Neutral citation [2009] CAT 35

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1110/6/8/09

Victoria House
Bloomsbury Place
London WC1A 2EB

21 December 2009

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
LORD CARLILE OF BERRIEW QC
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

BAA LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

supported by

RYANAIR LIMITED

Intervener

Heard at Victoria House from 19 to 22 October 2009

JUDGMENT (Non-Confidential Version)

Note: Excisions in this judgment marked "[…] [**C**]" relate to passages provisionally excluded having regard to Schedule 4, paragraph 1 to the Enterprise Act 2002

APPEARANCES

Mr. Nicholas Green QC and Mr. Mark Hoskins QC (instructed by Herbert Smith LLP and Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Applicant.

Mr. John Swift QC, Mr. Paul Harris, Mr. Ben Rayment and Mr. Ewan West (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Jowell and Miss Sarah Love (instructed by Nabarro LLP) appeared on behalf of the Intervener.

I. INTRODUCTION

1. On 29 March 2007 the Office of Fair Trading ("OFT"), in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 ("the Act"), made a reference to the Competition Commission ("the Commission") for an investigation ("the Investigation") into the supply of airport services in the United Kingdom. The OFT reference required the Commission to confine its investigation to the effects of features of the market or markets for such services as existed in connection with the services supplied by the Applicant, BAA Limited ("BAA").

2. On 19 March 2009 the Commission published its report entitled "BAA airports markets investigation: A report on the supply of airport services by BAA in the UK" ("the Report"). In the Report the Commission found that BAA's common ownership of airports in southeast England and lowland Scotland gives rise to adverse effects on competition within the meaning of section 134(2) of the Act ("AECs") in connection with the supply of airport services by BAA. It also found that a number of other features of the relevant markets give rise to AECs, namely: (a) Heathrow's position as the only significant hub airport in the UK; (b) Aberdeen's comparatively isolated geographical position combined with other factors that make it unattractive to serve a catchment area of Aberdeen's size with more than one airport; (c) aspects of the planning system; (d) aspects of government policy; and (e) the current regulatory system for airports.

3. The Commission concluded that the following package of remedies would be effective in remedying the AECs identified: (a) the divestiture by BAA of both Stansted airport and Gatwick airport to different purchasers; (b) the divestiture by BAA of either Edinburgh airport or Glasgow airport; (c) the strengthening of consultation procedures and provisions on quality of service at Heathrow, until a new regulatory system is introduced; (d) undertakings in relation to Aberdeen, to require the reporting of relevant information and consultation with stakeholders on capital expenditure; and (e) recommendations to the Department for Transport in relation to economic regulation of airports.

4. As far as the divestiture remedies are concerned, BAA is to be permitted to market the airports sequentially and each sale must be completed by a specified date. The published version of the Report does not reveal those dates "so as not to prejudice an effective sales process", but the specified end date is stated to be less than two years from the date of the Report. If a sale is not completed by its specified date, the Commission reserves the right, in each case, to appoint an independent divestiture trustee to carry it out. The Report states that the timetable may be subject to revision should a material change in circumstances make this appropriate.

5. BAA is required to sell the airports in question to suitable purchasers approved by the Commission. The purchasers must be independent of BAA, must have the intention, appropriate expertise and financial resources to operate and develop the airports as effective competitors and must not create further competitive concerns as a result of divestiture.

6. By a Notice of Application dated 18 May 2009 BAA applies to the Tribunal for a review of the Report pursuant to section 179 of the Act, relying on two grounds of challenge: apparent bias and proportionality.

7. In relation to the first ground, BAA submits that the participation of Professor Peter Moizer as a member of the group who conducted the Investigation falls foul of the principle of apparent bias by reason of certain connections which he has with potential purchasers of the airport assets to be divested by BAA. Professor Moizer has been a long-standing adviser to the Greater Manchester Pension Fund ("the Fund") which sits within and is governed by the ten local authorities of Greater Manchester. These same local authorities own 100% of the shares in the Manchester Airport Group plc ("MAG"). MAG owns and operates Manchester airport, as well as other airports in the UK. It played an active role in the Investigation, providing evidence and submissions to the Commission, and identified itself in the early stages of the process as a potential acquirer of further airports which might come onto the market, including BAA airports. When, in the later stages of the Investigation, BAA put Gatwick airport up for sale, MAG and the Fund formed part of a consortium bidding for the asset.

8. BAA has emphasised from the outset of the proceedings that its contention is one of apparent bias as that concept is understood in the light of the case-law, and that there is no allegation that Professor Moizer was actually biased.

9. In relation to the second ground, BAA submits that, in assessing the proportionality of the divestiture remedies, and in particular in determining the timetable for sale of the three airports, the Commission failed to take account of material considerations relating to the impact of divestiture on BAA.

10. It is BAA's contention that these grounds should at the very least result in the quashing of the requirement to divest the airports in question, and of the findings on which that requirement is based.

11. The Commission resists both grounds of challenge, and is supported in this regard by Ryanair Limited ("Ryanair") who was permitted to intervene in the proceedings by an order of the Tribunal dated 1 July 2009. Ryanair is the single largest airline operator at Stansted airport. As far as the allegation of apparent bias is concerned the Commission and Ryanair deny that such bias existed; alternatively they submit that BAA waived it; they also argue that Professor Moizer was no longer a decision-maker at the final stage, having stood down before the Report was adopted by the remaining five Commission members, and that those other members were not affected by any apparent bias of Professor Moizer. The Commission also submits that BAA's challenge on this ground is made out of time. In relation to the second ground the Commission and Ryanair deny that the Commission failed to take proper account of the considerations in question when deciding what would be the appropriate timetable for the divestiture process. Alternatively the Commission contends that in view of certain developments, which arose after the Report was published, the Tribunal should exercise its discretion to refuse relief.

12. As mentioned above, on 17 September 2008, prior to the Report, BAA announced that it was putting Gatwick airport up for sale. On the penultimate day of the hearing of these proceedings, 21 October 2009, there was a further announcement to the effect that agreement had been reached to sell BAA's 100% interest in Gatwick Airport Limited to Global Infrastructure Partners for £1.51 billion, subject

to *inter alia* EU merger regulation clearance. Completion of the sale is said to be due in December 2009.

13. Before examining the parties' respective contentions (which extended to notes submitted to the Tribunal after the hearing had finished and up to 30 October 2009), it is appropriate to set out the statutory framework under which the Investigation was carried out by the Commission, and then to refer to the factual background. As well as outlining the genesis and progress of the Investigation itself, we will need to explain in some detail the connections between Professor Moizer and the Fund, and between the Fund and MAG.

II. STATUTORY FRAMEWORK

14. Pursuant to subsection 131(1) of the Act, the OFT may make a reference to the Commission for a market investigation:

> "...if it has reasonable grounds for suspecting that any feature or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom."

15. In connection with a reference under subsection 131(1) of the Act, the Commission's duties are defined by subsection 134(1) of the Act which provides:

> "The Commission shall, on a market investigation reference, decide whether any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom."

16. The definition of "feature" is set out in subsection 131(2) of the Act:

> "For the purposes of this Part any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference to -
>
> (a) the structure of the market concerned or any aspect of that structure;
>
> (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
>
> (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services."

17. The definition of "relevant market" is provided in subsection 134(3):

> "(a) in the case of subsection (2) so far as it applies in connection with a possible reference, a market in the United Kingdom—

(i) for goods or services of a description to be specified in the reference; and
(ii) which would not be excluded from investigation by virtue of section 133(2); and
(b) in any other case, a market in the United Kingdom—
(i) for goods or services of a description specified in the reference concerned; and
(ii) which is not excluded from investigation by virtue of section 133(2)."

18. Subsection 134(2) introduces the concept of an "adverse effect on competition", which we have already referred to by the abbreviation AEC:

> "For the purposes of this Part, in relation to a market investigation reference, there is an adverse effect on competition if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom."

19. If the Commission finds that an AEC exists it is required by subsection 134(4) of the Act to decide the following additional questions:

> "(a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

20. Subsection 134(6) provides that, in reaching its conclusions under subsection 134(4) of the Act, the Commission:

> "...shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition."

21. A detrimental effect on customers is defined in subsection 134(5) as being a detrimental effect:

> "...on customers or future customers in the form of -
> (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or
> (b) less innovation in relation to such goods or services."

22. Under subsection 134(7) the Commission may have regard to the effect of any action on any relevant customer benefits "of the feature or features of the market concerned".

23. Subsection 137(1) of the Act requires the Commission to prepare and publish a report on a market investigation reference within 2 years of the date of the reference concerned. By virtue of subsection 136(2) such a report shall "*in particular*" contain:

> "(a) the decisions of the Commission on the questions which it is required to answer by virtue of section 134;
> (b) its reasons for its decisions; and
> (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions."

24. Where the Commission has published its report within the two-year time-limit and has found an AEC, subsection 138(2) states that:

> "The Commission shall, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable—
> (a) to remedy, mitigate or prevent the adverse effect on competition concerned; and
> (b) to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition."

25. Section 138 further provides:

> "(3) The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently."

26. Sections 159 and 161 of the Act empower the Commission, respectively, to accept final undertakings to remedy the adverse effects and to make final orders for the same purpose. A final order made under section 161 may contain anything permitted by Schedule 8 to the Act, which covers a wide range of actions including division of a company, divestment of assets and restrictions on conduct.

27. Finally section 179 provides:

> "179 Review of decisions under Part 4

(1) Any person aggrieved by a decision of the OFT, the appropriate Minister, the Secretary of State or the Commission in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision.

(2) For this purpose "decision"—
(a) does not include a decision to impose a penalty under section 110(1) or (3) as applied by section 176; but
(b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.

(3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.

(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.

(5) The Competition Appeal Tribunal may—
(a) dismiss the application or quash the whole or part of the decision to which it relates; and
(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.
…"

III. THE FACTS

28. In view of the nature of the issues it is necessary to set out the facts at some length. As well as a considerable number of documents, written submissions and commentaries, we have been presented with ten witness statements from nine witnesses. On behalf of BAA we have statements from Mr. Robert Herga, General Counsel and Company Secretary of BAA at the material time; Mr. Timothy Hawkins, who is acting Director of Economics and Regulation at BAA and was its Head of Structural Review at the time of the Investigation; and an expert report by Mr. Martin Falkner of Gleacher Shacklock LLP. On behalf of the Commission we have statements from Professor Peter Moizer, Dean of the Leeds University Business School, a member of the Commission and of the Group responsible for the Investigation; Mr. Christopher Clarke, one of the Deputy Chairmen of the Commission and Chairman of the Group responsible for the Investigation; Mr. David Saunders, appointed as the Chief Executive of the Commission from 30 January 2009; Mr. Simon Jones, a legal director a the Commission since 3 December 2007; Mr. Peter Morris, the Director of Pensions at the Fund since 2003;

and Mr. Steven Taylor, the Head of Pensions Investments at the Fund since 1994. Ryanair has not sought to put in evidence.

29. Most of the material relevant to the parties' respective contentions is undisputed, in the sense that there is not a substantive dispute in relation to the primary facts, as opposed to inferences which may be drawn from such facts. Indeed none of the parties has applied to cross-examine any of the other parties' witnesses. It is true to say that what was, or ought to have been, known by BAA and/or its employees about Professor Moizer's connections with the Fund and with MAG has been the subject of a good deal of debate in the course of the parties' submissions to the Tribunal. Also, slight differences of recollection as to what was said in the course of certain discussions have emerged. Subject to such matters, to which we will refer at the appropriate time, our account of the facts set out below is intended to be non-controversial.

Background to the investigation

30. Under the Airports Act 1986 BAA (then BAA plc) took over the assets and liabilities of the former British Airports Authority which was dissolved. The assets included Heathrow, Gatwick, Stansted, Edinburgh, Aberdeen, Glasgow and Prestwick airports. BAA later acquired Southampton airport and disposed of Prestwick. It also developed an international business, with interests in airports in the USA, Italy, Hungary and Australia. In November 2006, after its acquisition by a consortium led by Grupo Ferrovial SA ("Ferrovial"), BAA ceased to be a plc and changed its name to BAA Limited.

31. On 25 May 2006, the OFT issued a press release announcing that it was considering a study of the UK airports market. The press release indicated that in the light of the European Commission's recent clearance of the takeover of BAA the OFT considered it appropriate to make public that in any such study the structure of the market might be reviewed. On 30 June 2006 the OFT issued a further press release to the effect that it had now decided to carry out a study of the UK airports market with a view to establishing "whether the current market structure works well for consumers." The OFT stated that nearly two thirds of UK air passengers begin or end their journey at BAA airports, and that within the London area this figure rose

to nine out of ten passengers. In Scotland over eight out of ten air passengers flew from a BAA airport. The press release went on to quote the OFT Chief Executive John Fingleton as saying that:

> "We now think it is time to explore the potential for greater competition within the airport industry as this could ultimately yield significant benefits in terms of timely and adequate investment in UK airports, a better value service to the UK travelling public as well as potentially relieving the industry - and ultimately its customers - of the costs of regulation that may be disproportionate."

32. On 29 March 2007, following its market study, the OFT made a reference to the Commission for a market investigation into the supply of airport services in the UK, confined to investigating the effects of features of the markets in question such as exist in connection with the supply of those services by BAA. On the next day the reference was announced publicly. The reference itself is contained in a report dated April 2007 entitled "BAA The OFT's reference to the Competition Commission" (OFT 912). In that report the OFT concluded that in lowland Scotland BAA's ownership of Edinburgh and Glasgow airports limited competition between the two airports. In the South East of England BAA's ownership of Heathrow, Gatwick and Stansted limited competition between the airports to promote delivery of extra capacity, and there were also concerns about prices and quality. The OFT considered that it had reasonable grounds to suspect that BAA's joint ownership of these airports and its high regional market shares in the south east of England and lowland Scotland, together with certain other features of the market, combined to prevent, restrict or distort competition, with adverse consequences for customers and consumers using the airports. This conclusion was said to be based on the OFT's analysis of the market and to be consistent with strong expressions of concern from interested parties, particularly airlines. The OFT expressed the view that if the Commission were to find that an AEC existed, there was a reasonable prospect of appropriate remedies being available, including divestiture of some of BAA's airports.

Appointment of members to the Investigation and disclosure of interests

33. Following the OFT's reference the Chairman of the Commission appointed the Commission members who would carry out the Investigation ("the Group"). The Group consisted of six members, including Professor Moizer. It was chaired by Mr.

Christopher Clarke, Deputy Chairman of the Commission. At the same time these members plus another member were also appointed to carry out a separate exercise on behalf of the Commission, namely the quinquennial review of the maximum amount by way of airport charges that BAA should be permitted to charge at Heathrow and Gatwick airports under the current regulatory arrangements ("the 2007 QR"). As one might infer from the name, there had been prior reviews of this kind. In particular two such reviews took place in 2002. It will be necessary to refer to these in due course.

34. Mr. Clarke explains in his witness statement that apart from the Commission's Chairman and Deputy Chairmen (of which there are three), all the members of the Commission are part-time. They are appointed by the Secretary of State for their expertise in their respective fields and hold their posts for fixed terms of eight years, being assigned to particular inquiries on a case by case basis. Mr. Clarke states that one of the reasons Professor Moizer was appointed to these inquiries in 2007 was that he had served on a quinquennial review in 2002 and the Commission wished to draw on his experience.

35. In his statement Mr. Clarke also observes that the Commission has clear policies and procedures in place to identify and deal with the risks to impartiality arising from conflicts of interest. At the start of an inquiry disclosure is made of any connection between a member and the inquiry. Further disclosure may be made in the course of an inquiry if new information so requires. All such disclosures are published on the Commission's website.

36. On 17 April 2007 the Commission sent to BAA by email biographical details of the appointees to the Investigation and the 2007 QR. The details for Professor Moizer were as follows:

> "Professor Peter Moizer PhD FCA currently serves on the CC's Reporting Panel. He has been appointed to the CC's Reporting and Utilities Panels from 10 September 2005 until 9 September 2009. He is Professor of Accounting at Leeds University Business School, where he has been employed for the last 16 years. Prior to joining Leeds, he was a lecturer in accounting at the University of Manchester and before that, Assistant Audit Manager at Price Waterhouse. Peter has advised the DTI on issues related to the audit profession **and has given strategic advice to the Greater Manchester Pension Fund on how to structure**

> **investments**. He has sat on a number of committees of the Institute of Chartered Accountants in England and Wales. He is a co-founder of the European Auditing Research Network." (Tribunal's emphasis)

37. The next day, 18 April 2007, the Commission wrote to BAA with details of "interests" of members and staff who would work on the Investigation and the 2007 QR. The letter gave details in respect of three members of the Group. In relation to Professor Moizer it stated:

> "Peter Moizer is one of the three strategic advisers to the Greater Manchester Pension Fund, dealing with long term funding issues, such as the balance between equity and bonds. External fund managers control the investments of the Pension Fund. Professor Moizer has no involvement in the share selection decisions of the Pension Fund and is unaware of the shares in which it invests. It is possible, however, that the Pension Fund may include investments the value of which could be affected by the outcome of the inquiry…
>
> …The members mentioned above and the [Commission] do not believe that these matters will prejudice the ability of the Group to discharge its functions in an independent and impartial manner. In accordance with our normal practice, the substance of this letter will be placed on the [Commission's] website."

38. We shall refer to these two communications as "the 2007 Disclosure".

Disclosure by the Commission in 2002

39. At this point it is necessary to interrupt the chronological sequence of events and go back to the 2002 reviews of airport charges to which we referred earlier. On 28 February 2002, the Civil Aviation Authority, pursuant to its duties under the Airports Act 1986, referred certain airports to the Commission to determine the maximum level of airport charges (including charges for landing and parking aircraft as well as passenger-related charges) to be levied at those airports during the five-year period beginning on 1 April 2003. The Commission was also to consider whether at any of these airports there had been actions contrary to the public interest in relation to airport-related activities since the previous review. The airports concerned were: Manchester, owned by MAG, and Heathrow, Gatwick and Stansted, owned by BAA. In 2002 the Commission therefore commenced two inquiries to be conducted in parallel: one in respect of Manchester airport ("the 2002 Manchester QR") and another in respect of Heathrow, Gatwick and Stansted. ("the 2002 BAA QR").

40. Professor Moizer was appointed to the 2002 BAA QR, but not to the 2002 Manchester QR. Although the two reviews were separate, there were certain common issues. One such issue related to the determination of the cost of capital, which was an important factor for the airport charges in question. As a result of this overlap, at some stage in or around May 2002 it was proposed that joint working groups of the two review bodies be formed to produce a common position on the constituents of the cost of capital determination. The proposal was accepted and Professor Moizer participated in one of the joint working groups. However, there was then a suggestion that joint meetings between the two inquiry groups should take place. This suggestion caused Professor Moizer some concern. In his witness statement he says:

> "I was conscious that Manchester Airport was owned by the local councils comprising Greater Manchester, and that I advised the pension fund of those same councils, namely GMPF. Both 2002 Inquiries were concerned with the determination of the charges that could be directly levied by the respective airports. I had a connection to the owners of Manchester airport and I felt that the Commission should be given an opportunity to consider the connection."

41. He therefore raised the matter with the then Chairman of the Commission, Mr. Derek Morris (as he then was). Mr. Morris was also Chairman of the 2002 BAA QR of which Professor Moizer was a member. Mr. Morris referred the matter to Mr. Simon Jones, at that time a Commission legal adviser, but not specifically an adviser to the 2002 BAA QR or the 2002 Manchester QR. On 30 May 2002 Mr. Jones spoke to Professor Moizer, who explained his concerns. In his witness statement Mr. Jones describes those concerns and his (Mr. Jones') reaction to them as follows:

> "Understandably they revolved around the fact that the inquiry into Manchester airport's charges would determine a significant part of the airport's revenue for the next five years. Professor Moizer explained that as the advisor to a pension fund he advised the local authorities who, through a holding company, also owned Manchester airport. I concluded that had the question arisen the Commission would not have appointed Professor Moizer to the Manchester group. For the sake of consistency it seemed to me that he should not subsequently play a role in the proceedings of the Manchester group."

42. On 13 June 2002, the then Chief Executive of the Commission, Mr. Robert Foster, wrote to MAG (being the main party to the 2002 Manchester QR) a letter which appears to have been copied to a number of interested third parties, but not to BAA.

