taken, it was obvious that any sale at that time could only proceed under the supervision of the Commission, whose interests would be protected by the appointment of a shadow monitoring trustee accountable to the Commission. Any purchaser would have to be acceptable to the Commission, as would the terms and conditions of sale. Also, a decision to sell does not equiparate with the acceptance of an obligation to sell. BAA remained free to change its mind. These are important factors in the context of any consideration of apparent bias in this case. In addition, albeit less cogently, once MAG and the Fund had manifested an interest in purchasing Gatwick, there arose the possibility that, even if they were unsuccessful in that regard, they might turn their attention to one or more of BAA's other airports.

30. The Commission relies heavily on the fact that Professor Moizer was quarantined in relation to Gatwick matters from 20 January 2009. However, that was about seven weeks after he had become conflicted. Although Mr Sumption seeks to make light of the intervening period, the evidence is that the Commission had information from the shadow monitoring trustee on 16 December that MAG and the Fund were potential bidders for Gatwick. The provisional decision on remedies was published on 17 December. Professor Moizer attended a Panel meeting on 9 January and was also involved in a further meeting on 14 January when purchaser suitability criteria were discussed. On 20 January he took part in a Panel hearing and put questions to BAA representatives. Whilst it is apparent from the contemporaneous documentation that his involvement was modest, I do not consider that it was irrelevant to the issue of whether his apparent bias can be said to have been nullified on the basis of a lack of operative effect.

31. It is important in this regard to keep in mind that we are considering apparent and not actual bias and that, for this purpose, "appearances are not without importance": *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679, at paragraph 16, per Lord Bingham. I accept Lord Pannick QC's submission that BAA ought not to be put in the position of having to prove operative effect once apparent bias has been established. That would be to blur the distinction between actual and apparent bias. I therefore reject the ground of appeal relating to this aspect of operative effect. I turn next to contamination.

3. Contamination

32. This issue was first raised on behalf of Ryanair but it has also been adopted on behalf of the Commission. If apparent bias was established from as early as October 2007, the issue could not arise. Throughout the subsequent period, Professor Moizer would have been in a position to influence his colleagues on the Panel and the apparent bias on his part would have to be seen as contaminating the Panel as a whole. This was the conclusion of the CAT (at paragraph 198):

> "In our view, the fair-minded and informed observer would conclude in the light of the material facts that there was a real possibility that, as a result of Professor Moizer's influence within the [Panel] from October 2007 until February 2009, the deliberations, the thinking and the ultimate outcome of the investigation were affected by bias."

33. However, if the apparent bias only arose after 2 December 2008 (and was not waived), the position is not necessarily the same. This case is not simply about Professor Moizer. It is about whether the decision of the Commission, contained in its Report of 19 March 2009, was vitiated by apparent bias. The Report was signed off by the five remaining members of the Panel, Professor Moizer having first been the subject of a limited quarantine and having then withdrawn from the Panel on 3 March. Because of its finding that apparent bias was present from October 2007, the CAT made no finding on the hypothesis that it was only present after 2 December 2008. It is therefore submitted on behalf of the Commission and Ryanair that we should address the question on that basis and that we should conclude that, whatever may have been the position in relation to Professor Moizer, the other five members of the Panel were not afflicted by apparent bias and their eventual decision, to which Professor Moizer was not party, is untainted.

34. BAA does not take issue with the legal principle. It is well-illustrated by *ASM Shipping Ltd v Bruce Harris* [2007] EWHC 1513 (Comm) which concerned an arbitration in which one of three arbitrators was tainted. Andrew Smith J said (at paragraph 44):

> "I am unable to accept that there is an invariable rule, or it is necessarily the case, that where one member of a tribunal is tainted by apparent bias the whole tribunal is affected second-hand by apparent bias, and therefore should recuse themselves, or should be excluded, from the proceedings. After all, it is common practice where a juror has to be discharged … for the judge to consider whether there is a risk of 'contamination' of other jurors, and if there is no reason to think that there is, to continue the trial with the remaining jurors."

