IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1219/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10th October 2013

Before:

HODGE MALEK QC
(Chairman)
PROFESSOR JOHN BEATH
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

RYANAIR HOLDINGS PLC Applicant

- and -

COMPETITION COMMISSION Respondent

- and –

AER LINGUS Proposed Intervener

_____

Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Audio Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(*info@beverleynunnery.com*)

_____

CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

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

Mr. Daniel Beard QC and Miss Alison Berridge (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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

———————

THE CHAIRMAN: Yes, Mr. Kennelly?

MR. KENNELLY: May it please you, sir, I appear with Mr. Jones for Ryanair. My learned friend Mr. Flynn QC and Mr. Piccinin appear for Aer Lingus, and Mr. Beard QC appears with Miss Berridge for the Competition Commission.

We have sought, pursuant to the Tribunal's suggestion, to agree as much as we can, and you have the submissions at least from Ryanair and from the Competition Commission. I do not believe Aer Lingus has submitted a document indicating its preferred procedural directions, save in relation to confidential information.

I understand there is agreement between the parties as to the forum and in relation to Aer Lingus's intervention.

THE CHAIRMAN: So we can direct forum is, as agreed, England and Wales, and that there be leave to intervene on the part of Aer Lingus.

MR. KENNELLY: Yes.

THE CHAIRMAN: It seems as though the Treasury Solicitors on behalf of the Competition Commission have proposed some detailed directions taking us right up to the substantive hearing, and your position is that we should not go that far at this stage?

MR. KENNELLY: That is correct, and there is obviously a dispute between the parties that you can see in detail in relation to the proper approach to confidential documents in this proceeding.

THE CHAIRMAN: Of course. Is it agreed that the substantive hearing will be a maximum of three days? Having seen the material, that seems right. There will be a three day hearing. I think it is important that we set down when that hearing is going to be so we can work backwards. The dates which are convenient to the Tribunal are 24th, 27th and 28th January 2014. As I understand it, those dates are available at least for Ryanair. I am not sure about your position. I have not seen your position in writing. Aer Lingus, is that convenient for you?

MR. FLYNN: Sir, I think it is. I think the Treasury Solicitor says that the two blocks of dates they suggested were convenient to us, and I think this falls within that.

THE CHAIRMAN: It has been very difficult for us to find a date where all three of us can be available.

MR. FLYNN: Well understood, sir. Probably nothing is going to suit everyone, but those will be fine for us.

THE CHAIRMAN: Thank you. The position of Ryanair?

MR. KENNELLY: The position of Ryanair: of course, our primary position is that we should not fix the hearing dates, that should be put off until 28th October, but if you are against me on that, we have obviously looked at our diaries and Lord Pannick's diary. Lord Pannick, of course, is leading counsel for Ryanair in this matter. Unfortunately, of the dates which were put forward by the CC for the convenience of their counsel, Lord Pannick is not available for 22nd and 28th January slot. He is available for the dates that were provided by the CC in February. I should say that Lord Pannick is in the Supreme Court in January, including the dates in January which have been put forward by the CC.

You have seen the reasons put forward by the CC for why the hearing should be listed at the convenience of Mr. Beard, because of his long-standing custody of the case for the Competition Commission and for the OFT before that. Of course, Lord Pannick is in a similar position. He has also been involved in this case for ----

THE CHAIRMAN: The difficulty is still going to be with the Tribunal as to whether or not we are available for those dates in February. My concern is that the only dates that we could identify that we can all meet was actually the 24th, 27th and 28th January.

MR. KENNELLY: Again, it is for the Tribunal, but it may be possible to look at later dates. I am not, of course, aware of the Tribunal's availability.

THE CHAIRMAN: This is a judicial review coming out of a merger inquiry. The idea is to get things done as quickly as possible. I do not want this to be pushed into the long grass.

MR. KENNELLY: Sir, I do not propose for a moment that that should happen. As I said, any date in February would be possible on our side. Early February would also convenient. We only mentioned the end of February because those are the dates that suit Mr. Beard. We can, of course, be before you in early February, and Ryanair is as anxious as anyone to get on with this, but of course it would be very detrimental to Ryanair's case if it had to instruct fresh senior counsel. Lord Pannick has been involved in this for some time and has drafted the pleadings. Sir, this is Ryanair's application. Our rights are in issue, very onerous remedies are being proposed to be imposed if we fail in this litigation. That must be paramount.