Mr. Jones states that the letter was published on the area of the Commission's website dedicated to the 2002 Manchester QR. We shall refer to this letter, together with the website posting, as "the 2002 Disclosure". The contents are important and we quote them in full:

> "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 three external advisers to the Greater Manchester Pension Fund, which is a pooled investment vehicle with a value currently of over £6,000 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. Employees of a wide range of other bodies providing public services can join the Scheme by means of admission agreements made between the body concerned and Tameside MBC. Consequently, as well as the ten local authorities in the Greater Manchester area, the scheme employers include five Greater Manchester joint authorities and over 100 other bodies. The ten local authorities within the Greater Manchester area are the shareholders of the Manchester Airport holding company.
>
> An issue has arisen because it is planned that three joint meetings of the members of the Manchester and BAA inquiry groups will take place to consider primarily, but perhaps some other, issues common to both inquiries. There are also bilateral working groups between the two inquiries, and Professor Moizer has been a member of one of these groups. There is also a limited exchange of views between the two groups.
>
> In order to ensure the independence and impartiality of the Manchester inquiry the Commission is taking the following steps:
> - Professor Moizer should not participate in any joint meeting of the Manchester and BAA groups, or in any smaller bilateral group;
> - His interest should be disclosed to the BAA and Manchester inquiry groups;
> - Where the views of the BAA group reflect those of Professor Moizer in whole or in part, and are conveyed to the Manchester group, the Manchester group should be so advised; and
> - The parties to the BAA and Manchester inquiries, and also third parties who have participated in the inquiries, should be advised of Professor Moizer's position and the steps that will be taken in relation to it.
>
> In accordance with our usual practice a copy of this letter will be placed on our website.
>
> I am copying this letter to those on the attached list"

43. Thus, whereas the 2007 Disclosure only referred to Professor Moizer's link with the Fund, the 2002 Disclosure clearly identified a link between the Fund/Professor Moizer and MAG, going so far as to characterise Professor Moizer's connection as

"a financial interest" in MAG. In view of that conflict of interest the Commission took steps to neutralise it by ensuring that there could be no possibility of his influencing the outcome of the 2002 Manchester QR. He was not of course a member of that inquiry, so what needed to be avoided was any risk of indirect influence through joint meetings etc.

44. The following appear to be common ground: that the letter was not copied to BAA by the Commission at that time or at any time thereafter; that until a telephone call from the Commission to BAA on 22 January 2009 informing BAA that Professor Moizer had a conflict of interest in relation to the proposed divestiture of Gatwick, the only disclosure by the Commission in relation to Professor Moizer was the 2007 Disclosure; that, with the omission of the final two sentences, the text of the 2002 letter remained on the Commission's website right up to the final stages of the Investigation, and possibly beyond. As to this, in his first witness statement Mr. Timothy Hawkins, who is now acting Director of Economics and Regulation at BAA, states that on 26 January 2009 following the telephone call from the Commission on 22 January 2009 BAA made an internet search and discovered the letter on the Commission's website. Mr. Hawkins also states that until then he had not been aware of the 2002 Disclosure. We return to this later in the judgment.

The Fund and Professor Moizer

45. At this stage we should refer to certain other details of the Fund, and its relationship with Professor Moizer, as presented to us in evidence.

46. The Fund, which is the largest of the national local authority pension funds, with assets under management in the region of £9 billion in 2008, has no separate corporate identity. The Fund and its administration is explained in the witness statement of Mr. Peter Morris, who has been its Director of Pensions since 2003. The Fund has been administered by Tameside MBC since 1987. That Council's functions in maintaining the Fund is delegated to the Pension Fund Management Panel, made up of local councillors from the ten local authorities within Greater Manchester. The majority of the councillors are from Tameside MBC. The Fund's Governance Policy 2008, annexed to Mr. Morris' statement, describes this Panel as carrying out a similar role to the trustees of a pension scheme. The governance

arrangements allow for further delegation of specific functions, including those of day to day management which are carried out by the Director of Pensions. Investment powers are provided by the Local Government Pension Scheme (Management and Investment of Funds) Regulations 1998, which require the administering local authority to have regard to both the suitability and diversification of its investments and to take proper advice in making investment decisions. A Statement of Investment Principles is to be prepared and taken into account by fund managers.

47. The Pension Fund Management Panel is assisted by the Pension Fund Advisory Panel. It consists of ten councillors, one nominated by each of the ten local authorities within the Fund; in addition there must be at least two employee representatives nominated by the North West TUC. Current practice is to have six such representatives. All members of this panel can vote. Some of the members of this panel are also members of the Pension Fund Management Panel. The Pension Fund Advisory Panel has three external expert advisers, one of whom is Professor Moizer. Mr. Morris states that in practice the two panels hold their meetings together, quarterly, and that Professor Moizer has attended all such meetings. Professor Moizer has fulfilled this role for about twenty years and continued to do so throughout the Investigation. He is paid an annual fee of £12,600. The Fund regard him as someone whose views carry weight and authority. Although the advice given is of a strategic nature, including commentary on the performance of the Fund's fund managers, from time to time advice may be sought in relation to discrete matters; one example given was advice on a particular property investment.

48. Mention should also be made of another example of advice given by Professor Moizer, on which comment was made at the hearing. At the meeting of the panels in March 2008 the Director of Pensions (Mr. Morris) had expressed the view that in the light of the current economic and financial circumstances the Fund should be in a position to ensure speedy decision-making and implementation should circumstances require. Another member felt that whilst cash should be held, "opportunistic purchases" should also be made. Professor Moizer is recorded in the minutes as supporting that view. At their meeting in June 2008 the panels returned to the theme of what came to be known as the "fleet of foot" proposals. It was then

recommended that further consideration be given to this proposal under two heads: one of which was “The creation of a “Special Opportunities Portfolio””. Further discussion of this took place at the meeting on 21 November 2008 when Mr. Morris submitted a report setting out proposals for streamlining decision-making in investment strategy so as “to be in a position to react to market events in a timely manner.” Allied to this was the proposal for the special opportunities portfolio which “offered the scope for increased diversification.” The portfolio would be developed over time on the basis of recommendations of the advisers or the internal team. Mr. Morris’s recommendation to the meeting was that the portfolio be allocated 5% of the assets of the Fund, then around £400 million. Professor Moizer is recorded as giving “a detailed analysis of the current global economic situation” and as agreeing with the proposals.

49. In his witness statement Mr. Morris states that at the time he prepared proposals for “fleet of foot” and a special opportunities portfolio he was not aware of the Fund’s potential involvement in a consortium bidding for Gatwick. Mr. Steven Taylor, the Fund’s Head of Pensions Investment, states in his witness statement that he is unsure whether such an investment would meet the current criteria for inclusion in the special opportunities portfolio. Mr. Morris states that although MAG and a partner had been working on the possible purchase for some time, the Fund was only approached as a potential participant in late November 2008. He refers to a presentation on the investment opportunity as having taken place at a meeting on 26 November 2008 between the Fund (represented by himself and Mr. Taylor) and representatives of MAG. Mr. Morris and Mr. Taylor in their witness statements refer to their decision to take advice on this proposal from the external advisers, and in particular from Professor Moizer. We will need to refer to what transpired in this regard in due course.

50. Mr. Taylor gave further insight into the Fund’s relationship with Professor Moizer in a telephone conversation with Mr. Jones on 18 February 2009. The following summary is taken from Mr. Jones’ note of that conversation. Mr. Taylor stated that Professor Moizer has been a long-standing adviser of the Fund. He is on very good terms with Mr. Taylor and Mr. Morris. He attends quarterly "trustee meetings" as a matter of course as one of three external advisors whom Mr. Taylor termed the

"three wise men". They comment on matters arising, and would normally comment on matters such as the investment in Gatwick as a matter of course. The fund will not make an investment that is not approved by each of the three wise men. At trustee meetings a vote is never taken. Proceedings are consensual and Professor Moizer is very influential in forming that consensus. Contact with Professor Moizer between trustee meetings is ad hoc. There may be no contact or there may be numerous contacts. His role is effectively at "officer level" in the Fund. He is one of the "main players". Due to the length of his connection with the Fund a relationship of trust and respect had developed and matured.

The Fund and MAG

51. As we said in the Introduction, MAG owns and operates Manchester airport, as well as other airports in the UK. (In 1999 a majority shareholding in Humberside airport was acquired, and this was followed in 2001 by the acquisition of East Midlands and Bournemouth airports.) Since it was formed in 1986 all the shares in MAG have been owned by the ten local authorities comprising Greater Manchester, Manchester City Council being the largest shareholder with 55%, and each of the other nine local authorities (Bolton, Bury, Oldham, Rochdale, Salford, Stockport, Tameside, Trafford and Wigan) owning 5%. These local authorities are the same ten authorities within the Fund.

52. The majority shareholder, Manchester City Council, has the right to appoint a member to MAG's board. The other nine local authority shareholders can collectively appoint a further member. MAG's Articles of Association provide for a Shareholder Committee with powers to constrain the acquisition of assets or the entering into transactions above a specified value without shareholder consent. The Annual Report and Accounts for 2007/08 note that MAG's board is "committed to a proactive communications programme with its Shareholders. The Chairman, Group Chief Executive and Group Finance Director attend meetings with the Shareholders' Committee at its invitation." The document goes on to record that MAG provides to the Committee on an annual basis information and documents about *inter alia* MAG's business plans, major capital investments and financial results. There are further connections. The same Annual Report and Accounts state

that Manchester City Council was at that time a creditor of MAG to the tune of £86 million. The Fund holds in the order of £250 million in respect of pension contributions from MAG. The local authority shareholders receive annual dividends from MAG.

53. In view of these connections it is hardly surprising that MAG should turn to the Fund as a potential consortium partner when the opportunity to bid for Gatwick arose, or that such an approach, if made, would receive serious consideration by the Fund. Indeed it is clear from considered statements made by Mr. Taylor to Mr. Jones in the course of a telephone conversation in mid February 2009 that the connection between the Fund and MAG […] [**C**].

MAG's participation in the Investigation

54. At a hearing on 25 October 2007, nearly a year before BAA announced the marketing of Gatwick, MAG made clear to the Commission that it would be interested in further airport acquisitions at the right price, including BAA airports coming onto the market for any reason. It referred to its "strategic" relationship with its shareholders, who were represented on the company's board, and the over-arching shareholder committee which gave regular consideration to the long-term strategy of MAG's business. Mention was also made of MAG's other airport acquisitions and the benefits to be obtained from its having a group of airports in its portfolio. So far as it made comments on BAA's multiple ownership of airports in the south east of England, these tended to favour divestment of BAA's airports or some of them.

55. Professor Moizer was not present at this hearing but read the transcript of it. Although he cannot now recall reading about MAG's expression of interest, he accepts that he would probably have done so. A summary of the hearing, which refers to that expression of interest, was published on the Commission's website on 8 January 2008. Professor Moizer also accepts that he would have been aware from the press coverage that MAG might bid for a BAA airport. From March 2008 onwards there was persistent press comment at a national and regional level to the effect that MAG was interested in acquiring Gatwick, Stansted or BAA's Scottish

airports and was gearing up to do so. For example on 17 March 2008 the Manchester Evening News reported:

> "MANCHESTER Airport bosses have London rival Gatwick firmly in their sights today as the break-up of BAA looms nearer.
> …Now Manchester Airports Group, the country's second largest airports operator behind BAA, is lining up a bid if the Spanish-owned company is dismantled.
> It already owns East Midlands, Bournemouth and Humberside Airports but would dearly love to add a London gateway to its portfolio.
> Gatwick or Stansted would cost billions but MAG chiefs are willing to forge a partnership with private equity or other outfits, such as American investors or the Australian infrastructure and banking giant Macquarie, to achieve their goal.
> Geoff Muirhead, chief executive of Manchester Airports Group, said today: "We have a strong track record when it comes to running airports - we have a lot of skilled people who have developed very good relationships with airlines and other partners.
> "The group is interested in acquiring assets that will add value for our shareholders."
> …BAA, which is owned by Ferrovial, could decide to press ahead with a break-up of its own accord before being ordered to do so by competition regulators, which would prevent a `fire sale' of its assets.
> That could mean an announcement by the end of the year.
> "It's a question of when, rather than if, this happens, and MAG has to be ready to act very quickly when the opportunity arises," said a group source.
> "The group does not have the resources to buy Stansted or Gatwick in its own right, and linking up with another party looks the most sensible option.
> "However that does not apply in Scotland, where Edinburgh or Glasgow are seen as the most likely to come on to the market."
> "MAG, which is owned by the 10 local authorities of Greater Manchester, would be keen to bid alone for one of those and, with its current low levels of debt, sees no problem raising the finance."

56. Its attendance at the Commission hearing on 25 October 2007 was not the limit of MAG's participation in the Investigation. There was a further meeting between MAG and the Group on 21 December 2007 at which MAG expressed its views on planning issues relating to airports. In the course of this meeting MAG is recorded as stating that it did not believe that planning paralysis would result from a splitting of ownership of the airports in the south east of England. On 17 September 2008 MAG also provided the Commission with written submissions on its Provisional Findings Report, arguing that Heathrow, Gatwick and Stansted should each be in separate ownership, and emphasising that purchaser suitability criteria were essential for any divested airports. On 9 January 2009 MAG submitted a response to the Commission's Provisional Decision on Remedies report published on 17 December 2008.

57. In the course of its submissions to us BAA drew attention to a number of respects in which at meetings between the Group and BAA during the Investigation the Group apparently placed some reliance upon the MAG submissions or MAG's performance in order to draw unfavourable comparisons with BAA's operation of its own airports. One such comparison was made by Professor Moizer himself, namely at the meeting with BAA on 12 March 2008. On more than one occasion during the Investigation BAA made submissions to the Commission challenging the factual basis or validity of such comparisons with MAG. In its submissions to the Tribunal BAA also identified passages and conclusions in the Report itself which BAA suggested were influenced by, or relied upon, MAG's representations to the Group. Be that as it may, from the early stages of the Investigation MAG was clearly an interested party, and its interests were, to put the matter at its lowest, not aligned with those of BAA.

The course of the Investigation and the marketing of Gatwick airport

58. We can now once more pick up the chronological course of the Investigation and related events, including the marketing of Gatwick airport.

59. On 9 August 2007 the Commission published its Issues Statement. In this document the Commission stated that it was aware of concerns over the operations of BAA's airports, especially Heathrow, Stansted and Gatwick, and that one of its tasks would be to consider how common ownership might affect BAA's incentives to develop and operate its airports.

60. The next major milestone was the publication of the Commission's Emerging Thinking report on 22 April 2008, together with a press release of the same date. The press release referred to the possibility of BAA being required to divest one or more of its airports as a remedy for any competition problems identified in the market under investigation. The Emerging Thinking report was followed by a Commission working paper on planning issues, and various written responses to these documents from BAA, as well as meetings between the Commission and BAA in June and July 2008.

61. Meanwhile the press reports of MAG's interest in buying BAA's airport assets continued. For example on 18 August 2008, the Financial Times reported that:

> "Manchester Airport Group, the largest UK-owned airports group, which is controlled by the 10 local authorities of Greater Manchester, said it had gained the backing of its shareholders to investigate bidding for BAA assets. A bid for Gatwick, the second largest UK airport, would only be mounted as part of a consortium, but a bid for Glasgow could be made alone."

62. On 20 August 2008 the Commission published its Provisional Findings report and Notice of Possible Remedies. The Commission provisionally found that there were competition problems at each of BAA's seven UK airports (Heathrow, Gatwick, Stansted and Southampton in England, and Edinburgh, Glasgow and Aberdeen in Scotland) with adverse consequences for passengers and airlines. A principal cause of the competition issues at these airports was their common ownership by BAA. In the Notice of Possible Remedies the Commission considered possible remedies and provisionally concluded subject to further consultation that the only effective pro-competitive remedy was divestiture. The Commission also concluded, again provisionally, that in England divestiture of Gatwick and Stansted was likely to be effective in addressing the AEC which had been provisionally identified, making the divestiture of Heathrow unlikely. In Scotland the Commission provisionally concluded that separate ownership of Edinburgh and Glasgow airports would effectively address any AEC there. The Commission therefore sought views on which two of BAA's three London airports should be sold and similarly which of Edinburgh or Glasgow airports should be sold. The Commission also invited views on its provisional criteria for determining the suitability of purchasers.

63. As we have already mentioned, MAG was one of those who responded to this invitation to comment. On the day on which MAG submitted its response to the Commission's consultation, 17 September 2008, BAA publicly announced its intention to sell Gatwick. BAA had forewarned the Commission of this announcement on 9 September. MAG was identified as a potential purchaser in documents supplied by BAA to the Commission on 26 September 2008. There followed over the next few weeks a series of exchanges and meetings between the Commission and BAA as to the sale process which would be carried out. Particular concerns of the Commission were: (1) that there should be someone in the position

of a monitoring trustee – a shadow monitoring trustee, or "SMT" – who would be engaged and paid by BAA but report to and be under the direction of the Commission, and who could be appointed as a monitoring trustee if and when divestiture of Gatwick was finally required by the Commission; (2) that the selected purchaser and the terms of the sale agreement should be satisfactory to the Commission; and (3) that BAA and the SMT kept the Commission fully and regularly informed of how the sale was proceeding, in particular the SMT should report on matters such as separation planning, asset preservation and sales monitoring. On 25 November 2008 BAA appointed Grant Thornton as SMT for the sale of Gatwick. The appointment required the SMT to oversee the sale process and provide the Commission with all relevant information as to suitability of bidders.

64. This brings us back to 26 November 2008 which, as we have already mentioned, was the date on which representatives of MAG had a meeting with Mr. Morris and Mr. Taylor in order to give them a presentation on the investment opportunities for the Fund in joining in a consortium to buy Gatwick. Mr. Morris and Mr. Taylor decided that the best person from whom to seek advice on this proposal was Professor Moizer. Mr. Taylor was aware that Professor Moizer was doing some work for the Commission relating to airports. He also knew that because of this work the advice would be likely to raise a conflict for Professor Moizer. Mr. Taylor remembered that some such conflict had arisen in the past. However, he only had a hazy idea of what the work for the Commission currently entailed. Mr. Taylor and Mr. Morris discussed and agreed how the approach to Professor Moizer should be made so as to confirm or otherwise the existence of a conflict. The agreed approach would be for Mr. Taylor to telephone Professor Moizer and begin at "a high level of generality" progressively narrowing the conversation until it reached the issue on which advice was being sought, namely the Fund's possible investment in Gatwick with MAG. Professor Moizer was to be invited to stop the conversation at any point if he felt uncomfortable. Mr. Taylor made the call on 2 December 2008. It apparently lasted just over a minute. His recollection is that after explaining his intended approach he got no further than mentioning that the Fund was looking at the possibility of a large single investment opportunity relating to an airport before Professor Moizer indicated that he did not wish the topic to be continued, and it

stopped. Thereafter the Fund, realising that Professor Moizer had a conflict, sought advice on the potential investment from another external adviser.

65. Professor Moizer's recollection of the conversation is similar. He recalls that it began by Mr. Taylor saying "You can stop this conversation at any point…" to which Professor Moizer replied "If this is anything to do with airports or Gatwick, the conversation can stop now." Professor Moizer therefore considers that it was he and not Mr. Taylor who first mentioned airports. He says that in doing so he was reacting instinctively – the only possible source of prejudice would be his work at the Commission at the time, which involved BAA's airports. He states that if he had given the matter any thought at the time, which he did not, he would have had no reason to think that the Fund would be considering participating in a bid for Gatwick, as in all his long association with it the Fund had not to his knowledge been involved in a similar investment.

66. On 16 December 2008 the Commission received a potential purchaser update from the SMT naming both MAG and the Fund as potential bidders. This stated that the Fund had been sent a confidentiality agreement on 10 December 2008. The Fund was identified as an equity provider for a bid by a consortium led by MAG and Borealis.

67. On 17 December 2008 the Commission published its Provisional Decision on Remedies report. The Commission identified the features of the relevant markets which in its provisional view gave rise to AEC. These features included BAA's ownership of a number of airports in the south east of England and in Scotland. Subject to final consultation, the Commission would require BAA to sell both Gatwick and Stansted airports to different purchasers, as well as Edinburgh airport, although Glasgow was a possible alternative to Edinburgh. In addition, the Commission referred to the arrangements surrounding the appointment of the SMT for the sale of Gatwick, pending the Commission's final report. Views were sought on the timing of a sale of Stansted, given the forthcoming planning inquiry on a second runway. In relation to the purchaser suitability criteria to be applied to the sale of airports, the Commission was of the view that a suitable purchaser should be independent from BAA and its parent company, should possess appropriate

expertise and financial resources, and should not give rise to further competitive concerns.