35. Cases in this area are necessarily fact-sensitive. BAA point to the fact that there were still live issues being considered by the Panel for a considerable time after 2 December and that Professor Moizer did not finally step down until 3 March. Its case is that we simply cannot know what influence he may or may not have had during that period. It is also emphasised that this is a case of apparent and not actual bias and it is consequently about perception.

36. On behalf of the Commission, reliance is again placed on the fact that nothing in the Panel's views changed significantly after 2 December. Its provisional findings and possible remedies had been published on 20 August 2008. To conclude that there was a real possibility that the apparent bias of Professor Moizer after 2 December afflicted the final decision of the Commission it would be necessary to find a risk that first he and then, through his influence, his colleagues, when maintaining the conclusions at which they had previously arrived on a provisional basis, were influenced by the new factor of his conflict of interest. In other words, the same views were reached but on a newly tainted basis – or, put another way, Professor Moizer may have prevented his colleagues from changing their minds. Mr Sumption describes such an analysis as "moving into the reaches of fantasy". I agree. In the context of the iterative nature of the Commission's procedure and the stage it had reached by 2 December, I do not consider that the final decision would be considered by a fair-minded and informed observer to have been tainted by a real possibility of apparent bias. In reaching this conclusion, I bear in mind the evidence about the extent of Professor Moizer's

involvement after 2 December (to which I referred in paragraph 30), knowledge of which I impute to the fair-minded and informed observer.

4. Waiver

37. The basic principle was enunciated by Lord Bingham giving the judgment of the Court in *Locabail (UK) Limited v Bayfield Properties Limited* [2000] QB 451 in the following terms (at paragraph 15):

> "… a party with an irresistible right to object to a judge hearing or continuing to hear a case may … waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not."

38. "Full knowledge of all the facts relevant to the decision" was further explained and illustrated in *Jones v DAS Legal Expenses Insurance Limited* [2003] EWCA Civ 1071, where the judgment of the Court (Ward, Waller and Hale LJJ) contained this passage (at paragraph 36):

> "Waiver would never operate if 'full facts' meant each and every detail of factual information which diligent digging can produce. Full facts relevant to the decision to be taken must be confined to the essential facts. What is important is that the litigant should understand the nature of the case rather than the detail. It is sufficient if there is disclosed to him all he <u>needs</u> to know which is invariably different from all he <u>wants</u> to know."

39. It is incumbent upon the objector to make his objections with reasonable promptness but he must be given "a fair opportunity to reach an unpressured decision": *Smith v Kvaerner Cementation Foundations Limited* [2006] EWCA Civ 242, per Lord Phillips of Worth Matravers CJ, at paragraph 29. What an informed potential objector must not do is to wait and see if the outcome of the proceedings is favourable or unfavourable before raising his objection.

40. The judgment of the CAT considered waiver in great detail but in the context of its finding that apparent bias was established from October 2007. As I have concluded that the CAT was wrong to find apparent bias before December 2008, it is now appropriate to focus on the waiver issue only after that date. The question becomes: was there a point at which BAA had full knowledge of the essential facts about Professor Moizer but failed to make a timely objection?

41. Before considering the "essential facts", there is one aspect of the matrix that requires resolution. The CAT found that until 26 January 2008 BAA was ignorant of the fact that the Fund is a pension fund for the benefit of employees of the ten local authorities of Greater Manchester which own and control MAG. That may seem a generous finding but the Commission does not seek to disturb it. Ryanair, on the other hand, challenges it as perverse. Given the high hurdle that must be safely negotiated for such a challenge to succeed, I find myself unable to accept the Ryanair submission. I therefore turn to the CAT's factual findings.