THE CHAIRMAN: I think we are going to have to balance what is actually feasible. We are first going to see if there is a date within a reasonable period that Lord Pannick and everyone else can make. If we cannot find a date then it will be the dates that are convenient to the Tribunal. I think we have got no other way of doing it. Let me just speak to my colleagues. I am going to rise for a couple of minutes, consult our diaries and we will take into account what you have said. Thank you.

(Short break)

THE CHAIRMAN: We will fix this hearing from 12th to 14th February, because that seems to be the only three days that we can all make. Your position is, as I understand it, that we need to resolve disclosure issues prior to even laying down a timetable. As I understand the position of the Competition Commission and the interveners, we can lay down a timetable now - is that right? That is where the differences are?

MR. KENNELLY: Yes, although since the Tribunal has now listed the hearing, much of my first point falls away. Our primary concern was that there would be sufficient time for us to make any applications that we thought were necessary, once the external lawyers saw the confidential documents.

THE CHAIRMAN: That is assuming that you get that far.

MR. KENNELLY: Indeed, but if the external lawyers can see the unredacted version of the Final Report at the very least, it might then be necessary for us to come back to the Tribunal to apply to seek particular confidential documents or to extend the confidentiality ring to particular named individuals in order for us to get evidence in relation to the redacted material or documents. We seek today both the full unredacted version of the Final Report and the underlying evidence relied upon by the Competition Commission but only for the purposes of its review by the external lawyers who have signed the undertakings in the proposed confidentiality ring. The point we make is that on review of those documents and that evidence by the lawyers, we may need to come back to you urgently to make an application supported by evidence along the lines which I have described. Our concern is to allow sufficient time for that to be done which will fit within the timetable.

Since the Tribunal, and we are grateful for this, has listed the hearing in February, it seems to me that it is possible to allow time at the beginning of this process for us to review those documents if the Tribunal is minded to give them to us and then make any application that needs to be done. We can propose a timetable that accommodates that.

THE CHAIRMAN: Having seen the Competition Commission's response to your application, they are saying this is sensitive material that involves third parties. It looks to me that they would want to at least consult with those third parties before any order is made. The various scenarios that we can go through on this are either we have the hearing and the argument on that today, or I set down a timetable for skeleton arguments and have a hearing in the next couple of weeks or so whereby we have this properly argued out. Looking at the letter, you have made a pretty general application, and ordinarily one would not expect to have an order in the terms of point three, unless it is properly justified. In particular, you

are asking for the evidence gathered by the Competition Commission, including evidence which is relied upon in reaching it conclusions, and that is a very wide ranging disclosure order. As presently minded, you are not likely to get it - let us put it that way - on the basis of a letter like that. If you want to make a proper application with a skeleton argument and the arguments in detail explaining why you need this material specifying what material you want, the reasons why it is necessary, then of course I will look at it. At the moment it looks a very general application. I am very happy to hear it. If it has been properly particularised of course I will hear it and I will deal with it, but not on the current basis.

MR. KENNELLY: I am grateful for that indication. I should say in Ryanair's defence, first of all, the lack of particularity in our request stems in large part from the position that we are in. We are not able to give greater particularity because we do not know what other documents there are such is the extent of the redactions in the Final Report

Putting that to one side, there are two different stages to the process. In order for us to make a fully application supported by evidence as to why we need to see the underlying evidence, we need at the very least to see the redacted material in the Final Report. Without that material we cannot even begin to list the categories of documents in order to give the level of precision and particularity that the Tribunal requires.

If the Tribunal will bear with me, I can take you to the paragraph in the pleading that addresses this and the part of the Decision where these redactions appear.

THE CHAIRMAN: Let us see what the Competition Commission say about the issues in general and then we will come back to your point. Mr. Beard?

MR. BEARD: I am sorry, sir, may I just take instructions for one moment in relation to the suggestion of the matter being deferred from today?

THE CHAIRMAN: I am not talking about a long deferment.