68. On 5 January 2009, the SMT's latest potential purchaser update of 22 December 2008 was circulated to the Group. It reported no change in the position of MAG and the Fund ie no change from the situation as reported in the 16 December update. The participation of the Fund was mentioned at a meeting on 6 January between the SMT and the Commission's staff (not the Group). On 9 January there was a meeting of the Group which Professor Moizer attended. At this meeting Mr. John Collings, another Group member, brought to Professor Moizer's attention the SMT's 22 December update indicating that the Fund was a potential bidder in the MAG consortium, and was reviewing a confidentiality agreement the acceptance of which was a condition precedent to receipt of information from BAA relevant to the bidding process. In his witness statement Professor Moizer states that this was the point at which he first had knowledge of the Fund's interest in Gatwick and potential participation in a bid by MAG. He had paid no attention to the weekly updates, as he had been fully occupied with the provisional decision on remedies in late December and was abroad on holiday from 22 to 29 December.

69. On 14 January 2009 the Group, including Professor Moizer, met to discuss BAA's response to the Provisional Decision on Remedies and also BAA's submissions as to the appropriate approach to purchaser suitability criteria. In his evidence to the Tribunal Mr. Clarke states that the Group considered BAA's proposals in regard to the latter were inadequate. As far as Professor Moizer's position was concerned, Mr. Clarke observes that "Although there was no evidence of any actual conflict of interest relating to Professor Moizer's role and relationship with [the Fund], the fact that [the Fund] had been named as a potential member of the Manchester Consortium was sufficient for us to consider whether such a conflict, perceived or actual, might require us to take action once the facts had been ascertained." The trigger for such action came on 20 January 2009 when Commission staff learned that the Manchester consortium had made an indicative bid for Gatwick. Mr. Clarke states that at that point steps were taken to stop Professor Moizer receiving further information relating to the sale of Gatwick and to exclude him from discussions on

the subject. Thereafter the Commission "commenced an evaluation of whether there might be a conflict and if so, what action we might take."

70. The Commission only learned about the Fund's indicative bid after the conclusion of a hearing with BAA held by the Group on the same day. The participating members of the Group included Professor Moizer. The issues covered included the sale of Gatwick airport and purchaser suitability. Each Group member was allocated a specific set of questions drafted by Commission staff. Professor Moizer's questions related to: certain objections and comments raised by BAA in its response to the Commission's consultations, the timetable for the divestiture of Stansted and the proportionality of requiring a new owner to continue with the planning application for a second runway, BAA's resistance to restrictions on the on-sale of Gatwick by a new purchaser, and BAA's views on sequential sale of airports.

71. It seems that following this meeting the quarantine arrangements to which we have referred were implemented, and thereafter Professor Moizer was isolated from the Group's deliberations on the sale of Gatwick. He did however apparently receive the papers relating to two subsequent Group meetings when among other matters the sale of Gatwick was discussed, namely a meeting on 23 January 2009 which including a hearing with the SMT relating to the bidders who should proceed to the second round of bidding, and a meeting on 28 January 2009 in which there was discussion of AECs in Scotland and England, as well as the sale of Gatwick. At this stage the Group were engaged in the final stages of the process of completing what would become the Report, and Professor Moizer attended subsequent Group meetings on 3, 5, 11 and 17 February 2009 at which a good many aspects of the Report were under consideration with a view to finalising the document. Professor Moizer left these meetings when the Gatwick sale was being discussed.

72. Having taken steps to quarantine Professor Moizer to this extent, on 22 January 2009 Mr. David Peel, the Manager of the Investigation on behalf of the Commission, telephoned Ms Louise Pengelly, BAA's Regulatory Review Project Manager, to say that Professor Moizer was likely to be stood down from discussions within the Commission on the Gatwick sale process because of his

connection with the Fund, but he would continue as a member of the Group in other respects. This call led BAA's regulatory team to carry out a search of the Commission's website on 26 January, seeking information as to Professor Moizer's conflict of interest. This search produced the 2002 Disclosure.

73. We have already mentioned that the Commission's letter of 13 June 2002 containing the 2002 Disclosure had not been copied to BAA by the Commission. Mr. Herga states that he does not recall having seen the 2002 Disclosure prior to 26 January 2009. Although he was Legal Director of BAA in 2002 he was not closely involved in the 2002 BAA QR. Mr. Herga also says that no one at BAA had raised any concerns about Professor Moizer or any other member of the Group. Mr. Hawkins states that neither he nor, so far as he is aware, any of the BAA staff working on the Investigation were aware of the 2002 Disclosure until it was discovered on the Commission website on 26 January 2009. Of the BAA team working on the Investigation only Sheona Mackenzie, the team's financial analyst, and Maureen Davey, the PA to Kyran Hanks, BAA's Director of Economics and Regulation, had worked on the 2002 BAA QR. No one raised with him or with Mr. Hanks the existence of the 2002 Disclosure. He believes they would have done so had they been aware of it. Mr. Hawkins also states that when the 2007 Disclosure was circulated within BAA no one raised any concerns about it, and he himself did not identify a link between the Fund and MAG.

74. On 27 January 2009, during a further telephone conversation between them, Mr. Peel of the Commission informed Ms Pengelly of BAA that the Commission was considering whether to add to the disclosure relating to Professor Moizer on the Commission website, or write to BAA regarding Professor Moizer. No letter from the Commission having arrived, on 6 February 2009 Mr. Herga wrote to the Commission inquiring whether Professor Moizer was still acting as an adviser to the Fund, and if so what were the terms of his retainer; if not when did he cease so to act. BAA also asked whether, and if so when, Professor Moizer had become aware of the Fund's interest in investing in the MAG bid; whether he had advised the Fund on this investment; in which Group and staff meetings Professor Moizer participated since becoming aware of the Fund's interest in the MAG bid; and what steps Professor Moizer and the Commission proposed to take in the circumstances.

75. In response to this letter Mr. Peel telephoned Ms Pengelly the same day to say that the Commission still needed to write to BAA and to add to the statement on the website. On 9 February Mr. Peel contacted Professor Moizer and invited him to comment on BAA's letter. In his email reply to Mr. Peel Professor Moizer wrote:

> "Thank you for the copy of the letter from BAA. My response would be as follows:
> 1. Professor Moizer provides strategic investment advice to the GMPF and continues to do so. The Fund uses external and internal fund managers and he gives advice to the trustees on the fund managers' performance. He does not comment on the choice of individual investments.
> 2. Professor Moizer made clear to the GMPF that should they have any interest in being part of a bid for Gatwick that he could not offer advice in relation to that bid and should receive no communication in relation to that bid. Hence, he was not aware the bid until it became known in the financial press.
> He had had no communication with the GMPF in relation to this investment."

76. In his witness statement in these proceedings Professor Moizer explains that the first sentence of paragraph 2 of the email is a reference to the telephone conversation which he had with Mr. Taylor on 2 December 2008. He states that by the time he wrote the email he knew of the Fund/MAG's bid, although he was not aware of the possibility when he spoke to Mr. Taylor. Professor Moizer states that the second sentence of paragraph 2 represents an error in his recollection. He had then believed that he first read about the Fund's involvement in the Gatwick bid in the press. He now realises that he first heard about it when it was drawn to his attention by Mr. Collings at a meeting of the Group, as described earlier in this account.

77. The Group including Professor Moizer met on 11 February as part of the continuing process of finalising the Report. At the meeting there was also discussion of Professor Moizer's conflict of interest and it was agreed that Mr. Jones would speak to Mr. Herga to find out more about BAA's concerns, and that he would also speak to the Fund to see if they were interested in purchasing other BAA airports. Accordingly, when BAA came for a meeting with the Commission staff on 12 February to discuss the outstanding planning application by BAA at Stansted airport, Mr. Herga was asked to stay behind at the end of the meeting as Mr. Jones wished to speak to him. The two of them met alone. Each deals with the meeting in his witness statement. There is a large measure of agreement as to what was said,

but as is so often the case each has a slightly different recollection in regard to some of the detail.

78. Mr. Herga states that after one or two other matters were touched on Mr. Jones turned to the conflict issue and said he assumed BAA's main concern was that Professor Moizer might have advised the Fund in relation to its Gatwick bid. Mr. Herga says he confirmed that was so, but is sure he did not at any stage say that this was BAA's only concern. Mr. Jones, on the other hand, states that he asked Mr. Herga to identify BAA's concerns about Professor Moizer and the Fund, and that it was Mr. Herga who identified the concern as being that the Professor may have advised the Fund in relation to the Gatwick bid. Mr. Jones goes on to assert that Mr. Herga also observed that it would be difficult to object to more than that. Both witnesses agree that Mr. Jones sought to reassure BAA that Professor Moizer had given no advice to the Fund about Gatwick. Mr. Jones states that Mr. Herga "appeared to be satisfied" with that assurance. However, Mr. Herga does not recall saying that in these circumstances BAA would find it difficult to object to Professor Moizer's position. He states that Mr. Jones may have asked whether the assurance he had given dealt with BAA's main concerns, and that he may have indicated in response and as an immediate reaction that they appeared to cover the main or primary concerns. However he says that this was not a considered response, and the meeting on the subject was unexpected. He is certain that he did not at any stage commit BAA to limiting its concerns to those stated. He wished to see what the Commission said in the letter which Mr. Jones said the Commission would be writing in reply to BAA's of 6 February. Nor did he recall Mr. Jones asking him to get back to Mr. Jones that day with any further thoughts. Mr. Jones, on the other hand states that since Mr. Herga did not contact him later that day he "concluded that BAA's concerns regarding Professor Moizer were satisfied." Mr Herga also states that in the course of their conversation Mr Jones explained that Professor Moizer's role in relation to the Fund was a limited one of providing high level macro-economic advice.

79. On 16 and 18 February 2009 Mr. Jones had telephone conversations with Mr. Taylor of the Fund. In the first of these Mr. Jones asked whether there had been any involvement by Professor Moizer in the Fund's Gatwick bid. Mr. Taylor assured

Mr. Jones that there had been no such involvement. Mr. Jones also asked whether the Fund's involvement in the Gatwick bid was a one-off or likely to happen again in connection with other UK airport sales (specifically Stansted). Mr. Taylor indicated that they would need time to consider that question. In their next conversation on 18 February 2009 Mr. Taylor gave Mr. Jones a considered answer which had been cleared with Mr. Morris. This was to the effect that […] [**C**].

80. Mr. Jones also asked Mr. Taylor about Professor Moizer's role with the Fund. We have already referred to Mr. Taylor's answer at paragraph 50 above.

81. At about this time Mr. David Saunders, who had only taken up his post as Chief Executive of the Commission on 9 February, had decided that it would be better if Professor Moizer stood down, notwithstanding that he had made a significant contribution to the Investigation. He took the view that this step would end the problematic connection with the Fund at a time when the sale of Gatwick was entering its second phase and the Manchester consortium was a second round bidder. There would be a risk to the Commission's reputation if a member of the Group, which would be involved in the process of approving purchasers, was connected to a purchaser, even where the particular member was quarantined from such decisions. The only question was whether he should stand down sooner or later. Having reviewed all the information, Mr. Saunders concluded on 23 February that Professor Moizer should stand down immediately.

82. On 24 February he discussed his decision briefly with the Commission Chairman, Mr. Peter Freeman, who was content with the course proposed. The decision was then communicated to Mr. Clarke, who accepted the conclusion but requested that since he was already quarantined in relation to Gatwick, Professor Moizer might step down after commenting on the Group's draft recommendations on the reform of the airports' regulatory system which was unrelated to the sale of Gatwick. Mr. Clarke states that he had been "reluctant to lose Professor Moizer at this late stage in the inquiry unless there were good reasons". Professor Moizer's contribution was valued "for his grasp of the issues, and for his expertise and sound judgment in our decision making".

83. The next day, 25 February, the Commission wrote to BAA in response to the latter's letter of 6 February. The Commission provided an assurance that Professor Moizer had not advised the Fund on the Gatwick sale using the wording suggested by Professor Moizer in his email to Mr. Peel of 9 February (see paragraphs 75-76 above). The Commission also described the arrangements which had been put in place to quarantine Professor Moizer from issues relating to the sale of Gatwick. No mention was made of the decision that Professor Moizer should stand down from the Investigation entirely (communicated to Professor Moizer himself by telephone the following day). Nor was any mention made in the letter of the additional information gleaned from Mr. Taylor about the nature of Professor Moizer's relationship with the Fund and […] [**C**].

84. In the event Professor Moizer formally stood down on 3 March 2009 without having commented on the draft recommendations. He states that his last effective involvement with the Investigation was his attendance at a meeting of the Group on 17 February.

85. The Group signed off on the Report on 10 March 2009, and an embargoed copy was provided to BAA on 18 March. The bare fact of Professor Moizer having stood down on 3 March was recorded in a footnote. This was the first time BAA became aware of the Commission's decision. The Report was published the following day. We have already referred to its main conclusions at paragraphs 2-5 above.

IV. FIRST GROUND: APPARENT BIAS

The issues

86. Under this ground three main issues fall to be examined: (1) whether, and if so when, any apparent bias arose in relation to Professor Moizer; (2) if any such apparent bias did arise, whether it was waived by BAA so that it can no longer be relied upon as a ground for challenging the Report; (3) if apparent bias applies to Professor Moizer, and was not waived by BAA, whether the other members of the Group are "tainted" by such apparent bias. These are distinct issues, and the Tribunal will examine them separately.

Apparent bias: BAA's submissions

87. BAA contends that the connections of Professor Moizer with the Fund, and through the Fund with MAG, means that there was an acute conflict of interest from the outset, with the result that the Investigation's impartiality was compromised.

88. In support of this submission Mr. Nicholas Green QC, who appeared on behalf of BAA, identified what he variously called the "bare facts" and the "key facts" giving rise to the conflict of interest. He submitted that these facts were known to Professor Moizer and had been set out in the 2002 Disclosure but not in the 2007 Disclosure. They were as follows: that the owner of Manchester airport, MAG, is wholly owned by the ten local authorities making up Greater Manchester; that those same authorities have a pension fund the administration of which is delegated to one of them; that Professor Moizer is an on-going fee-paid investment adviser to that pension fund; that in 2002 the Commission considered this connection of Professor Moizer with MAG to represent "a financial interest" in MAG such that it should be disclosed generally and such that, in order to ensure the independence and impartiality of the 2002 Manchester QR, it was necessary for Professor Moizer to be prevented from having any influence over that inquiry whose findings would have important implications for MAG.

89. The above facts, which can be derived from the 2002 Disclosure, are not the only facts relied upon by BAA as being relevant and within Professor Moizer's knowledge. BAA points in addition to the fact that Professor Moizer's relationship with his local authority clients is a long and continuing one, based on trust and respect for his views and advice, which is sought and given on a wide range of matters; his influence with his clients is very strong; his contacts with those who are responsible for operating the Fund are frequent and not restricted to the regular quarterly meetings of the Advisory Panel. Reliance is also placed upon the very close links between MAG and its local authority owners, illustrated by their representation on MAG's board, by the proactive role in MAG's business played by the shareholder committee comprised at least in part of councillors from the owning authorities, by the dividends received by those authorities, and by the loans provided to MAG by them. Further, BAA points to the relationship between MAG

qua employer and the Fund, in terms of pension funds contributed to the Fund, said to amount to about £300 million at the present time. BAA also points to the fact that in 2002 Professor Moizer expressly recognised that as adviser to the Fund he was in effect advising the ten local authorities who owned MAG.

90. BAA submits that in the context of the 2002 inquiries it was understandable that the Commission considered the conflict of interest did not prevent Professor Moizer from sitting on the 2002 BAA QR: first, there had been disclosure of his connection with MAG, and second, MAG was not a protagonist in relation to BAA; each of the two 2002 inquiries was discrete and any possibility of Professor Moizer's participation in the 2002 BAA QR being able to affect MAG was remote. On the other hand the Commission was quite clear that in view of his connection with MAG Professor Moizer could not have been appointed as a member of the 2002 Manchester QR.

91. BAA contrasts that situation with the position in the Investigation. It says that Professor Moizer's connections with the Fund and MAG have not changed – if anything they have grown stronger, with more annual retainers having been paid to him and a further five years of an already close and trusting relationship. However the difference in 2007 is that now MAG is a direct player in the Investigation, and one whose position is opposed to BAA.

92. MAG's position as a protagonist vis-à-vis BAA is said to arise as follows. BAA relies on the OFT's reference in March 2007: this made it clear that divestiture of BAA's airports was in prospect as a remedy for any AECs resulting from BAA's ownership of several airports. BAA argues that Professor Moizer should have been aware not just of that, but of the real possibility that MAG was a potential buyer given its position as the largest airport operator in the UK after BAA. MAG was mentioned in the OFT report in a list of other airport operators. On any view, BAA argues, MAG would be a player in the Investigation because it was in its interest to see BAA dismantled. This is said to be borne out by what happened early in the Investigation.

93. BAA submits that if the Commission had not previously been aware of MAG's position and the divergence of interest between MAG and BAA, there can have been no doubt after MAG's oral hearing at the Commission on 25 October 2007. This would have highlighted to the Commission, and to Professor Moizer when he read the minutes, MAG's close connection with its local authority owners and would have made crystal clear MAG's keen interest in acquiring any BAA's divested assets. From this point at the latest, according to BAA, the Commission and Professor Moizer must have realised the full extent of the divergence of interest between BAA and MAG, and the intolerable position of Professor Moizer. For example, he would be advising the Commission about whether, and if so the terms on which, BAA should be ordered to divest its airport assets, at the same time as his clients' wholly owned company, MAG, was telling the Commission that they were interested in buying airports "at the right price" including BAA's airports. BAA also relies upon the fact that MAG would be likely to need external funding for such an acquisition and would probably look to their close connection with the Fund. BAA submits that the fair-minded and informed observer would be aware of these facts and would consider that Professor Moizer was quite clearly judge in his own cause.

94. BAA submits that from then on the existing conflict merely became worse, pointing to:

(a) the Emerging Thinking report in April 2008, which made clear that the Commission was considering divestiture – a remedy which would clearly favour MAG and its shareholders (who were Professor Moizer's clients).

(b) the various ways in which MAG's interests showed themselves to be opposed to those of BAA, including: BAA's submission of evidence to the Commission to contradict MAG's contention about its neutral stance in other operators' planning applications; BAA's submissions to the Commission refuting the validity of unfavourable comparisons made by Professor Moizer and the Commission between its performance and that of MAG.

(c) the various press comments from March 2008 onwards about MAG's interest in buying Stansted or Gatwick or a Scottish airport to add value for its local authority shareholders.

(d) the fact that MAG was known to be preparing to act quickly in the event of a "fire sale" of BAA's assets – this being the phrase used in one of the press articles in March 2008.

(e) the fact that at about the same time as such press speculation the Fund was considering the setting up of an investment vehicle for rapid and opportunistic purchases, with the benefit of Professor Moizer's advice and approval.

(f) that although Professor Moizer states he was not aware at the time that the purpose of the vehicle was to carry the joint indicative bid for Gatwick, it was in fact used for that purpose.

(g) that by August 2008 the press were saying, in anticipation of the Commission's Provisional Findings report, that a break up of BAA's ownership of London and Scottish airports was expected and that MAG had gained the backing of their local authority shareholders to consider bidding for BAA assets, either alone or as part of a consortium.

(h) that MAG was also quoted in the press as saying that the prices being quoted for BAA airports were "far too high".

(i) that while all this was going on Professor Moizer, as a member of the Group, was involved in deciding whether divestiture of airports should be ordered, and if so what should be the purchaser suitability criteria, how many airports should be divested, over what timescale and with what sequencing etc., all of which are decisions capable of favouring MAG and its shareholders who were Professor Moizer's clients.

(j) that in September 2008 MAG itself was making submissions to the Commission about *inter alia* the nature of the purchaser suitability criteria.

(k) that once the sale of Gatwick was announced by BAA in September 2008 MAG pressed the Commission to require the appointment of a divestiture trustee to ensure that BAA would conduct the sale fairly.

(l) that at the meeting of the Fund on 21 November 2008 Professor Moizer advised and approved the adoption of a so-called "special opportunities portfolio" giving access at that time to about £400 million for investment, in the context of the need to be able to move quickly to acquire assets at distressed values.

(m) that MAG was seeking to interest the Fund in the Gatwick bid at the suggestion of one of their local authority shareholders, and that at the time of the meeting between the Fund and MAG on 26 November 2008, MAG and its consortium partner Borealis had been working on the project "for some time."