42. BAA knew that Manchester Airport (and some smaller airports) were owned by MAG and that MAG was owned and controlled by the ten local authorities of Greater Manchester (a metropolitan county created by the Local Government Act 1972). It also knew that Professor Moizer was a strategic adviser to the Fund, having been so informed by the Commission in its formal 2007 disclosure. It had no knowledge or recollection of the 2002 disclosure to which I referred in paragraph 20, above. The CAT found as follows:

> "170 … the Tribunal does not consider that BAA had actual knowledge of the original link between Professor Moizer and MAG. That link not being known to BAA, neither the January 2008 website publication of MAG's interest in purchasing BAA's airport assets, nor the subsequent press speculation about that interest, would have alerted BAA to the conflict problem …
>
> 172 … BAA did not know of the original link giving rise to apparent bias on the part of Professor Moizer until 26 January 2009 when, having been alerted by the Commission's phone call on 22 January, BAA and its advisers researched Professor Moizer's position and discovered the 2002 disclosure. There is therefore no question of BAA having waived the apparent bias before 26 January …
>
> 175 … In a further phone call on 27 January the Commission said it was considering writing to BAA regarding Professor Moizer. No letter from the Commission having arrived, on 6 February 2009 Mr Herga wrote to the Commission. The subject matter of the letter … is expressed in general terms: 'the implications of this role [ie as adviser to the Fund] for his position as a member of the Panel' … BAA goes on to seek as a matter of urgency answers to specific questions relating to any involvement of Professor Moizer in the Gatwick bid."

The letter of 6 February was in these terms:

> "We understand you are considering writing to us concerning the position of Professor Moizer as strategic adviser to [the Fund] and that implications of this role for his position as a member of the Panel …
>
> As we understand it, Professor Moizer acts as an adviser to [the Fund] (the members of which include employees of local authorities in the Greater Manchester area). His role is as adviser to [the Fund] on investments. On 19 January 2009 BAA received first round bids in relation to the sale of Gatwick. One of the consortia bidding, comprising Borealis and [MAG] (which is owned by local authorities in the Manchester area) has indicated that [the Fund] will invest in that consortium. We understand that MAG is also a potential

> bidder for Stansted and/or a Scottish airport should the Commission require divestment.
>
> BAA does not want to prejudge the situation and therefore we would be grateful if you could address the following matters:
>
> - Whether Professor Moizer continues to act as an adviser to [the Fund], and if so, to set out what are the terms of his retainer. If he no longer advises [the Fund] when did he cease to do so?
>
> - Whether Professor Moizer has been aware of [the Fund's] interest in investing in the MAG bid, and if so when he became aware;
>
> - Whether Professor Moizer has advised [the Fund] in relation to this investment;
>
> - Identify the Panel and staff meetings in which Professor Moizer participated since becoming aware of [the Fund's] interest in the MAG bid; and
>
> - What steps Professor Moizer and the Commission propose to take in the circumstances.
>
> We would appreciate your urgent attention to this matter."

43. That letter did not attract an immediate reply. At a meeting about another matter on 12 February Mr Jones of the Commission mentioned the situation to Mr Herga but nothing of significance was found to have passed between them, save that Mr Jones gave Mr Herga "certain assurances about the nature of Professor Moizer's role as an adviser to the Fund". On 18 February Mr Jones discussed the position with Mr Taylor of the Fund. Mr Taylor told him of the extent of Professor Moizer's influence in the Fund – investments are not made unless each of the three advisers approved them; meetings work on a consensus basis and the Professor is very influential in forming that consensus; he is one of the "main players".

44. The Commission replied to BAA on 26 February. The letter stated:

> "Professor Moizer has assured us that he took steps to exclude himself from any possible involvement with any [Fund] bid for Gatwick before he became aware that [the Fund] was considering a bid. He became aware of the Fund's interest via the Press; and he has certainly not advised the Fund on anything to do with its bid. For the sake of completeness we have spoken to [the Fund] which has confirmed that Professor Moizer has had no connection with its bid for Gatwick."