MR. BEARD: No, I anticipated not. You will have seen from the letter that has been provided by the Competition Commission that the Competition Commission considers that the way in which this request has been put by Ryanair is wholly inadequate. We are dealing with highly sensitive material. They actually know what it is about. We are not in Donald Rumsfeld's "unknown unknowns" territory, we are talking about known unknowns. In those circumstances, it really needs to be borne in mind that we are dealing with a judicial review here. What Mr. Kennelly is already suggesting is ploughing through piles of evidence and then his putting in more evidence. It is very, very difficult to see why any part of that story is relevant to judicial review. His Ground 2 is, "We did not see enough to be able to comment".

As we have set out in our letter, what we say is that, actually, you can protest perfectly adequately to this Tribunal that you did not see enough without having any further material. If you say we did not do enough, we did not spell our reasons, we did not justify our case, you can do that on the basis of the report you had.

I should just mention the report they had is actually with fewer redactions than the one in the bundle. The one in the bundle is the public version of the Report, and obviously there is Ryanair confidential material that is of course redacted from the public version of the Ryanair, because Ryanair itself protests that that sort of material should not be made available.

THE CHAIRMAN: So the version I have read is not the same version that Ryanair have?

MR. BEARD: No. I am not saying there are not further redactions and there are not further redactions in relation to some of the particular paragraphs that they have referred to. We are not taking issue with their references in their pleadings, but this Tribunal should not go away thinking all that Ryanair had was the version that is available is publicly. The version they had included their confidential information as well.

I quite understand that Mr. Kennelly will say, "Ah, yes, but we do not care about that, we have seen our own information, we know about that because we gave it to you, it is the other stuff that I care about". Again, we say, "Yes, but you can understand the report, you can protest and you can complain about procedural fairness, and you need to come to this Tribunal and spell out precisely why it is that you need those particular pieces of information even to go to a confidentiality ring". There is a certain casualness and presumption about using a confidentiality ring in these circumstances particularly in circumstances where Ryanair, to be fair to it, has made absolutely clear that it sees this as one stage in two step process where it immediately asks for this material to go out beyond the ring otherwise it will not be fair because they will not be able to comment on it.

So, in those circumstances, we do have real objections. We do think this is a matter that could be dealt with today. If the Tribunal is minded, because of the inappropriate manner in which Ryanair has come forward with these requests, to defer matters then so be it and we are prepared to deal with it at a near term date. Obviously we may end up with some availability issues but we can move on to those in due course.

THE CHAIRMAN: We have looked at the application, we have obviously seen your submissions, we have looked at the section under Ground 2 in the notice, and the provisional feeling we have is that Ryanair has not really specified its application in detail enough, but I do want to be fair to Ryanair as well as to everyone else, and what I am saying

to Ryanair is that it may be better for them – it may not be, but it may be better for them – if they put in a properly particularised application with a skeleton argument and then we look at it properly, but at the moment it is just too general. I am giving the opportunity for them to have their best shot, and I think if we resolved it today in the way that you suggested they may feel that they have not had a fair enough hearing.

MR. BEARD: We quite understand the Tribunal's concern. It is somewhat frustrating that a party that has been so heavily engaged in this process, that has geared up for this application as it has done, knowing that the Tribunal rules talk about applications in relation to evidence, decide that the way that they are going to deal with it is a very casual and very general reference to it in letters. We have tried to engage with it as best we could by providing those submissions this morning, but we obviously understand if the Tribunal has concerns about the fairness of the process those need to be accommodated.

THE CHAIRMAN: Of course. I think you have got the message.

MR. KENNELLY: Absolutely, and that is why I made the point that we do not propose to deal with our application to see all of the evidence today. The point I was making was before we can make the application properly particularised as you suggest, sir, the external lawyers need to see the unredacted version of the report. This is not, as Mr. Beard suggests, trawling through loads of evidence and then making a fresh application for evidence he is confusing the unredacted version of the report and the evidence underlying the report. In view of the steer which we have received, for which we are grateful, we are not asking for the underlying evidence today.

THE CHAIRMAN: So what you are saying is of the three points you are asking just for today the unredacted form of the final report.

MR. KENNELLY: Indeed, and I should make the point in response to Mr. Beard, because he says this is inappropriate for the purposes of judicial review. We need the material in order to be able to address the materiality of the procedural unfairness. In the absence of the material we cannot make submissions as to whether the procedural unfairness is material or immaterial. We cannot make submissions as to whether if Ryanair had had the material it would have made submissions that could have made a difference. We are unable to make that submission without seeing this material.