95. BAA put forward these and other events as instances of Professor Moizer's conflict of interest being evident throughout the process of the Investigation. According to BAA the conflict continued unabated through to 2 December 2008, when the one minute telephone conversation between Professor Moizer and Mr. Taylor of the Fund took place. BAA submits that Professor Moizer clearly knew or inferred on that date that the Fund was interested in a bid for Gatwick, yet he did not inform the Commission of what had occurred. The Commission for its part did not apparently realise they had a problem until 9 January 2009 when a fellow Group member noticed from the SMT's 22 December update that the Fund was a potential bidder with MAG. Thereafter BAA submits that the Commission failed to recognise the true scale of the problem, regarding the position as merely "a potential conflict", and keeping the matter "under review". BAA contrasts that reaction with the Commission's conduct in 2002. Only on 19 January 2009, after the Fund had made an indicative bid with MAG, did the Commission take any steps to isolate Professor Moizer from the Gatwick bid. Professor Moizer was not however isolated from any

other aspect of the Investigation nor even from the sale of Gatwick. BAA points out that Professor Moizer was in fact allowed to see the minutes of Commission meetings relating to the bid on 23 and 29 January 2009. Mr. Green took us through the subsequent events leading to the ultimate standing down of Professor Moizer with effect from 3 March 2009 some two weeks prior to the publication of the Report.

96. BAA submits that in the light of the relevant case law the test to be applied by the Tribunal is whether a notional fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Professor Moizer was biased. In relation to this BAA referred us to a number of authorities, including *In re Medicaments and Related Classes of Good (No 2)* [2001] 1 WLR 700; *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, at paragraph 103; *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187, at paragraph 21; *R (Al-Hasan v Home Secretary)* [2005] UKHL 13, [2005] 1 WLR 688, at paragraph 30; *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679, at paragraph 15; *Helow v Home Secretary* [2008] UKHL 62, [2008] 1 WLR 2416, per Lord Hope at paragraphs 2-3 and Lord Mance at paragraph 39.

97. In summary BAA submits that applying the test prescribed in that case law, on these facts the fair-minded and informed observer would have no difficulty in concluding that from the outset of the Investigation and with increasing intensity thereafter, there was a real possibility that Professor Moizer was affected by bias.

Apparent bias: the Commission's submissions

98. At the outset of his submissions Mr. Swift QC, on behalf of the Commission, whilst accepting that the rules on conflict and apparent bias fully applied to the Commission in this context, emphasised that this was not private litigation (the words he used were: *lis inter partes*). Further, the Group started with a clean sheet of paper and collected the evidence they needed regardless of what was in the OFT's report which sparked the reference. He also reiterated that there was no suggestion here of any actual bias on the part of Professor Moizer or any other member. Mr. Swift reminded the Tribunal at the beginning and again at the end of his submissions that the Report is a very important decision for airport competition,

airline competition, and consumer welfare, and followed a most extensive inquiry over nearly two years.

99. On the characteristics to be attributed to the fair-minded and informed observer Mr. Swift also took us to a number of the authorities, including *Helow v Secretary of State for the Home Department and another* (see above). He drew attention to the proposition that when the fair-minded and informed observer considers the relevant facts he or she will be careful to put them into their overall context before reaching any conclusion. This was important, he submitted, when considering the true nature of the links between Professor Moizer, the Fund, the local authorities and MAG. Similarly in *Flaherty v NGRC* [2005] EWCA Civ 1117 the Court of Appeal had approved a dictum to the effect that the principles of natural justice or fairness must adapt to their context and can be approached with a measure of realism and good sense.

100. Mr. Swift submitted that as at the appointment of the Group in April 2007 the fair-minded and informed observer should be assumed to know about the 2002 and 2007 Disclosures, and about Professor Moizer's quarantining at that time; the fair-minded and informed observer would also know about the composition of the Commission and its functions under the Enterprise Act 2002. He or she would know as background about the OFT report and the possibility of divestiture. Given this knowledge, and given the fair-minded and informed observer's other assumed qualities set out in the case law, the fair-minded observer would conclude that the appointment of Professor Moizer was not such as to raise a real possibility that in any disagreement between BAA and MAG Professor Moizer would favour MAG. He or she would conclude that Professor Moizer was a person with relevant experience appointed to do an important job in the public interest. Any other conclusion would make the fair-minded and informed observer unduly suspicious. The most the observer might say is that there may come a time over the course of the next two years when an issue could arise which involves Professor Moizer, but that might not happen.

101. In the Commission's view BAA was entitled to, and did, rely on the 2007 Disclosure as to the connection of Professor Moizer to the Fund – until the position

changed with the Fund's involvement in an indicative bid for Gatwick in January 2009. The fair-minded and informed observer would not have been concerned about the links between the Fund and the owners of MAG. The observer would not have perceived all those as a "unitary" body with no differences between them. The commercial interest of MAG and its shareholding local authorities are distinct from the Fund – the Fund's governing panels carry out a role equivalent to that of the trustees of a pension fund. MAG's October 2007 expression of interest in acquiring an airport was wholly hypothetical and a far too tenuous basis for any suggestion of apparent bias.

102. Mr. Swift also emphasised the nature of the advice given to the Fund by Professor Moizer. He advises on the Fund's investments, not MAG's money. There was no evidence that Professor Moizer was in any way involved in the decision to involve the Fund in a bid by MAG for a BAA airport.

103. In short, the fair-minded and informed observer would have been alert to any real possibility of apparent bias emerging throughout 2007 and 2008 and, although aware of the evidence and submissions by MAG to the Commission in the Investigation, would not have concluded that there was any problem in relation to apparent bias until January 2009 when the Fund was identified as a bidder for Gatwick. Until then, the observer would have had no reason to doubt the continuing impartial discharge by Professor Moizer of his functions. Thereafter a wholly reasonable quarantining process was undertaken by the Commission to remove any possibility of apparent bias, enabling the observer to be satisfied that the Commission had at all stages retained complete impartiality up to the point when the Report was published in March 2009. Mr. Swift accepted that absent that process to remove the possibility of apparent bias it was an inevitable inference that Professor Moizer "would plainly have been seen to be judge in his own cause." As it was, the problem was satisfactorily dealt with and there had been no prejudice to BAA, actual or perceived.

Apparent bias: Ryanair's submissions

104. Mr. Jowell for the Intervener, Ryanair, adopted Mr. Swift's submissions. He then took us through the history and development of the present test of apparent bias

from its starting point in the *Sussex Justices* [1924] 1 KB 256 case culminating in *Porter v Magill* (above). The earlier cases applied a test which resulted in a host of unmeritorious claims of bias, and so the pendulum began to swing back to a stricter approach requiring a likelihood of bias. More recently there had been a re-balancing, with the test of "real possibility" of bias being applied through the eyes of the fair-minded and informed observer, bringing the approach into line with the Strasbourg jurisprudence. From this Mr. Jowell submitted that although the pendulum had swung back to some degree, it had not swung all the way back to the *Sussex Justices* approach with its test of "mere suspicion". There is now a strong link with the reality of the situation through the test of "real possibility" and through the linkage to the actual facts, which the Tribunal must find and knowledge of which must be attributed to the fair-minded and informed observer. The test recognises that conflicts can and do arise, but not every conflict, however fleeting, will lead to striking down a decision.

105. In relation to the facts of the case, Mr. Jowell emphasised the importance of the nature of the Fund and of the fiduciary relationship owed by the local authorities who were in the position of trustees for the employees whose pensions were dependent on the Fund. In view of this the local authorities could not act for their own general benefit – that would breach their fiduciary duty. In this regard he drew our attention to relevant principles in Snell's Equity (31st edition) at paragraphs 7-05, 7-13 to 7-16, and 7-88 to 7-90. This, he argued, gave the lie to BAA's point that the Fund represented a pot of money which the local authority shareholders could use for the purpose of MAG. This also highlighted the distinction between the Fund and the local authorities themselves, and why there was no conflict of interest since Professor Moizer was acting for the Fund and not the local authorities.

106. Mr. Jowell also took issue with BAA's suggestion that in the light of, in particular, "the fleet of foot" and "special opportunities" proposals the Fund must have anticipated that it might involve itself in a bid for one of BAA's airports. Mr. Jowell submitted that the evidence was very clear that at the time neither Professor Moizer nor the other members of the Fund anticipated that the Fund would make such a bid. Those proposals were not, according to the evidence, designed with that in

mind, and were being designed well before the MAG's meeting with the Fund in November 2008.

Apparent bias: legal principles

107. The principles of law to be applied by English courts in order to determine whether a court or other decision-maker is affected by apparent bias have evolved over the years, and are now reasonably settled. There was little if any difference between the parties as to the nature of these principles and the test to be applied by the Tribunal. In view of this harmony it is unnecessary to burden this judgment with a detailed analysis of the case-law. The applicable principles were recently summarised by Lord Bingham of Cornhill in his speech in *R v Abdroikov* (see above) and it is sufficient for present purposes to do little more than set out that summary.

> "*Appearance of bias*
>
> 14. In his extempore judgment in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, Lord Hewart CJ enunciated one of the best known principles of English law:
>
> > "… it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."
>
> This principle was quoted with approval by the European Court of Human Rights in one of its very early decisions: *Delcourt v Belgium* (1970) 1 EHRR 355, 369, para 31. There is, as Lord Steyn on behalf of the House ruled in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14, now no difference between the common law test of bias and the requirement under article 6 of the European Convention of an independent and impartial tribunal. As Lord Hewart's aphorism recognises and later case law makes clear, justice is not done if the objective judgment of a judicial decision-maker (whether judge or juror) is shown to be vitiated by actual partiality or prejudice towards any of the parties. But actual bias, hard as it usually is to prove, is rarely alleged….
>
> 15.The test of apparent bias has been developed through a succession of cases. In *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, 187, Devlin LJ recognised that "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so". Lord Denning MR, in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599, said:
>
> > "The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand…"

> Lord Goff of Chieveley, in *R v Gough* [1993] AC 646, formulated the test of apparent bias in terms a little different from those now accepted, but echoed (at p 659) Devlin LJ's observation in the Barnsley Licensing Justices case in referring to "the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias . . .". Following the decision of the Court of Appeal in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, the accepted test is that laid down in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 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". As the House pointed out in *Lawal v Northern Spirit Ltd*, above, para 14, "Public perception of the possibility of unconscious bias is the key", an observation endorsed by the Privy Council in *Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 2 AC 513, para 22. The characteristics of the fair-minded and informed observer are now well understood: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious: see *Lawal v Northern Spirit Ltd*, above, para 14; *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53.
>
> 16.The analysis of the European Court in Strasbourg has been to distinguish between a subjective test, directed to identification of actual bias, and what it calls an objective test, directed to what in this country would be called apparent bias: see, for instance, *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, paras 46-49. The court has not regarded a defendant's perceptions as decisive, but has required that his suspicions of bias be objectively justified. By this is meant that there must be some demonstrable and rational basis for what he suspects. The court has accepted that appearances are not without importance (see, for instance, *Hauschildt*, above, para 48).”

108. Thus (1) apparent bias is to be distinguished from actual bias: a decision may be affected by apparent bias without the decision-maker being actually biased; (2) in relation to apparent bias, not only are outward appearances and public perceptions important, but it is also to be borne in mind that a person who in good faith believes that he or she is impartial or is capable of acting impartially, may nevertheless be subconsciously affected by bias; (3) the test to be applied is an objective one: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased; (4) the fair-minded and informed observer, who is not to be equated with the complainant, must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious; (5) this test is consistent with the requirement under article 6 of the European Convention on Human Rights of an independent and impartial tribunal.

109. The characteristics of the fair-minded and informed observer were recently considered by Lord Hope in *Helow v Secretary of State for the Home Department and another* (above):

> "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." (paragraph 2)

110. It will be noted that the test in *Porter v Magill* requires the hypothetical fair-minded and informed observer to consider "the facts" when reaching his or her conclusion. In his judgment in *In re Medicaments and Related Classes of Goods (No 2)* (above), Lord Phillips of Worth Matravers MR (as he then was) made clear that the material facts for this purpose are not limited to those which were apparent to the applicant:

> "The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased…." (paragraph 86)

111. These would include any explanation given by the decision-maker whose impartiality is under review as to his knowledge or appreciation of those circumstances.

> "Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The Court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced." (paragraphs 83 to 86 of the judgment)

112. Thus, for example, where the facts which give rise to the conflict of interest are accepted or established to be entirely outside the actual knowledge of the decision-maker, so that there is no possibility that it could have affected his or her decision, no apparent bias can arise. (See in this respect per the Court of Appeal in *Locabail (UK) Ltd. v Bayfield Properties Ltd.* [2000] QB 451, at paragraphs 18 and 55.)

113. However, it follows from the underlying assumption that bias may be subconscious as well as conscious that protestations by the decision-maker that he is not biased are, in the words of Lord Hope of Craighead in *Porter v Magill* "unlikely to be helpful" from the point of view of the fair-minded and informed observer (see [2002] 2 A.C. 357 at 495). Indeed, Lord Hope approved Schiemann LJ's approach, in the Court of Appeal in the same case, of treating such assertions as self-serving and of no weight. In a similar vein, in *Locabail* (above), at paragraph 19, the Court of Appeal said:

> "Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value…"

114. Although relevant circumstances might well include facts knowledge of which would not necessarily have been available to the complainant or an observer at the time the issue arose the reviewing court, personifying as it must the fair-minded and informed observer, should take:

> "an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public.." (*Locabail*, paragraph 17)

115. By a "real possibility" we understand the test to mean a possibility which is not without substance, not fanciful, more than merely minimal but less than a probability. The meaning of "bias" is not really in doubt: to be biased is to be prejudiced against or pre-disposed in favour of a person for reasons unconnected with the merits.

The Commission's guidance on conflict of interest

116. The Commission's *Guidance on Conflicts of Interest* recognises the need for members of the Commission to comply with the law on actual and apparent bias. This guidance, which applies to reporting and specialist panel members, states:

> "A conflict of private interest (or duty) and public duty arises where a member has any interest which might influence, or be perceived as being capable of influencing, his or her judgement even unconsciously….
> The Commission must be seen to be above suspicion". (paragraph 1)

> "Members should disclose to the Chief Executive any interest which might give rise to a conflict when the prospect of their serving on a group dealing with a reference

> is first raised. Similarly, such interests which emerge during the course of an investigation should be disclosed immediately." (paragraph 4)

117. Consistently with this it has been no part of the Commission's case that the law on apparent bias applies with anything less than full force to its conduct of the Investigation. This is hardly surprising. The Commission has at its disposal enormous powers in the context of a market investigation, and it is obviously of considerable importance that those affected and the wider public should have confidence that those powers are exercised, and the decisions underlying their exercise are reached, in a manner which reflects the highest standards of impartiality and fairness.

Automatic disqualification

118. We should also refer to a further category of bias, sometimes referred to as the principle of automatic disqualification. It was this principle which was applied in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. In that case the House of Lords held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. On the facts of the case the principle was applied to disqualify a judge who was the chairman and a director of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International. The latter had intervened in the case as a party to support the prosecution's application for the extradition of Senator Pinochet to Spain.

119. As Mr. Jowell reminded us during his oral submissions, the fair-minded and informed observer has no role to play in this category of case, since where the principle applies bias is assumed, subject only to waiver.

120. In its Notice of Application and skeleton argument BAA placed its case fairly and squarely within the category of bias where the existence of apparent bias is judged according to the conclusions of the fair-minded and informed observer, and did not rely on the category which results in automatic disqualification of the decision-maker. However, in the course of his oral submissions Mr. Green did at one point indicate that the Commission's analysis in 2002, to the effect that Professor Moizer

had a "financial interest" in MAG, was correct and ought also to have been their conclusion in 2007 so that automatic disqualification followed. He did not seek to develop that line of argument, and thereafter based BAA's case solely upon apparent bias established by means of the fair-minded and informed observer.

Apparent bias: the Tribunal's conclusions

121. Our first task in considering this issue is to ascertain the circumstances which have a bearing on the question of apparent bias. These are the facts knowledge of which will be attributed to the fair-minded and informed observer for the purposes of the required test. In our view the material facts are encompassed within our account at paragraphs 30-85 above.

122. The parties in their submissions have drawn distinctions between the factual context at different stages. We agree that some differentiation is justified. For example we consider that one very significant development took place in October 2007 after the Group had been appointed. However we start with a snapshot of the essential facts as at the time of Professor Moizer's appointment to the Group in April 2007, before going on to consider how matters developed thereafter.

123. In April 2007 the fair-minded and informed observer would know and have regard to, in particular, the following:

(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 the members of the Group;

(b) that the Fund has no separate corporate identity; it sits within the ten 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 ten 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 ten 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 ten 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 £250 million);

(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 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 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.

124. As far as we are aware there is no evidence that in April 2007 either Professor Moizer himself or the Commission knew that MAG was interested in acquiring more airports, or that MAG would play an active role in the Investigation. In the light of what happened in the weeks and months after April 2007 it is certainly possible, and perhaps probable, that by then MAG's aspirations and intentions had already been formed; but if they were not known to the decision-maker whose apparent impartiality is in question, there can be no justification for attributing that knowledge to the fair-minded and informed observer.

125. Therefore, given the facts outlined at sub-paragraphs (a) to (j) above, what would the fair-minded and informed observer make in April 2007 of Professor Moizer's participation in the Investigation? In our view Mr. Swift is correct in submitting that at this stage the observer would not have been particularly concerned. He or she would probably have concluded that the prospect of MAG's interests being able to be affected by the processes or outcome of the Investigation was too remote to cause him or her to identify any real possibility that Professor Moizer would be biased in the Investigation. On the basis of the facts assumed to be known to the observer at this time, he or she would conclude that on the face of it the Investigation did not concern MAG or its airports.

126. However, the position changed significantly when, as a result of MAG's submissions to the Commission at the hearing on 25 October 2007, it became clear to the Commission (and also to Professor Moizer when he read the transcript of the hearing) not only that MAG was going to play an active role in the Investigation, but also that the company was in the market for further airport acquisitions at the right price, including any of BAA's assets that might become available. Here, then, was MAG, a company wholly-owned by Professor Moizer's long-standing clients, and the next largest airport operator in the UK after BAA, making submissions to the decision-maker about issues which intimately concerned the future of BAA's airport business. At the same time MAG was telling the decision-maker, who has the power to order divestiture, that it was interested in acquiring assets such as those which might have to be divested by BAA. All this is in a context where divestiture of some of BAA's airports is commonly known to be on the cards.

127. In order to gauge the reaction of the fair-minded and informed observer to the situation as at 25 October 2007, Mr. Jowell suggested that we should look at what Mr. Herga said and did when BAA unearthed the 2002 Disclosure in late January 2009, and what Mr. Herga and Mr. Hawkins have since said in their witness statements. Mr. Jowell contends that in relation to the former Mr. Herga expressed concern only about the Gatwick sale, and that in relation to the latter the statements contain no expressions of outrage. However, we do not glean any real assistance from looking at these matters. It is hardly surprising that attention at the time in question should focus on the Gatwick sale, as that was the urgent topic of the

moment for all those involved. Mr. Herga's words and actions at that stage will have to be explored later in relation to the issue of waiver. As for the witness statements, they deal with certain factual issues. Had the witnesses sought to use them as a vehicle for expressions of outrage the relevant passages might well have been regarded as self-serving.

128. The Tribunal considers that in their submissions to us the Commission and Ryanair have underestimated the significance of Professor Moizer's links with *MAG*, as distinct from his links with the Fund. This has led the Commission also to underestimate the significance of MAG's direct involvement in the Investigation and of its aspiration to acquire BAA assets. We do not agree with the Commission's contention that the fair-minded and informed observer would not have felt any real concern at the situation until the Fund became involved in MAG's bid in December 2008/January 2009.

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 and informed observer would of course take account of the fact, emphasised by Mr. Swift and Mr. Jowell in their submissions, 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 reason of 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. The observer would also be aware that the Commission's legal adviser, Mr. Jones, had recorded Professor

Moizer's own analysis of the situation as follows: "Professor Moizer explained that as the adviser to a pension fund he advised the local authorities who, through a holding company, also owned Manchester airport."

130. Even making due allowance for Professor Moizer's undoubted professionalism and experience, the fair-minded and informed observer would entertain a real concern that he might at least unconsciously be predisposed to favour MAG's submissions to the Commission or to support a decision which was conducive to MAG's aspirations. The observer's concern would be reinforced by both Professor Moizer's and the Commission's assessment in 2002. The observer would take the view that Professor Moizer had been right in 2002 to draw the Commission's attention to his links with MAG's owners once the prospect of joint meetings between the two inquiries arose, and that given the nature of those links the Commission was not being over-scrupulous in taking steps to exclude the possibility of the Professor indirectly influencing the 2002 Manchester QR. The observer 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. He or she would also be mindful of the fact that Professor Moizer was chosen for his experience and expertise in the matters with which the Investigation was concerned and therefore that he could reasonably be expected to be an influential member of the Group.