45. The letter also advised that from about 23 January the Commission had taken steps to exclude the Professor from consideration of the arrangements for the sale of Gatwick.

46. The CAT was critical of this letter on the grounds that it did not relay all the information that had been provided by Mr Taylor on 18 February; it did not refer to the possibility that the Fund might become involved in other airport investments; and it did not disclose that a decision had already been taken to stand Professor Moizer down completely from the inquiry. It also referred to a possible discrepancy in relation to when and how the Professor had first discovered the interest of the Fund in the MAG bid for Gatwick but it appears to have accepted an explanation for that.

47. The CAT concluded:

> "The basic facts only became known to [BAA] at what was almost the end of the investigation, by which time opinions would inevitably have been formed and the decision-making process was far advanced. Once they ascertained those basic facts, partly through their own research, they raised the issue in a timely manner in their letter of 6 February. It took the Commission nearly three weeks to reply to that letter and the response was less than full, frank and accurate. Not only did the letter not reveal what was actually happening vis-à-vis Professor Moizer but no options were put to BAA: no election was sought. By the time the letter arrived the investigation was virtually over."

48. In these circumstances, it rejected waiver. It, of course, did so on the basis that apparent bias had existed since October 2007.

49. The submissions in this Court relating to waiver can be grouped under two sub-headings: (1) the burden of proof; (2) the merits.

(1) Burden of proof

50. It is submitted on behalf of the Commission and Ryanair that waiver was established because BAA had failed to discharge the legal burden to prove by evidence its unawareness of the essential facts. The submission is based on a venerable line of authority. In *Reg v Kent Justices* (1880) 44JP 298, Cockburn CJ said (at page 299):

> "As to the point whether the party acquiesced in the decision, we need not decide further than to say that it is a very sound rule of practice that a party making such an application should show that neither he nor his solicitor knew of the interest of one of the justices at the time of the hearing … it is a rule of practice and a very good one."

Manisty J added:

> "If there had been an application for certiorari the party taking the objection of interest in one of the justices ought certainly to negative the fact that he knew of such interest at the time of the hearing. There may be some cases where that might not be necessary, still it was a wholesome rule of practice and ought not to be departed from in such cases."

51. The reason for the rule is plain. It is to prevent someone with the necessary knowledge from staying silent in the hope of a favourable outcome, "possibly with a view of raising it later" following an unfavourable outcome: *R v Byles* [1911-13) All ER Rep 430, per Lord Alverstone CJ and Avory J, at page 431. The rule was applied again in *The King v Williams* [1914] 1 KB 608, where Rowlatt J referred to it (at page 615) as "a very salutary rule".

52. In the present case, the CAT was somewhat dismissive of these authorities, describing them as "turning on a somewhat technical rule of practice in the Divisional Court at the time" and possibly no longer relevant "in the light of the Strasbourg jurisprudence and the modern case law on apparent bias and waiver": paragraph 160-161. However, Mr Jowell's researches establish that these authorities continue to influence Australian jurisprudence: see *R v Magistrates' Court at Lilydale, ex parte Ciccone* [1973] VR 122; *Nickelseekers Limited v Vance* [1985] 1 Qd R 266, at page 272, per McPherson J; and *Kempe v Bailey* [2003] ACTSC 13, (2003) 174 FLR 460. Moreover, we have not been shown any recent domestic or Strasbourg authority which casts doubt on the rule or the reason for it. For my part, I consider that it remains a salutary rule because objectors ought not to be allowed "to eat their cake and have it, to approbate and reprobate": *ex parte Ciccone*, at page 135, per McInerney J.

(2) The merits

53. Having said that, however, the CAT did not decide or find a lack of knowledge of essential facts simply on the burden of proof. It decided that BAA did not know of "the original link giving rise to apparent bias on the part of Professor Moizer until 26 January 2009" (paragraph 172) and that, even then, it lacked knowledge of essential facts which it sought to establish by its letter of 6 February. However, "it took the Commission nearly three weeks to reply to that letter and the response was less than full, frank and accurate. Not only did the letter not reveal what was actually happening vis-à-vis Professor Moizer, but no options were put to BAA: no election was sought. By the time the letter arrived, the investigation was virtually over." (At paragraph 180).