131. In short, the fair-minded and informed observer would conclude that from the end of October 2007 onwards there was a real possibility that Professor Moizer would be affected by bias in favour of MAG. Nor would the observer be shaken in that conclusion by Professor Moizer's comment in his witness statement that he did not regard MAG's interest in bidding for a BAA airport as "in any way bearing upon my independence in the BAA Inquiry or my appearance of independence, and I continue to take that view." The observer would contrast that statement with Professor Moizer's, and the Commission's, approach in 2002, and would be puzzled, as frankly we are, as to how that view could be maintained in the light of the connections to which we have referred.

132. In view of the above conclusion it is probably unnecessary to embark upon a protracted analysis of how subsequent events affected the appearance of bias. We consider that many of these events simply served to emphasise and exacerbate what was already a clear and unequivocal problem. For example, MAG's participation in the Investigation continued right into 2009, with further submissions to, and meetings with, the Commission. MAG's involvement appears to have raised at least one issue with which BAA had to deal, ie the submission by BAA of evidence to the Commission in order to contradict MAG's contention about its neutral stance in other operators' planning applications (see paragraph 94(b) above). Generally it was clear that the two companies' interests did not coincide. In particular, BAA was understandably very opposed to divestiture of its airport assets whereas such a remedy would provide a golden opportunity for MAG, and their submissions to the Commission were in favour of that outcome. All this was entirely predictable from the first meeting with MAG in October 2007. As the Investigation progressed, and the Commission's iterative decision-making process seemed more and more likely ultimately to result in an order for divestiture of two of the London airports, and another in Scotland, the press speculation about divestiture and about MAG's plans to acquire divested BAA assets mounted. The problem which had arisen in October 2007 was thrown into higher focus as time went on, but did not change its nature.

133. Could it be argued that the fair-minded and informed observer would identify a further strand of possible bias in relation to the Fund? From March 2008 onwards, with Professor Moizer's knowledge and approval, the Fund itself began to gear up, by means of the "fleet of foot" and "special opportunities" proposals, for rapid and opportunistic acquisition of assets becoming available in distress sales. The observer would probably consider that those operating the Fund must have been aware of MAG's aspiration to purchase further airports if the price was right, and that at some point it could well have entered their heads that given the closeness of the Fund's connections with MAG, the Fund's resources might be sought. The observer would note that whilst Mr. Morris states that at the time he prepared the "fleet of foot" and "special opportunities" proposals he was not aware of the Fund's potential involvement in the bid for *Gatwick*, MAG had expressed an interest in purchasing BAA airport assets *generally* (not just Gatwick) in October 2007, and that the proposals which became the "fleet of foot" and "special opportunities"

vehicles had surfaced at the Fund's meetings in March 2008. The observer would therefore wonder whether the Fund might have had an inkling that something of the kind could come their way via MAG, and they should be ready for it. He or she would go on to wonder whether, if that were the case, Professor Moizer too might have had reason to suspect as much, given the regularity of his contacts with those administering the Fund. The observer would recall that on one version of the conversation when Mr. Taylor telephoned him on 2 December 2008 Professor Moizer seemed to have anticipated that the call was about Gatwick or another airport, a possible implication being that he already had reason to suspect the Fund's involvement. The observer would note that not long after Gatwick was put up for sale in September 2008, the Fund's participation in a joint bid for the airport was being actively considered by both MAG and the Fund, and that this was taking place at about the same time that the "special opportunities" proposals were being finalised by the Fund.

134. However, Professor Moizer in his witness statement states that although he was aware of MAG's expressions of interest in a BAA airport, he had no reason to think that the Fund might be involved in any such bid. There is no direct evidence to the contrary, and no request was made by BAA to cross-examine Professor Moizer. The matters referred to in the previous paragraph, while certainly giving cause to wonder, do not enable us to reach the threshold of probability. In these circumstances the Tribunal is not in a position to make a finding that he knew or suspected, prior to 2 December 2008, that the Fund was contemplating an investment in an airport. On the other hand we consider that from the time of that telephone conversation Professor Moizer could be in no doubt that this was the case. Whichever version of the conversation is preferred, there is no doubt that airport investments were mentioned and the conversation came to an end abruptly because Professor Moizer had quite properly indicated that he did not wish to discuss any such matter. Moreover, the Fund interpreted Professor Moizer's reaction as one which confirmed that he had a conflict. Accordingly we do not consider that it is credible to suggest that Professor Moizer could have been ignorant of the Fund's interest in the acquisition of a BAA asset (almost certainly Gatwick) after that conversation.

135. Although the Commission's Defence contains an assertion that no real possibility of bias arose at any stage of the Investigation, Mr. Swift, rightly in our view, 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. Thus, in respect of the period from 2 December 2008 until he stood down from the Investigation with effect from 3 March 2009, the argument before the Tribunal mainly revolved around the appropriateness or otherwise of the steps taken by the Commission to address the conflict of interest, around the question of waiver, and whether the other members of the Group should be treated as affected by Professor Moizer's conflict of interest.

136. 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.

137. We emphasise that these findings are in response to an allegation of *apparent* bias, and there is no finding, express or implied, that Professor Moizer was actually biased.

Waiver: the Commission's submissions

138. The Commission submitted that as a result of the 2002 and 2007 Disclosures BAA knew or should be taken to have known since 2002 of the link between MAG and the Fund that existed prior to and independently of their later decision to participate together in a consortium bid for Gatwick. As to the more limited terms of the 2007 Disclosure, Mr. Swift contended that BAA should not have treated this disclosure or the Commission's statement at the end of the 18 April letter as the last word. That statement read: "*The members mentioned above and the CC do not believe that these matters will prejudice the ability of the Group to discharge its functions in an independent and impartial manner*" A diligent legal adviser would, Mr. Swift submitted, have suggested making inquiries and checking the Commission's website. Such checks would have revealed the 2002 Disclosure, as BAA discovered

when it did check in late January 2009. This information was in the public domain and knowledge of it is to be imputed to BAA for the purposes of waiver. Mr. Swift submitted that a valid waiver is not dependent on disclosure by the decision-maker, but on whether the relevant knowledge is in the possession of the complainant. For this proposition he took us to Lord Phillips' judgment in *Smith v Kvaerner Cementation Foundations Limited* [2007] 1 WLR 370, and in particular the following sentence at paragraph 29:

> "The vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an unpressured decision."

139. Mr. Swift also drew our attention to a document supplied by BAA to the Commission in about February 2008, which sought to respond to a point made against BAA in the Investigation and relating to Manchester airport's planning permission for a second runway. This document identifies in a footnote MAG's ten local authority owners and contains a weblink to MAG's Annual Report and Accounts for 2006-7. On page 47 of the Annual Report and Accounts are set out the shareholdings of the ten local authorities, and on page 75, in the Notes to the financial statements, are references to certain pension schemes used by MAG. One of these is the Fund, and the document records that it is administered by Tameside MBC and that the majority of MAG's employees participate in it. Mr. Swift submitted that this was evidence that BAA knew of the link between MAG and the Fund.

140. Mr. Swift contended that if that original link between MAG and the Fund gave rise to any concern it should have been raised at the outset of the Investigation. If that knowledge was not sufficient by itself then it must have been clear to BAA that MAG was hypothetically interested in airport acquisitions by January 2008, when the hearing with MAG of October 2007 was published on the Commission's website. If (contrary to the Commission's submissions) those circumstances gave rise to any legitimate concerns on BAA's part they should have been raised at the time but were not. Accordingly, they must be considered as having been waived by BAA.

141. The Commission further contended that if there were any doubt as to whether any right to object on the grounds of Professor Moizer's position with the Fund had been waived prior to early 2009 it was clear that after that date any concerns that arose from the original link or from the consortium bid were waived. In particular, by late January 2009 BAA was well aware of both the original link and the link that had formed between MAG and the Fund in connection with the indicative first round bid it had received from the MAG consortium. At that stage it could have raised and pursued any concerns about the steps being taken by the Commission to address the issues relating to the Gatwick sales process (or those in relation to other airports), or any other wider concerns it had about Professor Moizer's position. However, despite the Commission's invitation it did not do so.

142. The Commission argued that the reason is that the explanations and assurances given by the Commission addressed BAA's main concern, which was to ensure that Professor Moizer had not been involved in any way with the Fund's decision to join the consortium. If BAA had any other concerns it was required to raise them with the Commission at the earliest opportunity. It failed to do so. Mr. Herga's explanation in his witness statement that: "...it was ... unclear what BAA could gain from raising objections in relation to Professor Moizer…" and "... it was unclear to me what BAA could do if it were not satisfied with any further responses that it might have been elicited from the CC..." and "... I was concerned that, if I pushed the matter further, this might annoy the CC at a particularly sensitive stage of the inquiry ..." does not excuse that failure. It was too late to raise any other alleged concerns now.

Waiver: Ryanair's submissions

143. Mr. Jowell for the Intervener made a number of submissions on the legal principles to be applied. He contended that where there has been no disclosure but a party happens to know the material facts and sits tight, there is an implied waiver. He went further and argued that the burden is on the objecting party to assert and provide evidence that he did *not* know the facts giving rise to the alleged appearance of bias. For these propositions he relied upon two older cases: *R v Byles* (1912) 77 JP 40 and *R v Williams & Ors ex parte Phillips* [1914] 1 K.B. 608 and

one more recent decision of the Supreme Court of Victoria *R v Magistrates Court ex parte Ciccone* [1973] V.R. 122. Next, he submitted that the knowledge required or the disclosure to be made is of the *essential* facts, not every little detail is necessary. For this he cited *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, at paragraph 35, and *Baker v Quantum Clothing Group* [2009] EWCA 566. The latter case was also authority for the proposition that a complainant is not entitled to take a leisurely approach to the objection – it must be made as soon as practicable. Finally, on the law, he showed us a passage in Chitty on Contracts (30th ed., Sweet & Maxwell, 2009, paragraph 24-008) which indicated that for waiver by election to exist the electing party must "either know or have obvious means of knowledge of the facts giving rise to the right…" He submitted that where a fact is disclosed from which a reasonable person would draw an obvious inference, he will be taken to know the matter which is to be inferred.

144. In relation to the facts of this case, Mr. Jowell first submitted that some responsible person in BAA must have seen the 2002 Disclosure at that time as it was on the Commission's website. BAA is a corporate entity and as such is fixed with the knowledge of its officers and employees.

145. Secondly he argued that even absent the 2002 Disclosure the essential facts were either already known to BAA or were disclosed to it in the 2007 Disclosure or could be inferred from facts known to them. In this connection he identified four basic facts: 1. that the local authorities of Greater Manchester own MAG; 2. that MAG was a potential bidder for any BAA airports divested; 3. that Professor Moizer advised the Fund; 4. that the Fund was the pension fund for the employees of the local authorities. He submitted that these facts established the link between MAG and Professor Moizer and BAA knew these facts, and therefore knew of the link. As to fact 1, he pointed to the document dated February 2008 produced by Mr. Swift (paragraph 139 above) and BAA's statement in its skeleton argument that it "was aware that Manchester airport was owned by a group of local authorities in the Manchester area". Fact 2 was in the public domain by early in the Investigation. Fact 3 was revealed in the 2007 Disclosure. As to fact 4, any ignorance of that was culpable, as it was incumbent on BAA once told about Professor Moizer's connection with the Fund, to ascertain what it was. It was not sufficient to sit back

and rely on the Commission's assurance at the end of the letter (see paragraph 37 above). Mr. Jowell said BAA and its advisers were fully aware of the need to make such inquiries, as illustrated by BAA's zeal in pursuing the Commission in relation to a different conflict issue concerning a member of staff, Mr. Earwaker. Mr. Jowell submitted that the Fund's role was obvious from its name and anyway a quick check of its website revealed that it was the staff pension fund for the ten local authorities of Greater Manchester and other similar bodies. So BAA must have known, but took no objection. In these circumstances there was waiver in relation to the "first stage".

146. So far as the "second stage" was concerned, Mr. Jowell adopted Mr. Swift's arguments. Mr. Jowell submitted that there was waiver by reason of BAA's silence after all relevant material was disclosed by the Commission in its letter of 25 February 2009.

Waiver: BAA submissions

147. Mr. Green's primary submission was that waiver was only put forward by the Commission after the event and did not reflect reality. Relying on the Court of Appeal's guidance in *Jones v DAS Legal Expenses Insurance Co Ltd* (above), Mr. Green argued that none of the 'vital requirements' for waiver to be effective were satisfied in this case. First, at no point did the Commission make full and frank disclosure of the material facts relating to Professor Moizer, the Fund and MAG. The 2007 Disclosure was inadequate and failed to make BAA aware of all the facts relevant to the interests of Professor Moizer at the beginning of the Investigation. There was, in particular, no reference to any of the matters disclosed during the 2002 BAA QR and 2002 Manchester QR. BAA took the 2007 Disclosure at face value and got on with the task of participating in the Investigation. Second, the BAA employees working on the Investigation were never fully aware of all the relevant facts. The discussions between BAA and the Commission about Professor Moizer's involvement with the Fund and Gatwick in early 2009 were effectively too little, too late. In any event, disclosure would only be valid if it were made to all parties. There can be no question of constructive knowledge of the links between Professor Moizer, the local authorities, the Fund and MAG. The third

point was that the Commission did not indicate that it was asking BAA to waive its rights at the time and failed to set out the options available to BAA. Finally, BAA criticised the informal way in which Professor Moizer's position was handled by the Commission, in particular at the meeting of 12 February 2009, and the resulting lack of a non-pressurised and fair opportunity for BAA to consider the position before deciding what to do.

Waiver: legal principles

148. The effect of the case law in relation to waiver was helpfully summarised by Lord Bingham of Cornhill in *Millar v Dickson* [2002] 1 WLR 1615, at 1629:

> "In most litigious situations the expression 'waiver' is used to describe voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression."

149. In *Jones v DAS* (above), at paragraph 35, the Court of Appeal provided detailed guidance for a judge who becomes aware somewhat late in the day of circumstances which might give rise to an appearance of bias. Some of the detail of this guidance is not particularly appropriate in a case such as the present, being tailored very much to ordinary courts and litigation. But the following passages may be pertinent:

> "(iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. …
>
> (v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.
>
> (vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented…"

150. As the Court of Appeal emphasised in *Jones v DAS* and subsequently in *Smith v Kvaerner*, such guidance should not be treated as a set of rules which must be

complied with if a waiver is to be valid. Boiled down to its essentials, the following points emerge: (1) the party waiving must know all the material facts relevant to the decision; (2) the party waiving must be "given a fair opportunity to reach an un-pressured decision"; and (3) the waiver must be clear and unequivocal. (See in this respect *Locabail*, at paragraph 15 and *Smith v Kvaerner*, at page 379.)

151. The requirement of full knowledge of all the facts relevant to the decision whether to waive or not was considered by the Court of Appeal in *Jones v DAS*, 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 needs to know which is invariably different from all he wants to know…"

152. It is not possible for a party, who has full knowledge of the facts relating to apparent bias subsequently relied upon, to adopt a policy of "wait and see" before raising their objection. When a party is informed and in a position to object but takes no steps to do so, that party is not entitled to complain at a later stage that the decision-maker was biased: see *Locabail*, at paragraph 26; see also *Baker v Quantum Clothing Group* (above), at paragraph 36 to the effect that applications for recusal must be raised as soon as reasonably practicable.

153. Whilst the more recent cases have tended to place the emphasis on the need for appropriate disclosure, there is nothing in them to suggest that implied waiver is excluded or different principles apply in circumstances where there has been no, or insufficient, disclosure but all the material facts are nevertheless known to the complainant. The cases to which we were taken by Mr. Jowell indicate that if, with full knowledge of the facts giving rise to the right to object, the complainant remains silent, he or she cannot later rely upon that ground of objection.

154. None of the cases to which reference is made above expressly deals with the question of constructive knowledge, in the sense of facts which are not within a person's actual knowledge but are in the public domain and could with a certain amount of research be ascertained. In our view *R (Toovey and Gwenlan) v The Law*

Society [2002] EWHC 391 (Admin) to which Mr Jowell drew our attention was not a case of constructive knowledge in the above sense: it is clear from the judgment of Stanley Burnton J (as he then was) that the complainants knew the relevant fact (which was that the members of the sub-committee deciding their case would be *likely* to include solicitors who were principals) and could easily have confirmed this had they thought it material (see paragraphs 52 to 53 of the judgment). The only reference to anything other than actual knowledge was the sentence in *Chitty* which Mr. Jowell showed us, stating that for waiver by election to exist the electing party must either know "or have obvious means of knowledge of the facts" which found the right to object. He did not take us to the cases cited in support of this as he said they added nothing.

155. In our view considerable caution should be exercised before imposing a burden on litigants and those in an equivalent position to take the initiative in discovering facts which might support an objection to a decision-maker on grounds of bias. It is important that primary responsibility should rest with the decision-maker to make full and timely disclosure, not just because the facts will in many cases be particularly within his or her own knowledge, but also because a duty of disclosure helps to maintain confidence in the integrity and fairness of the decision-making body. A party who comes before the decision-maker should be able to feel assured that anything which might call into question the decision-maker's appearance of impartiality will be voluntarily disclosed at the earliest opportunity. Such disclosure is also in the interests of the efficient administration of justice, as the later problems emerge, the greater the inconvenience and expense. As we have seen, the Commission's own guidance on conflicts of interest reflects the need for a scrupulous approach to disclosure.

156. If a litigant were to be fixed with knowledge of those facts which he or his advisers could with reasonable effort discover, then even if disclosure had taken place legal advisers would feel bound to carry out further detailed searches. This is not to say that complainants should not be fixed with knowledge of matters which, for example, are an irresistible inference from known facts. Nor should complainants be entitled to close their eyes to the obvious, in Nelsonian fashion. It may well be to such a situation that the *Chitty* proposition is referring; and if *R (Toovey and*

Gwenlan) v The Law Society (above) is not a case of actual knowledge (as we believe it to be) then it is certainly one where the complainant "as good as knew" the relevant facts on which the complaint was later based.

157. What of Mr. Jowell's submission that the burden of proving the *absence* of knowledge of material facts rests on the person complaining of apparent bias? This proposition is at first sight unattractive: proof of a negative is generally regarded as difficult, and this is particularly so where the subject-matter is knowledge. Moreover waiver is a matter which is naturally raised by the decision-maker. It would seem odd that he or she should be able to raise it but then leave it to be disproved by the complainant. Although this type of burden arises in the criminal law, for example in relation to self-defence, that is because of the all-pervading presumption of innocence. One should therefore look carefully at the cases relied upon by Mr. Jowell.

158. In *R v Byles* (above) the Divisional Court held that the objection had been waived because the court was satisfied that the objector and his legal representative knew of the presence on the bench of the affected justice, but did nothing and kept the point in reserve. However, Lord Alverstone CJ said:

> "When an application like the present is made it is necessary for the applicant to satisfy the court that he had no knowledge of the point at the time when it might have been raised."

159. In *R v Williams* (above), which was factually a very similar case to *R v Byles*, the point was explained a little more. Channel J there said:

> "This special remedy [ie *certiorari*] will not be granted *ex debito justitiae* to a person who fails to state in his evidence on moving for the rule *nisi* that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them. By failing so to do a party grieved precludes himself from the right to have the writ *ex debito justitiae* and reduces his position to that of one of the public having no particular interest in the matter. To such a one the granting of the writ is discretionary."

160. Thus the affidavit of the applicant was held to be defective because it omitted an averment which was necessary if the prerogative writ of *certiorari* was to be granted as of right, as opposed to in the court's discretion. Those cases could therefore be seen as turning on a somewhat technical rule of practice in the

Divisional Court at the time. In the Australian case *ex parte Ciccone* (above) to which Mr. Jowell also drew our attention, McInerney J. adopted a different approach:

> "Mr. Batt suggested that once an irregularity was established, the onus was on the respondent to prove waiver or election or other conduct disentitling the applicant to relief… I doubt if Mr. Batt's analysis as to the onus of proof is the correct analysis. I think the ultimate question is whether on the whole of the facts the applicant is entitled to *certiorari*, and I think this is particularly true where the challenge to the order is based on an allegation of a denial of natural justice. In such a situation the Court might well look to the overall question of the justice of the whole situation."

161. Whether or not those earlier cases in the Divisional Court are still relevant or good law in the light of the Strasbourg jurisprudence and the modern case law on apparent bias and waiver, in the present context it will be a rare case which is determined by the incidence of the burden of proof. In practice the court will consider all the evidence as to whether the right to object on the ground of apparent bias was waived, and decide accordingly. Only in the improbable event that there was no evidence either way as to the applicant's knowledge of the material facts would the burden of proof be likely to matter. That is not this case.

Waiver: the Tribunal's conclusions

162. The first question is whether the apparent bias which we find to have arisen in October 2007 as a result of the "original" link between Professor Moizer/the Fund and MAG, was waived by BAA.

163. It is not contended by the Commission or Ryanair that the facts establishing that link were disclosed in the 2007 Disclosure. Their main contention is that the 2002 Disclosure completed the picture, on the basis that it had been on the Commission's website since 2002 and must have been known to BAA personnel at the time of the 2002 BAA QR.

164. Whatever the reason for the 2007 Disclosure being more limited in comparison with that in 2002 (no real explanation has been offered), once the involvement of MAG in the Investigation and its interest in acquiring BAA's airport assets were known to Professor Moizer and the Commission the duty arose to disclose the link with MAG. For some reason this was not done until that link became subsumed by the

involvement of the Fund itself in the Gatwick bid. It may be that Professor Moizer did not remind the Commission of the link. This would be consistent with his statement that he did not, and still does not, consider the link with MAG to represent a conflict of interest in the context of the Investigation. It therefore seems entirely possible that, absent any reminder from Professor Moizer, the Commission did not itself recollect the 2002 Disclosure.

165. In these circumstances it lies ill in the Commission's mouth to suggest that BAA ought to have recalled a link which was disclosed five years earlier in the context of a different inquiry which did not really concern BAA. Indeed at that time the Commission apparently did not consider BAA to be sufficiently affected by the conflict for it to be necessary to send BAA a copy the disclosure letter. We reject the argument that BAA should be fixed with knowledge of the contents of the 2002 Disclosure because it had been on the Commission's website. Even if in 2002 someone at BAA saw the information about Professor Moizer posted on the Commission's website, there is no evidence that anyone at BAA actually knew of this disclosure in 2007 or at any time until 26 January 2009; Mr. Hawkins and Mr. Herga state that the 2007 Disclosure was circulated within BAA in April 2007, and that no one referred to the 2002 Disclosure. As Mr. Hawkins states, it is highly likely that they would have done so had they been aware of it. BAA had not been slow to pursue possible bias issues in respect of a Commission staff member following disclosure, as Ryanair has pointed out. Equally there is no reason to doubt Mr. Hawkins' and Mr. Herga's assertions that they were unaware of the link between Professor Moizer and MAG.

166. In our view BAA was entitled to feel some reassurance as a result of the statement at the end of the letter containing the 2007 Disclosure, and to remain confident of the impartiality of the Group unless and until the Commission advised it of a possible conflict of interest. The Commission, and in particular the members of the Group, would usually be in the best position to know if and when such a situation arose, and that is certainly the case as regards the conflict with which we are dealing. In all the circumstances we do not consider that knowledge of the contents of the 2002 Disclosure can fairly be imputed to BAA.

167. Nor does the Tribunal agree with the Commission's and Ryanair's contention that BAA's knowledge of the original link with MAG is established from other sources. In this regard they placed a great deal of reliance upon the document of February 2008 supplied to the Commission by BAA. It is true that this document contains a link to the Annual Report and Accounts of MAG, which refer to MAG's being owned by particular local authorities. It is also correct that the Annual Report and Accounts refer to the fact that the Fund is one of a number of pension funds used by MAG and its employees for their pensions. However, the purpose of the February 2008 document was to respond to certain points made to BAA by the Commission relating to the grant of planning permission for Manchester airport's second runway. There is no reason to assume that those preparing the response on behalf of BAA would have directed their minds to the possibility of a conflict of interest on the part of Professor Moizer, and every reason to assume that they would not.

168. These arguments, which seek to show knowledge of individual items which, taken in combination, establish the link of which complaint is made, really amount to an assertion that because BAA had access to all of the individual pieces of the jigsaw puzzle, they are to be treated as having put them together and seen the completed picture. We cannot accept this contention. The idea that as well as seeking to address the critical substantive issues arising in a major inquiry which could well result in divestiture of its airport assets, BAA should have been putting together snippets of information from a variety of sources about Professor Moizer, who was one of a group of six decision-makers, in order to identify a conflict of interest which should have been disclosed to them, is not an attractive proposition.

169. As a matter of fact we do not think that the original link is something which jumps out at one from the items of information relied upon by the Commission and Ryanair as being, individually, within BAA's actual knowledge. It does require one to see the completed picture, which depends to some extent upon the fact that the local authorities within which the Fund sits are the self-same local authorities who own MAG. The complete picture would have been known to Professor Moizer for many years, but would be less obvious to someone coming relatively fresh to the matter. It is precisely the kind of information which needed to be disclosed, as indeed it was in 2002 in relation to a different inquiry.

170. In these circumstances 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 which existed, assuming they were seen by the company.

171. Further, as we have already said, there is little if any room for a concept of constructive knowledge in this area. While a complainant should not be entitled to turn a blind eye to the obvious, which might include failing to draw an irresistible inference from a known fact, in our view the case law does not justify fixing a complainant with knowledge of facts which he or his adviser could have ascertained had they done the necessary research into the matter. For the purposes of waiver actual knowledge, or some close equivalent, is required.

172. It follows that 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, whether impliedly or otherwise.

173. Accordingly we turn to consider whether waiver occurred thereafter. Here the main contention of the Commission and Ryanair is that BAA must be taken to have waived any right to object based on the original link by reason of their conduct after discovering its existence. In particular they allege that BAA failed to raise it as a specific issue in addition to the objection based on the immediate issue of the Fund's participation in the bid for Gatwick, and they also rely upon BAA's failure to respond to the Commission's letter of 25 February. In examining these points we should perhaps remind ourselves of what was happening in the Investigation at this time, what led up to the letter of 25 February, and what the Commission said in it.

174. First, the Investigation which had begun in April 2007 was now in its closing stages. The Commission's iterative decision-making process involving, for

example, an Emerging Thinking report (April 2008) followed by a Provisional Findings report (August 2008), meant that by January/February 2009, with the Report due in March 2009, in practice a great deal of the deliberating would have already been done and a good many of the decisions would have been close to being taken (if not already taken) by the Group. At this time the Commission and BAA were also heavily involved in the Gatwick bidding and sale process, and discussions between them about sensitive issues such as purchaser suitability criteria were ongoing.

175. On 22 January 2009 BAA was told by the Commission in a telephone call that Professor Moizer was likely to be stood down from discussions within the Commission on the Gatwick sale process because of his connection with the Fund. This led BAA and its advisers to carry out the internet research which led to their discovery of the 2002 Disclosure. 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, as identified in the opening paragraph, 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 in this inquiry." Moreover, as well as referring to the Fund's bid for Gatwick, the letter states "We understand that MAG is also a potential bidder for Stansted and/or a Scottish airport should the Commission require divestment." BAA then goes on to seek as a matter of urgency answers to specific questions relating to any involvement of Professor Moizer in the Gatwick bid. Thus, although BAA's letter is consistent with BAA being concerned about the immediate and pressing question of the Gatwick bidding process which was already under way, we do not think that BAA's concerns can fairly be interpreted as limited to the Fund's bid for Gatwick. The letter is clearly also raising more general questions about Professor Moizer's future role as a decision-maker, and about *MAG's* interest in acquiring other airports.

176. In a further 'phone call the Commission acknowledged BAA's letter as a "timely reminder" that BAA was owed a letter from the Commission. However no letter was yet sent. Instead, on 12 February 2009 Mr. Jones without prior notice to BAA raised the conflict issue with Mr. Herga at the end of a meeting about another

matter. We have already outlined the two slightly different accounts of the discussion which took place between Mr. Jones and Mr. Herga (see paragraphs 77-78 above). We do not think that anything really turns on the differences in the two accounts, despite the further submissions about this in the note submitted to us by the Commission on 28 October 2009 after the end of the hearing. In relation to Mr. Jones' witness statement, it must be said that the conclusion which he drew from the absence of any further contact by BAA on the day of their discussion, namely that "BAA's concerns regarding Professor Moizer were satisfied", seems unwarranted. We do not see how, on either's recollection of the discussion, such a conclusion could be justified. The meeting had been entirely impromptu and unprepared as far as Mr. Herga was concerned. There were outstanding queries resulting from BAA's letter of 6 February which Mr. Jones had agreed to answer in writing. Further, it must have been clear that Mr. Herga would need to consult with colleagues and consider any such reply from the Commission before any question of BAA committing itself could possibly arise. We do not consider that any significance whatsoever can be attached to Mr. Herga's failure to respond to a request to revert that very same day, even assuming that such a request was registered by Mr. Herga; he does not recollect it. BAA was in our view entitled to receive and consider the promised written explanation of Professor Moizer's position.

177. Mr. Jones does not appear to dispute that on 12 February he had given certain assurances to Mr. Herga about the nature of Professor Moizer's role as an adviser to the Fund. Nevertheless he made inquiries with the Fund about what that role entailed when he spoke to Mr. Taylor on 18 February. The information he obtained painted a rather different picture to the one which Mr. Herga states had been given to him by Mr. Jones on 12 February, of a role limited to giving high level macro-economic advice. In addition Mr. Taylor gave Mr. Jones significant insight into the close relationship between the Fund and MAG. We have set out what Mr. Jones was told on 18 February at paragraph 50 above.

178. Notwithstanding this further information, when the Commission did write to BAA about a week later on 25 February 2009 their letter did not disclose what Mr. Jones had been told about Professor Moizer's standing and role with the Fund, nor about

the possibility that […] [**C**]. Nor did the letter inform BAA that a decision had now been taken by the Commission to stand Professor Moizer down completely. Instead BAA was told about arrangements taken to quarantine him from the Gatwick bid process. BAA did not discover what had actually happened until they saw the Report itself some 3 weeks later. The Commission's letter was also misleading in another respect: it stated that Professor Moizer first became aware of the Fund's interest in making a bid for Gatwick via the Press. As we have seen, Professor Moizer became aware of this, at the very latest, on 2 December 2008 as a result of Mr. Taylor's 'phone call. This inaccuracy presumably arises from Professor Moizer's draft reply sent to Mr. Peel on 9 February. It would appear that at the time the Commission wrote to BAA on 25 February Professor Moizer had not told the Commission about the 2 December phone call.

179. BAA did not reply to this letter. The letter did not specifically call for a reply as it was purporting to provide BAA with information and assurances about Professor Moizer's role with the Fund and in relation to the Gatwick sale process. Mr. Herga explains in his witness statement why he decided not to continue the correspondence. One reason was that it was unclear what would be gained by annoying the Commission at a time when the sensitive purchaser suitability criteria were still being discussed with them.

180. In the light of these circumstances did BAA, by failing to respond to the letter or otherwise, voluntarily and unequivocally elect to waive its right to object to Professor Moizer? In the Tribunal's view the answer is emphatically in the negative. For the vast majority of the period during which the Investigation was running BAA had been in ignorance of the facts which formed the basis of its right to object. The basic facts only became known to them 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 had 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 – the Report would be published within three weeks, and the Commission had decided what it was going to do with Professor Moizer. On any view BAA would have been entitled to time to consider the Commission's response. Furthermore they were hardly in a position to make an unpressured decision. In these circumstances the Tribunal considers that BAA's conduct in not responding to the Commission's letter could not conceivably amount to a waiver of its right to object to Professor Moizer's apparent bias, whether in relation to the original link or the link based on the Fund's participation in the Gatwick bid. Nor was there any other conduct of BAA which could amount to waiver.

181. It follows that BAA's 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.

Impact on co-decision-makers: submissions of the Commission

182. In its Defence the Commission contended that although Professor Moizer was a respected member of the Group, as one of six he could not be described as exercising "undue influence" over the decisions reached by the other members, who after he had stood down reached their decisions unanimously. His participation was on a limited basis from 22 January until 17 February 2009, after which it ceased altogether. The Commission went on to argue that no apparent bias on his part could have altered the other members' decision to impose a divestment remedy. In such circumstances it would not be appropriate for the Tribunal to exercise its discretion by quashing any decision in the Report, even if it were to conclude that, contrary to the Commission's submissions, the decision was unlawful as a result of Professor Moizer's participation in the Investigation.

183. In his oral submissions Mr. Swift accepted that if, contrary to the Commission's contentions, the Tribunal were to find that apparent bias on the part of Professor Moizer arose at the outset of the Investigation rather than in its closing stages, it would be difficult to argue that the Report could remain intact. He argued that if, on the other hand, any apparent bias was limited to the closing stages it would be

wrong for the Tribunal to conclude that simply because the Commission might have acted differently, for example by standing down Professor Moizer earlier, the whole report was retrospectively tainted. He referred in particular to the swift steps taken by the Commission's Chief Executive to resolve the issues once he became aware of them. He submitted that these steps ensured the impartiality of the Commission in the critical remedies stage of the Investigation.

Impact on co-decision-makers: submissions of Ryanair

184. On this issue Mr. Jowell for Ryanair also directed his submissions to the period after Professor Moizer became aware of the Fund's Gatwick involvement, namely from December 2008/early January 2009 until his participation ceased on 17 February 2009. First Mr. Jowell took us to *ASM Shipping Limited v Bruce Harris & Ors* [2007] EWHC 1513 (Comm) and the judgment of Andrew Smith J., where the learned Judge, having referred to *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet (No. 2)* [2002] 1 AC 119 and *In re Medicaments* (above), said:

> "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 when a juror has to be discharged (for example, because he or she recognises a witness) 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…
>
> …I reject the suggestion that it follows from the authorities cited…or it follows as a matter of law from the finding of apparent bias on the part of [one member of the arbitral tribunal] that the whole of the arbitral tribunal and each member of it are tainted by apparent bias. The enquiry depends upon the particular facts of the case." (Paragraphs 44 and 46 of the Judgment)

185. Therefore, Mr. Jowell submitted, there was no automatic tainting of the other joint decision-makers: it was a question of the facts in each case. The question for the Tribunal was whether the fair-minded and informed observer would conclude that there was a real possibility that, as a result of Professor Moizer's influence in the relevant period of between 5 and 10 weeks from the date of his knowledge until 17 February 2009, the deliberations or the ultimate outcome was affected by bias. Mr. Jowell pointed to Mr. Clarke's statement that the Group did not take its final

decisions on the competition issues or remedies until the final Group meeting on 10 March when the Report was approved. In this context he stated that Professor Moizer was not a decision-maker. Mr. Jowell also emphasised the following facts as pointing to a negative answer to the question posed above: 1. the far-advanced stage of the decision-making process at which the apparent bias arose; 2. the fact of there being five other independent-minded members; 3. the limited involvement of Professor Moizer in the short period in question; 4. the fact that in this period the conflict of interest was out in the open; 5. the lack of any perceptible shift in the Group's views in this period.

Impact of apparent bias on co-decision-makers: submissions of BAA

186. BAA submitted that when one member of the Group was tainted by apparent bias, the whole Group and each member of it was tainted. It followed that there will be justifiable doubts about the independence and impartiality of each member so that the matter would need to be investigated by a group composed entirely of new members of the Commission. In support of this submission Mr. Green cited *ex parte Pinochet* (above) and *In re Medicaments* (above), in both of which it was directed that there should be a re-hearing before a freshly constituted judicial panel.

Impact on co-decision-makers: legal principles

187. The consequences of a finding of apparent bias where the decision-maker is an individual and there is no waiver were described by Lord Brown of Eaton-under-Heywood in *R (Al-Hasan) v Secretary of State for the Home Department* (above), at paragraph 43:

> "…it seems clear to me both as a matter of principle and authority that once proceedings have been successfully impugned for want of independence and impartiality on the part of the tribunal, the decision itself must necessarily be regarded as tainted by unfairness and so cannot be permitted to stand."

188. Where one member of a collective decision-making body is affected by apparent bias, the question then arises as to whether that finding means that the whole body and each member of it is similarly "tainted" (a word which, we should emphasise, in this context has absolutely no pejorative connotation).

189. In cases of automatic disqualification, such as those considered in *Ex p. Pinochet* and *Dimes v Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, the respective judgments of the House of Lords were set aside in their entirety due to the bias alleged against one of its members. However in neither case, so far as one can see, was there any discussion of this issue. It appears to have been assumed in each case that if apparent bias on the part of the member of the court in question was established the relevant decision must be set aside. Whilst both those cases were cases of "automatic disqualification" in the sense discussed at paragraph 118 above, it is not clear that that was the reason for the lack of any discussion about the effect on the co-decision-makers. The explanation may simply be that the point was not taken. In *ex parte Pinochet* the reason might also have been that the member of the court affected by apparent bias had been one of a 3/2 majority. Once he was disqualified the decision obviously could not stand as there would be no majority. Therefore there had to be a re-hearing. Lord Browne-Wilkinson stated that the reason for the re-hearing being held before a differently constituted panel was "so that ….the parties were not faced with a committee four of whom had already expressed their conclusion on the points at issue." (See page 137D.) This is not the same as those other members being automatically "tainted". Yet where a group of decision-makers have deliberated together and reached final conclusions it would very often be a sterile exercise to seek to ascertain what influence the affected member had had on the others' views.

190. In *In re Medicaments* the Court of Appeal concluded that one of the lay members of the Restrictive Practices Court, Dr Rowlatt, was affected by apparent bias. At paragraph 99 of his judgment, Lord Philips of Worth Matravers MR (as he then was) considered the impact of this finding on the other two other members of the court, who included the chairman, a High Court Judge:

> "…The trial had reached an advanced stage by the time that it was interrupted by the appellants' application. Dr Rowlatt must have discussed the economic issues with the other members of the court. We concluded that it was inevitable that the decision that Dr Rowlatt should be disqualified carried with it the consequence that the other two members of the court should stand down."

191. In the case of *ASM Shipping Limited v Bruce Harris & Ors* (above) to which Mr. Jowell referred us, Andrew Smith J. having considered these cases rejected the

suggestion that tainting was to be regarded as automatic, and held that the question whether the other members of the tribunal were affected by the apparent bias of one of their number depended on the particular facts of the case. On the facts before him he did not accept that a fair-minded and informed observer would conclude that there was any real possibility that there might have been discussions between Mr. Matthews and the two other arbitrators that might have improperly influenced their assessment or detracted from their impartiality (see paragraphs 44-45 and 59 of the judgment).

192. We see no inconsistency between that approach and the other cases discussed above. Thus, a finding of apparent bias in relation to one member of a collective decision-maker does not automatically taint the entire group and each member within it. It is necessary to consider the consequences of apparent bias in the light of the particular facts of the case. This is not to say that it will normally be possible or appropriate to conduct an intensive inquiry. As we have said, it will usually be quite pointless to speculate about whether and how much one member of a tribunal has been able to influence his or her co-members where the case in question is well-advanced, or is finished. This can clearly be seen from the approach of the Court of Appeal in *In re Medicaments*.

Impact on co-decision-makers: the Tribunal's conclusions

193. As indicated above, the Commission and Ryanair each based their submissions on an assumption that no apparent bias arose until Professor Moizer became aware of the Fund's joining in MAG's bid for Gatwick in late 2008 or early 2009. That assumption is not borne out by our conclusions. The Commission and Ryanair did not seek to argue that if apparent bias arose at the outset or in the early stages of the Investigation the other members of the Group should still be treated as unaffected by Professor Moizer's position. As we have mentioned, Mr. Swift recognised that any such argument would be difficult. In our view his approach was entirely realistic.

194. We find that in relation to the position of the other Group members the relevant circumstances to be considered by the fair-minded and informed observer are as follows:

(a) Professor Moizer was selected as a member of the Group in the light of his previous experience in the 2002 BAA QR. As Mr. Clarke explains in his witness statement "I valued his contribution for his grasp of the issues and for his expertise and sound judgment in our decision making." Indeed Mr. Clarke valued his contribution so highly that even after the Fund's participation in the Gatwick bid was known and some steps had been taken to isolate Professor Moizer from issues relating to that bid, Mr. Clarke persuaded the Commission not to stand him down immediately, but to allow him to continue until 3 March so that he could comment on draft regulatory proposals. (In the event he did not comment on them.)

(b) Professor Moizer had from the outset of the Investigation been in a position to exercise his influence over the Group's thinking and decision-making in the course of numerous Group meetings and discussions.