54. The submission on behalf of the Commission and Ryanair is that, on the material before the CAT, BAA had simply failed to establish unawareness of the essential facts. There are two difficulties which arise in this context. The first is that when the potential objector is a large corporation, there is bound to be a degree of imprecision about how many and which employees need to provide evidence of their unawareness. The second is that it will often be possible for a sophisticated potential objector and his often even more sophisticated lawyer to contrive an area of factual unawareness by continuing to raise questions and require answers prior to election.

55. As to the first point, in the present case, the appellants are critical of the quality and quantity of evidence of unawareness adduced by BAA. The principal witness was Mr Hawkins who was responsible for BAA's day to day conduct of the market investigation. His second witness statement in the CAT proceedings dealt specifically with the question of knowledge. In order to compile it, he spoke to six named members of his team. He said:

> "… as far as I am aware none of the BAA staff working on the market investigation (including myself) were aware of the 2002 Disclosure Notice until 26 January 2009."

56. He described his previous ignorance of the Fund's membership and governance and, in particular, the fact that MAG employees were members of the Fund. He added:

> "I first became aware of a conflict issue concerning Professor Moizer as a result of the call … on 22 January … but the nature of Professor Moizer's conflict was not clear from that call. I anticipated that the [Commission] would write to us explaining the situation but when there was no further communication we began our own inquiries on the following Monday (26 January) which led to the discovery of the 2002 Disclosure Notice and at around the same time that [the Fund] was a bidder for Gatwick. I was therefore not aware of the involvement of [the Fund] in a bid for Gatwick until around 26 January. I have made inquiries of each member of the market investigation team and they have each told me that they were not aware until on or about 26 January … of the interest of [the Fund] in Gatwick."

57. The other BAA witness to deal with the matter was Mr Herga, an in-house lawyer, who was responsible for the legal aspects of the investigation. It is apparent from his witness statement that he had no further knowledge.

58. It is plain that the CAT accepted this evidence. When asked by the Court, Mr Sumption made it clear that he was not suggesting that it was perverse of it to do so. I have already rejected Mr Jowell's tentative submission of perversity in relation to ignorance of the membership and governance of the Fund.

59. In my judgment, the evidence adduced by BAA was sufficient in form and content to satisfy the "salutary rule" about evidence of unawareness. It would not be appropriate to require a higher standard, for example, individual witness statements from every employee who had had any involvement with the investigation. In the circumstances of this case, the evidence adduced came from suitable sources, particularly Mr Hawkins, who testified as to his inquiries with his team. I do not consider that the technical part of this ground of appeal is made good.

60. That leaves the question whether the CAT was correct to find that BAA continued to lack knowledge of essential facts until "the investigation was virtually over". The crucial question is whether BAA needed the information requested in Mr Herga's letter of 6 February to complete what was essentially needed in order to make an informed election. I have not found the answer to be self-evident but, after careful consideration, I have come to the conclusion that the CAT was right not to see the letter as merely a cynical attempt to keep all the balls in the air but as a legitimate attempt to establish essential facts before making an informed election. The investigation was at a very advanced stage and BAA were entitled to know more about Professor Moizer's involvement and the chronology before deciding. I therefore conclude that the CAT was correct to decide that there was no waiver of the apparent bias.

Conclusion

61. It follows from what I have said that I consider that the CAT was wrong to find apparent bias before 2 December 2008 and was wrong on what I have referred to as the contamination issue. I would therefore allow the appeals and restore the decision of the Commission. On the issues of no operative effect and waiver, I reject the grounds of appeal.

Lord Justice Jacob:

62. I agree.

Lord Justice Patten:

63. I also agree.