(c) In relation to the period after he had become aware of the Fund's participation in the Gatwick bid, there was some limited quarantining from discussion of matters relating to the bid; this was implemented from 20 January 2009. However by this time seven weeks or so had passed since the telephone call on 2 December alerting Professor Moizer to the Fund's involvement. Further, apart from that quarantining he continued to be active as a Group member until 17 February 2009. For example, he attended meetings of the Group on 9, and 14 January 2009 and 3, 11, and 17 February 2009. He cross-questioned BAA at a meeting with the company on 20 January 2009. He continued to receive documents relating to the Investigation.

(d) As Mr. Clarke also states, there had been a consistent chain of thinking and decision making through the Emerging Thinking report in April 2008 and the Provisional Findings report in August 2008, and the divestment of airports including Gatwick had been envisaged "long before" the Group and Professor Moizer knew of the Fund's participation in a bid.

195. In the light of these circumstances, having identified a real possibility of bias on the part of Professor Moizer from October 2007 onwards, what would the fair-minded and informed observer conclude about the position of the other members of the Group?

196. The observer would not attach a great deal of significance to the fact that technically Professor Moizer was not a decision-maker, having stood down a week before the other members signed off the Report on 10 March 2009. He had been an active and, in all probability, influential member of the Group from the outset of the Investigation nearly 2 years before until about three weeks prior to sign off. As Mr. Clarke states, in an inquiry of this kind views and decisions are formed at a much earlier stage. The decision-making process was iterative and so far advanced as to be virtually complete by the time of his departure.

197. The observer would certainly take account of the fact that the five other members are independent-minded. As against that, however, he or she would have regard to Professor Moizer's acknowledged expertise and experience in the relevant area as emphasised by Mr. Clarke. He or she would also recognise the intangible and quite possibly subconscious effect of influence.

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 Group from October 2007 until February 2009, the deliberations, the thinking and the ultimate outcome of the Investigation were affected by bias.

199. It must be emphasised that this conclusion involves no reflection whatsoever upon the other members of the Group.

The time bar point

200. In its Defence, at paragraphs 280 to 283, the Commission contends that in any event BAA's apparent bias challenge is out of time. So far as any apparent bias arising in the period prior to 2009 is concerned, the Commission submits that the elements of that complaint have been known to BAA since the time when Professor Moizer was

appointed by the Commission in April 2007. Accordingly BAA should have challenged that decision within two months of the relevant date. So far as any apparent bias arose in 2009, BAA was notified of the Commission's relevant decision on 25 February 2009 when the Commission wrote to BAA in relation to the position of Professor Moizer. A challenge should have been mounted within two months of that date. In his oral submissions Mr Swift did not seek to add to the Commission's written arguments on this point. In its Reply BAA denies that any separate decision capable of review arose at an earlier stage of the Investigation.

201. Section 179 of the Enterprise Act 2002 provides so far as material that:

> "(1) Any person aggrieved by a decision of...the Commission in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision
> (2) For this purpose "decision"... (b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference."

202. Rule 27 of the Tribunal Rules provides that a challenge under section 179(1):

> "must be made within two months of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier."

203. In the Tribunal's judgment it is difficult to see what decision was notified to BAA, prior to notification of the Report, which BAA would have wanted to challenge under section 179. If, for example, following full disclosure to BAA in April or October 2007 of Professor Moizer's potential conflict of interest, BAA had objected to him as a member of the Group and the Commission had refused to stand him down or take other steps which BAA considered necessary, that would no doubt have constituted a reviewable decision. But nothing of that kind occurred. Similarly it is difficult to see how the Commission's letter of 25 February 2009 can lead to the conclusion that the present challenge is out of time. The only decision referred to in that letter is the decision about quarantining Professor Moizer. There is no reason why BAA should wish to challenge that, still less to challenge the unnotified decision to stand Professor Moizer down. We consider that this point has little if any merit. However, had we concluded that the challenge was out of time, we would have seen force in BAA's submission, made in the alternative, that the circumstances of this case are exceptional within the meaning of Rule 8(2) of the

Tribunal Rules, and that the Tribunal should exercise the discretion that would then arise to extend the time for commencing the present application.

Ground 1: Conclusion

204. It follows that BAA has succeeded in its challenge based on the principle of apparent bias. We will turn to the question of the appropriate relief after we have dealt with the second ground of challenge.

V. SECOND GROUND: PROPORTIONALITY

205. None of the parties suggested that if we were to hold in favour of BAA in relation to apparent bias we should not proceed to consider BAA's second ground of review. The two grounds are discrete.

The issue

206. The issue raised by BAA in this Ground is whether, in setting the timescale for the divestiture of Gatwick, Stansted and Edinburgh/Glasgow airports, the Commission properly applied the proportionality principles. BAA submits that, having recognised that the proposed divestitures would have a significant impact on BAA and that the timescale for divestment was a material consideration in the proportionality exercise which the Commission was bound to undertake, the Commission failed to conduct any analysis of the impact that the timescale would have on BAA, and failed to weigh that impact against any effect that a longer timescale would have on the effectiveness of the divestiture remedy and in particular on when the benefits of that remedy would materialise. BAA submits that if the Commission had considered these matters it may well have come to a different decision; for example, it might have decided that it was not proportionate to require BAA to divest three airports in such a short timescale.

The Commission's consideration of remedies and their timing

207. Before examining the parties' submissions it is convenient to see how the Commission approached the question of remedies and the timescale within which

they were required to be implemented. We therefore start by summarising the relevant section of the Report, namely section 10.

208. Section 10 begins by referring to the Commission's statutory obligations under section 134 of the Act, including the requirement "to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable" to the AEC which it has identified. The Commission continued by stating that it would consider the effectiveness of different remedies, and their associated costs together with the principle of proportionality. The Report records in a footnote that shortly before the Report's publication, the judgment of the Tribunal in *Tesco plc v The Competition Commission* [2009] CAT 6 was handed down, and that in assessing the proportionality of remedies in the present case the Commission adopted the principles set out by the European Court of Justice in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023 to which the Tribunal had referred in its judgment. The Commission indicated that it would consider the costs associated with implementing a particular remedy and would seek to implement remedies which were not disproportionate in relation to the AEC which had been identified.

209. The Commission next concluded that only divestiture would be effective in providing a comprehensive long-term solution to address the AEC arising from BAA's common ownership of Heathrow, Gatwick and Stansted airports. Further, divestment of two of those airports to different purchasers was considered necessary for this purpose. In Scotland BAA would have to divest Edinburgh or Glasgow airport, but could decide itself which one.

210. The main benefits from these divestitures would result from the dynamic aspects of competition, as explained in section 5 of the Report. Some of the benefits might not manifest themselves for several years, but others would accrue much sooner, as decisions began to reflect competitive pressures. Certain modest pricing and quality benefits would be delivered in the period immediately following divestiture.

211. Having decided that these divestitures were necessary in order to address the AEC effectively, the Commission then turned to consider the proportionality of the

remedies in relation to the AEC and any resulting detrimental effects on customers. In this connection the Commission stated that an AEC was likely to result in a cost or disadvantage to the UK economy in general, and to customers in particular. Where these costs were significant they might usually be expected to outweigh the costs of implementation and compliance incurred by the person on whom remedies were imposed. In the instant case the Commission estimated the costs to BAA of divestiture at about £63 million for the three airports. Further, any relevant customer benefits of the AEC connected with common ownership would not be likely to be significant. As against that the net benefits of increased competition and of concomitant savings or efficiencies likely to result from the removal of the AEC would be substantial and outweigh the relevant net costs of divestiture.

212. The Commission recognised that the divestiture of three airports was a "major intervention in this market and will have a significant impact on BAA's business" (paragraph 10.177), and also that the timing of the expected benefits was uncertain. Nevertheless, it concluded that a structural remedy was required for the long-standing AEC in question.

213. Having considered and decided upon the criteria for the suitability of purchasers, the Commission next considered the divestiture process, including considerations on the *timing* of divestiture. The Commission noted at the outset that BAA had an interest in maximising the proceeds of the sales, and would also have an interest in selling to less competitive purchasers (paragraph 10.155). The Commission then continued, at paragraphs 10.156-157, as follows:

> *Considerations on timing*
>
> 10.156 In determining an appropriate divestiture period, the CC seeks to find an appropriate balance between factors that would favour rapid disposal and factors that favour slower divestiture. The former include addressing the AEC promptly and avoiding deterioration of the business. The latter include providing sufficient time to attract and retain suitable purchasers to the divestiture.
>
> 10.157 BAA, in responding to our Remedies Notice and provisional decision on remedies, considered that it should be allowed to take longer than the standard period of six months to complete the divestiture process as, among other factors, separating airports from group linkages would take time and there was no need to stipulate a short divestiture period to mitigate the risk of degradation to assets. BAA noted that 'specifying a shorter divestiture period than twelve months at the outset, or requiring the divestments to be carried out concurrently, would create risks for

> the divestment process that could have a significant impact on the value achieved from the disposals', although it acknowledged that divestment could be achieved on a more rapid time-scale. In fact, BAA had itself decided to accelerate the divestiture of Gatwick so that it would take seven months to agree a sale if this went according to plan, although prospective purchasers thought that this was unrealistic. BAA indicated to us that this had been prompted by [..].

214. The Commission agreed with BAA that the airports were unlikely to degrade as quickly as other businesses over the divestiture period, and that the persistence of adverse conditions in financial markets "entail a degree of difficulty for financing airport acquisitions." The Commission then concluded, in paragraph 10.162:

> 10.162 On the basis of the evidence set out above, we have decided that a divestiture period of [..], on a stand-alone basis, is appropriate, including a preliminary period of up to [..] prior to the issue of an information memorandum. In the case of Gatwick, given that it is the first of BAA's three airports to be divested, we have decided to allow BAA [..] months to complete divestiture, on top of the stand-alone period of [..], from the time of the announcement of its sale by BAA (17 September 2008).

215. In relation to the issue of simultaneous sales, the Commission stated:

> "10.178 BAA was particularly concerned [..]. MAG considered that a sequential divestiture process would be preferable to the concurrent sale of several BAA airports, as bidders might have a limited ability to mount effective bids simultaneously and capital availability in the current market was restricted. In its view, sequential sales would ensure the most effective bids and most competitive process.
>
> 10.179 We recognize that the simultaneous marketing of BAA airports might, in current market conditions, constrain the opportunity to sell to a suitable purchaser and restrict prospective proceeds. However, we consider that the marketing of one airport can overlap with preliminary preparations for the sale of another airport without impacting the pool of purchasers or the prospective proceeds.
>
> 10.180 While maximizing proceeds may be the principal objective of BAA, our objective is to achieve a comprehensive remedy to the AECs we have found, while having regard to the principle of proportionality.
>
> 10.181 We have therefore decided to permit the sequential marketing of the divestiture air-ports, with an overlap of [..], during which preliminary preparations for the sale of the next airport can be carried out."

216. Finally, on the question of timing the Report concludes:

> *Decision on the timing of the divestments*
>
> 10.182 As noted elsewhere, the sale of Gatwick is under way. We consider that Stansted airport should be divested before Edinburgh or Glasgow, due to its relative

> scale and importance in addressing the AECs and detriments we have found and in the interests of resolving uncertainty with respect to the SG2 planning inquiry so as to facilitate the development of new capacity as soon as it may be required.
>
> 10.183 Therefore, after taking account of the various factors considered above, we have decided that:
> (a) the sale of Gatwick should be completed [..] after BAA's announcement on 17 September 2008;
> (b) the sale of Stansted should be completed [..] after acceptance of undertakings or [..] after publication of this report, whichever is earlier;
> (c) the sale of Glasgow or Edinburgh should be initiated no later than [..] prior to the end of the period permitted for the divestiture of Stansted; and
> (d) the sale of Glasgow or Edinburgh should be completed no later than [..] after the completion of the sale of Stansted.
>
> 10.184 The above requirements would imply, in the absence of any permitted delays, that the sale of Gatwick should be followed by that of Stansted; and that BAA should complete the sale of Gatwick no later than [..], Stansted no later than [..] and either Edinburgh or Glasgow no later than [..]. So as not to prejudice an effective sales process, these dates are not being published, but the end date is less than two years from the date of this report. This would mean that each of Gatwick, Stansted and either Edinburgh or Glasgow would have been divested, and be under separate ownership from BAA's other airports, within [..] months from the date of this report and [..] months from the date when BAA announced the sale of Gatwick. This time-table may be subject to revision by the CC, should a material change in circumstances make it appropriate.

BAA's submissions

217. BAA first submits that there is a large degree of common ground as to the legal obligations with which the Commission had to comply in relation to proportionality. These obligations are summarised in its Notice of Application at paragraphs 78-80. In particular BAA cites the Tribunal's identification of the main aspects of the proportionality principles in its judgment in *Tesco* (above), at paragraph 137 (quoted below).

218. BAA also submits that the obligation on the decision-maker to take into account as a relevant factor the burden of any proposed measure on individuals who will be affected by it is well-established and not controversial as between the parties here.

219. Next BAA draws attention to the fact that the impact of the timescale of divestiture on sale values was raised by BAA during the Investigation. In this respect BAA refers to the Report which records BAA's request for […] [**C**] for each sale on the basis that a shorter period "could have a significant impact on the value achieved"

(paragraph 10.157, above). In addition we were shown the minutes of a meeting on 20 January 2009 where Mr. Matthews, the Chief Executive of BAA, […] [**C**].

220. Mr. Matthews' reference to […] [**C**].

221. BAA points then to the Commission's acceptance that the timescale over which a remedy is to take effect and the impact upon the party that bears the burden of complying with the remedial timetable "are both matters that fall to the Commission to consider as part of its broad assessment of proportionality." (Defence, paragraph 90). BAA also refers to the Commission's acknowledgement that "where market conditions may become relevant is in relation to determining the period over which divestiture may take place." (Defence, paragraph 141) Further the Commission recognises that the divestiture of three airports constitutes "a major intervention in this market and will have a significant impact on BAA's business" (Report, paragraph 10.117).

222. Having set the scene in that way, BAA submits that the Commission simply failed to carry out any analysis, quantitative or qualitative, of whether and if so to what extent the timing of the divestments would lead to loss of value to BAA. Nor did the Commission go on to ask itself whether, had BAA been given extra time to divest, that would have caused any material detriment to the realisation of the benefits which the Commission was seeking by imposing this remedy. BAA submits that this would not have been a complex exercise for the Commission to carry out, and asks: what were the reasons for the Commission not conducting the exercise and were they good reasons?

223. BAA submits that had the Commission carried out this analysis and asked itself the relevant questions it may well have concluded that, in balancing the risk of loss of value on the sale where the time allowed was shorter, as against the risk of detriment to the anticipated benefits of divestiture resulting from a longer timeframe, allowing more time was the proportionate response.

224. In regard to the latter risk BAA points to the Commission's acceptance that the risk of degradation of the business over the divestiture period was lower in the case of

airports than might otherwise be the case. Further, the Commission was of the view that some of the main benefits from these divestitures might not manifest themselves for several years, and could be influenced by regulatory effects. The benefits of divestiture could not in any event be predicted with precision and were subject to uncertainty. Also, remedies were available to alleviate in the short term any detriment which might exist prior to divestiture.

225. In regard to the former risk, ie the risk of increased loss of sale value due to a shorter time-frame for divestiture, BAA lodged with its Notice of Application a report by Martin Falkner, an expert in UK utilities and in regulation within the UK utility sector. As at the date of his statement in mid-May 2009 Mr. Falkner calculated that if forced to proceed with the sale of the three airports within the overall period of […] [**C**] under current market conditions, BAA faced a loss of value estimated at about £ […] [**C**] relative to completing the divestitures "in an orderly fashion in a stable market." He stated that he was able to arrive at this estimate entirely from data available prior to the Report's publication, and there was no reason why the Commission could not have undertaken the same analysis.

226. Mr. Green submits that the extent of this estimated loss should not be particularly surprising given that, over the last nine years, there has been an average of less than three transactions per year in the entire global airport sector and, except for the acquisition of BAA in 2006, there has probably never been either a divestiture programme of this scale in the airports sector or a transaction equivalent to the size of the sale of the three airports to be divested by BAA. He does not suggest that the Tribunal need accept that Mr. Falkner is correct in all respects. His report is submitted simply to put beyond doubt that the costs to BAA of the remedy cannot be disregarded as *de minimis* or insubstantial. Even if the Tribunal were to assume a very wide margin of error by Mr. Falkner, the adverse impact upon BAA would be […] [**C**]. If, for the sake of argument, the loss was only 50% of that calculated by Mr. Falkner, it would still be nearly […] [**C**] the £63 million separation costs treated by the Commission as the only material costs.

227. BAA accepts that the Commission was not obliged to carry out a *quantitative* assessment such as Mr. Falkner's, and that no such estimate was put to the

Commission by BAA in the course of the Investigation. However, in the absence of such an exercise the Commission ought at the very least to have carried out a *qualitative* or descriptive assessment, explaining how the loss to BAA was taken into account, and how the Commission conducted the "netting off" process as against the AEC and/or the benefits of divestiture. Yet, submits BAA, it did not do so, and none of the passages identified by the Commission in its Defence amounts to such an analysis.

228. In this connection Mr. Green also draws a distinction between the Commission's Defence and its skeleton argument. Whereas in the Defence the Commission claimed that the Report contains such a qualitative analysis, in paragraph 30 of the skeleton the Commission seeks to justify its failure to engage in an analysis of that kind. The skeleton states:

> "In determining what factors are important the Commission will carry out an investigation. Where the investigation must as a matter of necessity be an inquiry made of the party on whom it is proposed that a remedy should fall the Commission is obviously dependent in large measure on material submitted by the party. At no stage in the Inquiry did BAA suggest or volunteer a quantitative assessment of how disposal proceeds might vary on different assumptions of timing or sequence of divestiture. This omission is not surprising because, given market uncertainties and limitations of empirical evidence with regard to such circumstances, such an analysis would be highly speculative and unreliable. In the light of BAA's conduct and these circumstances, the Commission was perfectly entitled not to examine whether the timing of the three divestments would lead to loss of value to BAA in the manner that BAA now alleges, far less that it should carry out a quantitative assessment of that supposed loss. The fact that BAA never raised the issue strongly suggests that quantitative assessment was not an issue for BAA at the time and that it is an after-the-event construct for the purposes of the current challenge."

229. Mr. Green argues that the words "…far less that it should carry out a quantitative assessment…" show the Commission's position as now being that it was not obliged to conduct any analysis of whether the timing of divestment would lead to loss of value, irrespective of whether such analysis was qualitative or quantitative.

230. It should be noted that Mr. Falkner was also of the view that there was an additional substantial "cost" of the divestiture, in the form of increased cost of capital of the three London airports which would arise from the introduction of competition between them. He was of the view that this cost had been ignored by the Commission. The Commission and Ryanair took issue with this in the Defence and

Statement of Intervention respectively. In its Reply BAA indicated that whilst not accepting their arguments, in order to simplify the issues it would be content not to rely upon the cost of capital point.

231. In summary, BAA contends that there is a real possibility that had the loss of value caused by imposition of a shorter timeframe in the current economic climate been taken into account by the Commission along with the costs of separation, and netted off against the risk of some detriment or delay to the benefits of the divestiture, it would have altered the design of the remedies, including perhaps a relatively modest extra period in which to divest. Mr. Green also argued that the Commission and Ryanair had erroneously suggested that the period allowed was generous on the basis that it was longer than the period of six months referred to in the Commission's Guidelines on Merger Remedies (CC8, November 2008) as "normally" imposed. He pointed out that the guidance in question related to mergers not market investigations, and that the relevant document, CC3, has no equivalent guideline on the timing of divestment.

The Commission's submissions

232. The Commission points out that the impact of remedies on BAA's own business is not the most important, far less the only, focus of a proportionality assessment. The Commission's application of the proportionality principle must take account of the totality of the situation including the scale and scope of the AEC. Having identified the AEC the Commission is required by the Act to proceed on the basis that any remedy must provide "…as comprehensive a solution as is reasonable and practicable..." (section 134(6)). The starting-point is therefore that the Commission must seek to remedy the AEC. The costs of implementation and compliance are part of the Commission's consideration of the proportionality of the remedy. The Commission accepted that this fell to be determined as at the date of the Report.

233. In the Commission's submission BAA's assertion that the Commission did not take into account the cost of the divestments to BAA is wrong on the face of the Report. As far as quantitative assessment is concerned, the Commission's evaluation of relevant costs is summarised in the Defence at paragraphs 79 to 86. The initial identification of such relevant costs and their quantification are normally matters

that are uniquely within the knowledge of the party subject to the remedy. For this reason the Commission asked BAA to identify and quantify the costs of the remedies proposed. BAA did so and the Commission scrutinised carefully the data and representations about such costs. At no time during the Investigation did the Commission have reason to believe that BAA had understated its costs of divestment.

234. The Commission accepts that it did not undertake an assessment of costs of the kind that Mr. Falkner made, part of which BAA now no longer relies upon. The reasons why the Commission did not undertake this are addressed in detail in the Defence. In short, the Commission had no evidence before it of the costs which BAA now identifies because BAA did not at any time during the Investigation argue for this kind of quantitative assessment, or provide the Commission with any evidence of the costs in question. The Commission did not consider such an assessment was necessary, and BAA did not at any stage suggest otherwise.

235. As far as a qualitative assessment is concerned, the Commission evaluated BAA's submissions on timing and pattern of disposal very carefully, giving considerable thought to the reasonableness and practicability of the divestiture timetable. The Commission weighed the advantages of remedying more quickly the substantial AECs that it had identified against the potential disadvantages of imposing a demanding timetable. Key to this process was the consideration of BAA's submissions in response to the Notice of Possible Remedies and the Provisional Decision on Remedies. These submissions were in summary:

(a) that separating the airports from group linkages would take a long time;

(b) that there was no reason to stipulate a short divestiture period to mitigate the risk of degradation of assets;

(c) that a period of shorter than […] [**C**] or requiring […] [**C**] would create risks that could have a significant impact on the value achieved through the disposals;

(d) that divestment could, however, be achieved more quickly than this (Report, paragraph 10.157).

236. The Commission points out that in its response to the Provisional Decision on Remedies BAA also submitted that:

> "Uncertainty around market conditions indicates that the Commission should take a flexible approach to extending the divestment period if this becomes necessary. BAA would expect the Commission's decision on such issues to be informed by advice from the monitoring trustee concerning BAA's conduct of the sales process. BAA would expect the Commission to exercise such powers to extend the first divestment period where the sale process had been run efficiently but had been slowed down by external factors such as economic conditions, rather than factors under BAA's reasonable control".

237. The Commission submits that it weighed these various matters in accordance with its statutory duties, and accepted that time would be needed for the separation of the facilities shared by the airports, especially the IT systems. Accordingly it granted longer for the first sale (i.e. Gatwick) to allow time for this. The Commission also accepted BAA's submissions that airports are unlikely to degrade in value as quickly as other business assets, and that the persistence of adverse conditions in the financial markets will entail a degree of difficulty for financing airport acquisitions, both of which were considerations to be weighed in favour of an extended divestiture timescale. These factors were therefore taken into account in the specific periods allowed for the divestiture of each airport. Further, in regard to the simultaneous marketing of BAA airports, […] [**C**], the Commission recognised that in current market conditions this might constrain sale to a suitable purchaser and restrict prospective proceeds. The pattern of divestment reflected this consideration too. The Commission considers that it is also relevant to note that the total divestiture period permitted is […] [**C**] from the date when BAA initiated the process with its announcement that it was putting Gatwick airport up for sale. This is the relevant period to consider for divestment, not the period of […] [**C**] that is repeatedly referred to by BAA in its Notice of Application and which runs only from the publication of the Report.

238. The Commission also points to paragraph 10.184 of the Report where, after the projected timescale for divestiture of the three airports, the last sentence states that:

> "This timetable may be subject to revision by the CC, should a material change in circumstances make it appropriate."

239. Thus the Commission submits that it foresaw that material changes in circumstances might require the timetable for divestiture to be extended, and adopted precisely the flexible approach advocated by BAA in its response to the Provisional Decision on Remedies (see above).

240. In summary, therefore, the Commission submits that it acted reasonably by inviting BAA's representations on timing, considering them, and taking them fully into account in the decisions it took pursuant to section 134(4) for the purposes of the report it had to prepare under section 136(1). Although the Commission does not accept that it should subordinate the objective of achieving a comprehensive remedy to the AEC to BAA's interest in maximising sale proceeds, in reaching its timing decision it had clear regard to the principles of reasonableness, practicability and proportionality. That assessment falls well within the Commission's margin of appreciation.

241. In those circumstances the Commission submits that BAA's challenge on Ground 2 should be rejected.

242. In addition to these arguments the Commission raised a matter concerning developments since publication of the Report which the Commission submits goes to the question whether, even if BAA's challenge on Ground 2 were to succeed, the Tribunal should exercise its discretion not to grant relief.

243. In relation to this point Mr. Swift noted that the timetable for divestiture is expressly subject to alteration where a material change of circumstances has occurred. He referred us to paragraphs 110 to 115 in the Defence. We were also taken to a letter from the Commission to BAA dated 15 May 2009. Certain of the paragraphs in the Defence were heavily redacted for confidentiality reasons, and the whole of the letter was treated as confidential. In essence the letter and the Defence indicate that […] [**C**].

244. In the light of this it is submitted that there would be no need to grant relief in respect of Ground 2 even if, contrary to the Commission's primary contention, BAA were to be successful in establishing that the timing decision in the Report was flawed.

Ryanair's submissions

245. Ryanair supports the Commission's contention that BAA's second ground of review should be dismissed and, in addition to its other submissions, provided us with a confidential note on the timing issues. Mr. Jowell submitted that the Commission took BAA's submissions as to the costs of timescale into account when considering the costs and benefits of the divestiture remedies, referring us to Appendix 10.3 of the Report. Mr. Jowell pointed to the period of six months referred to in the Commission's Guidelines on Merger Remedies (CC8). In his submission, it could not credibly be claimed that the chosen timescale for divestiture lay outside the Commission's wide margin of appreciation. A separate point emphasised by Mr. Jowell was that, even if the cost to BAA of the divestiture remedies was a relevant consideration, it was by no means the only consideration. In that regard, he referred us to various passages in the Report which clearly demonstrated the public interest and benefits to customers and consumers in making the divestitures as soon as possible.

The Tribunal's discussion and conclusions

246. The legal principles which the Commission is required to apply in determining an appropriate remedy for an AEC which has been identified in the context of a market investigation were not the subject of any real dispute between the parties. Reference was made to *Tesco* (above), where the Tribunal summarised the principles in the following passages of its decision:

> "135. The Commission accepts that any remedies which it recommends or adopts must satisfy proportionality principles (paragraph 4.9 of the Commission Guidelines). We agree with the Commission that consideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the AEC and its detrimental effects on customers, and if so what measure, having

regard to the need to achieve as comprehensive a solution to the AEC and its effects as is reasonable and practicable.

136. A useful summary of the proportionality principles is contained in the following passage from the judgment of the ECJ in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, paragraph [13], to which we were referred by the Commission:

> "By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".

137. That passage identifies the main aspects of the principles. These are that the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued.

138. The first thing to note is that the application of these principles is not an exact science: many questions of judgment and appraisal are likely to arise at each stage of the Commission's consideration of these matters. This is perhaps most obviously the case when it comes to the balancing exercise between the (achievable) aims of the proposed measure on the one side, and any adverse effects it may produce on the other side. In resolving these questions the Commission clearly has a wide margin of appreciation, with the exercise of which a court will be very slow to interfere in an application for judicial review.

139. That margin of appreciation extends to the methodology which the Commission decides to use in order to investigate and estimate the various factors which fall to be considered in a proportionality analysis (and indeed in its determination of the statutory questions of comprehensiveness, reasonableness and practicability). There is nothing in the governing legislation, or in the general law, which requires the Commission to follow any particular formal procedure or methodology when it comes to consider the effectiveness of a possible remedy, or its relevant costs, adverse effects and benefits. … The Commission can tailor its investigation of any specific factor to the circumstances of the case and follow such procedures as it considers appropriate. … Ultimately the Commission must do what is necessary to put itself into a position properly to decide the statutory questions. As the Commission itself accepts, this includes examining and taking account of relevant considerations, such as the effectiveness of the remedy, the time period within which it will achieve its aim, and the extent of any adverse effects that may flow from its implementation."

247. In the same case the Tribunal also drew attention to the need, when determining applications of this kind, to consider a report of the Commission "in the round":

> "79. It is also common ground that when considering Tesco's challenge the Report should be read as a whole and should not be analysed as if it were a statute. In its Defence the Commission referred to *R v MMC ex parte National House Building*

Council [1993] E.C.C. 388 in which Auld J (as he then was) (upheld on appeal: [1995] E.C.C. 89) after confirming the fact that reports prepared by the former Monopolies and Mergers Commission are susceptible of judicial review, held:

> "…the Court in the exercise of this jurisdiction, as in its exercise in other contexts, must take care not to subject the [Commission's] Report to fine textual or legal analysis as if it were a statute or other legal document. I respectfully adopt the words of Hodgson J about this in *R v MMC ex parte Visa International Service* [1991] ECC 291 … "…the Report must not be read as if it were a statute or a judgment … It should be read in a generous not restrictive way and the Court should be slow to disable the MMC from recommending action considered to be in the public interest or to prevent the [Secretary of State] from acting thereon unless perceived errors of law are both material and substantial"" (at p.398).

80. Whilst the Act sets up a different legal framework from that which existed under the Fair Trading Act 1973 (the Commission is here required to answer specific questions pursuant to a structured statutory scheme, and expressly to decide, amongst other matters, whether to take or to recommend remedial action in respect of any AEC identified) we agree with the Commission that those observations are also applicable to a case such as the present. As the Commission said in the Defence

> "applying the forensic magnifying glass only to particular parts of the analysis fails to do justice to the overall appraisal and assessment made by the Commission" (paragraph 37)."

248. We bear these principles in mind in considering what is essentially a relatively narrow albeit important point relating to the timescale imposed on the divestiture process. As seen, BAA asked for […] [**C**] for the sale of each airport. The Commission did not accede to this request, and the periods granted amounted in total to less than two years from the date of the Report. BAA's complaint boils down to an allegation that in considering how long to allow for completion of the sale of each airport, the Commission did not give proper consideration to the risk that in current market conditions too short a period would impose a risk of loss of value through lower proceeds of sale. It did not "net off" that risk against the risk that a longer period would affect the effectiveness of the divestiture remedy in addressing the AEC. To do this the Commission should have asked itself what was the extent of the possible loss, and whether reducing it by extending the period of divestiture would create unacceptable delay or prejudice to the benefits which were expected to flow from the remedy. Had the Commission asked these questions it might have arrived at a different conclusion.

249. There is no doubt that on more than one occasion in the course of the Investigation BAA brought the risk of loss of value through timing issues to the Commission's notice. It would have been extraordinary if the Commission had not taken that risk on board: it is obvious that in the context of a compulsory sale the shorter the period allowed for the disposal the less freedom the vendor has to refuse a prospective purchaser's first offer or generally to attract suitable buyers into the market, and that this can clearly have an impact on the proceeds realised. Nor does the Commission dispute that the risk of such loss is a relevant factor of which account must be taken when considering the time-frame, and its proportionality. Did the Commission properly weigh these factors?

250. The analysis of certain related issues in the Report is somewhat diffuse. A superficial reading could create the impression that in relation to the question (which is logically prior to the one of timing with which we are concerned) whether the remedy of *divestiture*, as opposed to an alternative remedy or package of remedies, was necessary and proportionate, only the quantified cost elements (the costs of implementation and compliance, assessed at £63 million) are being put in the balance to be weighed against the anticipated benefits of remedying the AEC. (See, for example, paragraphs 10.106 and 10.112.) If this were indeed the case it would represent a flaw in the Commission's approach to proportionality, similar to that identified in *Tesco*. The cost side of the weighing scales would not contain all relevant costs: in particular they would be missing a certain element of the impact on the person on whom the remedy is to be imposed, namely the undisputed impact on its business.

251. However in our view such an interpretation of the Report is not justified when the section as a whole is read carefully and with the advice of Auld J in mind (see *R v MMC ex parte National House Building Council*, above). The Commission has not completed its proportionality analysis with the apparent conclusion in paragraph 10.112, and has not yet finished placing items in the scales. For example, it goes on to assess the speed with which the anticipated benefits may be achieved. The conclusion on this aspect does not come until paragraph 10.117 where, in considering proportionality of divestiture of three airports, the Commission also takes into account the "significant impact on BAA's business" of such divestiture.

The reference to this factor is a recognition that the remedy to be imposed will inevitably result in significant (albeit unquantified) damage to BAA's business as well as the quantified costs of separation etc. When this section of the Report is read as a whole the burden of it is that notwithstanding the scale of these costs, and despite the uncertain extent and timing of the hoped-for benefits, the extent of the detrimental and long-standing effects of the AEC are such that only a structural remedy of divestiture will be effective in addressing them, and that the net benefits likely to arise from removal of the AEC will outweigh the costs identified, including the impact on BAA's business.

252. Of course BAA's specific complaint is not in respect of the imposition of a remedy requiring divestiture of three of its airports as such: its complaint is a narrower one about the timing of that divestiture. It is therefore necessary to examine the Report again. At the outset of its analysis of the issue of timing the Commission describes the exercise which it is proposing to carry out in that regard. We have quoted this earlier but it is sufficiently important to be repeated:

> "10.156 In determining an appropriate divestiture period, the CC seeks to find an appropriate balance between factors that would favour rapid disposal and factors that favour slower divestiture. The former include addressing the AEC promptly and avoiding deterioration of the business. The latter include providing sufficient time to attract and retain suitable purchasers to the divestiture."

253. This passage represents a summary of the kind of balancing exercise required for a proportionality analysis in the context of the issue which the Commission is considering. It also makes it clear that the Commission has well in mind, as a factor pointing to a longer divestiture period, the need to give BAA sufficient time to conduct an orderly and effective sale process. The Commission does not at this point expressly identify as a factor the need to avoid unnecessary loss of value by a too hasty sale in current market conditions. However, that factor is probably implicit in the paragraph quoted. In any event, it is clear from later passages of the Report that the Commission not only regards the risk of such loss of value as a relevant factor to be taken into account in deciding the timing of divestiture, but does take it into account.

254. For example, in paragraph 10.157 BAA is quoted as urging the Commission to extend the time beyond the standard period of six months on the ground that "specifying a shorter period than […] [**C**] or requiring the divestments […] [**C**], would create risks for the divestment process that could have a significant impact on the value achieved from the disposals". The Commission does not at any stage discount the possibility that such a risk could arise in certain circumstances. On the contrary it expressly finds, at paragraph 10.179:

> "… that the simultaneous marketing of BAA airports might, in current market conditions, constrain the opportunity to sell to a suitable purchaser and restrict prospective proceeds. However, we consider that the marketing of one airport can overlap with preliminary preparations for the sale of another airport without impacting the pool of purchasers or the prospective proceeds."

255. There the Commission is clearly recognising and taking account of the risk of loss of value to BAA by indicating that concurrent sales will not be required to take place. The Commission is seeking to structure the divestiture in such a way as to avoid the risk in question, which the Commission considers will not arise in the event that there is merely some overlap in marketing one airport and making preliminary preparations for sale of another. Thus the Commission's policy in relation to loss of value caused by timing of divestiture appears to be to *eliminate* the risk altogether. That being so it would be surprising if the Commission had approached other aspects of the timing with a different aim, or had simply ignored the risk of loss of value. Nor would that be consistent with the Commission's description in paragraph 10.157 of the exercise which it states it is carrying out at this stage of the Report.

256. Having carefully considered the relevant passages of the Report it is in our view inconceivable that BAA's representations and the risk of loss of value were ignored by the Commission. Further, we are satisfied that the Commission took into account the risk of loss of value when fixing the stand-alone periods within which each of the airports were to be sold and also in the relationship of those periods to one another. In reaching these conclusions we have been assisted by the following: first, the matters to which we have referred in the previous paragraph; second, the fact that the submissions of BAA on the timing issues are recorded in the Report together with the juxtaposed conclusions of the Commission on those same matters;

third, there is a fairly clear indication in the Report that, in the balancing exercise being undertaken pursuant to paragraph 10.156, the Commission is leaning in favour of factors favouring *slower* disposal so as to ensure sufficient time to attract and retain suitable purchasers; this indication is to be inferred from the following: the Commission's express acceptance that airports are unlikely to degrade as quickly as other assets, and its finding that current adverse financial conditions will entail a degree of difficulty for financing airport acquisitions (both these findings are in paragraph 10.160). This indication is consistent with an approach which seeks to eliminate or minimise the risk of any loss of value which might result from timing.

257. Although (unlike the case of concurrent sales) it is not spelled out in terms in the Report, whose reasoning on these issues is at times somewhat exiguous, we are satisfied that, for the reasons we have mentioned, the Commission sought to structure the timing so as to avoid the risk of loss of value through time constraints on the sales. The fact that the Commission did not allow the periods requested by BAA does not indicate otherwise, let alone mean that they failed to have any regard to such risk. The Commission was, as indicated in paragraph 10.156 of the Report, also bound to take account of the desirability of addressing the AEC as promptly as was reasonable, given that the sooner the remedy of divestiture took effect the earlier the benefits of competition would be likely to accrue (even if that would not be for a while in the case of some of benefits).

258. Therefore whilst the Commission might conceivably have expressed its reasoning in more specific and clearer terms when dealing with BAA's submissions on timing issues, particularly given the emphasis which BAA had placed on some of these points in the course of the Investigation, we do not consider that BAA has established a failure on the Commission's part to take proper account of the risk of loss of value when determining the timing of the divestiture.

259. If the aim of the Commission was to eliminate as far as possible the risk of depleted proceeds, as we have found, then it is not really surprising that the Report does not contain a qualitative or quantitative estimate of the loss which might be sustained if the Commission's objective had been different. For on this basis there would be no

loss to put in the weighing scales, assuming that the Commission has accurately calibrated the timing so as to achieve its aim; the latter assessment would be a matter falling within the margin of appreciation of the decision-maker unless the decision were irrational or flawed on some other ground justiciable in judicial review. Equally, if the time already allowed was in the Commission's view sufficient to avoid significant loss, it is not surprising that the Commission did not ask itself whether, if more time was allowed, it would cause detriment to the realisation of the benefits.

260. If we are wrong, and if that was *not* the Commission's aim and approach, then there would be force in BAA's submission. It is common ground that in the present case the Commission was not under an obligation to quantify in monetary terms the potential loss of value to BAA through a too hasty sale process in a difficult market, in for example the manner of Mr. Falkner's report. However BAA's point is that no assessment of any kind of the scale of this potential loss is discernible in the Report, and that at least a qualitative assessment should have been made in order to be in a position to balance that loss against the benefits likely to flow from the divestiture. BAA seems to be right in its submission that the Report contains no such qualitative analysis. On our finding, however, none would be expected.

261. In view of our main conclusion on this Ground it is unnecessary to deal in any detail with Mr. Green's argument that paragraph 30 of the Commission's skeleton argument is inconsistent with the Commission's Defence, and supports BAA's argument that no qualitative assessment was carried out. We agree that on one interpretation of paragraph 30 it could be read as arguing that even where some loss might be anticipated neither a quantitative nor a qualitative assessment of adverse effects of a remedy is required of the Commission. However when the whole paragraph is read it is fairly clear that its thrust is to deny the need to carry out a *quantitative* analysis of the kind carried out by Mr. Falkner.

262. For the sake of completeness we should also say that we attach little significance to the argument that the Commission was in error in referring to the divestiture period of six months contained in its Guidance CC8 relating to divestment in the context of mergers. In the course of the Investigation BAA itself also appears to have referred

to that period as having some relevance (see paragraph 10.157 of the Report). More importantly we very much doubt that in practice any reference to this period influenced the Commission in its determination of the timing structure; where the Guidance in question is applicable, the use of this period for divestment in a particular case is not mandatory and is stated to be flexible.

263. Finally, in the light of our finding on the substance of this ground we do not need to reach a decision on the Commission's fall-back argument that even if BAA succeeded on this, relief should not be granted by the Tribunal given what has transpired since the publication of the Report.

VI. CONCLUSION AND RELIEF

Ground 1: apparent bias

264. It is our unanimous decision that for the reasons set out in this judgment BAA's challenge on Ground 1 succeeds. We have reached our conclusions on Ground 1 with the greatest reluctance. We have throughout been very conscious of their implications for the Report which followed a detailed inquiry over a period of two years, at great effort and expense to all concerned.

265. BAA's position at the hearing was that if there were a ruling in BAA's favour then further submissions would need to be made at that stage as to the scope of the relief to be granted by the Tribunal. We therefore propose to allow further argument on the question of relief in relation to Ground 1, unless the parties can reach agreement on it.

Ground 2: proportionality

266. Our unanimous decision is that the challenge based on Ground 2 fails.

The President | Lord Carlile | Sheila Hewitt

Charles Dhanowa
Registrar

Date: 21 December 2009