THE CHAIRMAN: So you are saying you cannot even say whether you have any further relevant representations to make.

MR. KENNELLY: Precisely. And the point is being made against us, even today, that this information would not make any difference, and we cannot meet that objection without seeing the material. That is the impossible position in which we find ourselves.

I entirely take the point made by the Tribunal that the request for evidence is very wide and that is why I accept that we need to make that separately, but as a starting point – and the normal course of events in the Tribunal is that the external lawyers see the unredacted version of the report so, at the very least, we can see the beginning of what evidence is relied upon by the CC. In the absence of an unredacted version of the report it is harder to give greater particularity than we have already given, and that is my submission.

THE CHAIRMAN: So you are saying let us just do it on a stage by stage basis and deal with whether or not we should order an unredacted version of the final report to go into a confidentiality ring ----

MR. KENNELLY: Yes.

THE CHAIRMAN: -- limited to external legal advisers in the normal way.

MR. KENNELLY: And to reassure Aer Lingus, because I think there was some confusion on their side, on the basis of the letter that we have read, at this stage we ask only that the material be limited strictly to the external lawyers who, of course, will give the undertakings which we set out – strict undertakings of confidentiality – which preclude expressly any disclosure of that material to anyone in the business of Ryanair. At the very least that should be provided to allow Ryanair to make further application to the Tribunal as suggested today.

It ill behoves, to use old fashioned language, Mr. Beard to complain the way we have come to this because Mr. Beard himself only gave us his submissions last night or this morning. Ryanair wrote to the CC on 3rd October. We received their detailed points effectively a couple of hours before we came over this afternoon.

THE CHAIRMAN: So let us deal with your application then for an unredacted version of the final report to go into the confidentiality ring.

MR. KENNELLY: Just to stress, that is the limited nature of this application.

THE CHAIRMAN: Yes, I understand.

MR. KENNELLY: Since the Competition Commission has put in issue the way in which Ryanair has put its case, I do need to take the Tribunal to our notice of application, which I know the Tribunal has read because it has said so. I wish to take you very briefly to Ground 2, which is at p.17 of the notice of application. At para.50 you see the Ground, which is:

"During the course of its investigation, the CC withheld evidence from Ryanair on grounds of commercial sensitivity."

I just ask the Tribunal to read the rest of para.50.

THE CHAIRMAN: (After a pause) Yes, I have read that.

MR. KENNELLY: Then para.54 over the page.

THE CHAIRMAN: (After a pause) For the Competition Commission to do the investigation, you are not suggesting you are going to do a rival investigation in the middle of a judicial review?

MR. KENNELLY: Absolutely not. The point, as I have said, is that it goes to the materiality of the procedural unfairness. Our point is that we need to see the material in order to be able to say that Ryanair would have made a point, or could have made a submission that would have made a difference, or could have made a difference. It is the materiality of procedural unfairness. The procedural unfairness cannot be cured now. It is no job of this Tribunal to re-take the decision. It is a question of the materiality of the procedural unfairness. Without the material, the evidence withheld by the CC, we cannot make informed submissions about whether this was a serious or less serious procedural unfairness.

The next section goes to the law, and I will come back to what the law requires in a moment. Could I ask the Tribunal to turn to para.61, the unfairness in this case, and read paras.61 and 62. Paragraph 61 is a summary of our case, and 62 makes the point about materiality.

THE CHAIRMAN: That may be taking it a bit far, "the withholding of <u>any</u> of the evidence relied upon or <u>any</u> allegations". If you have got five strands all saying effectively the same thing, are you saying that the whole thing is vitiated if they do not give you one strand of that?

MR. KENNELLY: We have to assume that the material which was withheld was highly relevant and that we could have made powerful submissions had we seen it.

I should say, pausing there, of course it is always open to the Tribunal to proceed on the issue of principle, to assume that all this material was material. Then Ryanair would not need to see it, and we could operate on the basis that the material was material and Ryanair could have made submissions in response to it which could have made a difference. There is no suggestion that that is conceded by the CC, and so in those circumstances we do need the material at this stage to address its materiality.

At para.63 we refer to illustrative examples of the CC's approach and the unfairness that it has caused, and we say the problems are particularly acute in section 7(a) of the Final Report and in relation to appendix F. The CC in its letter to you suggested that our

concerns were limited to those sections. That is not correct. There are redactions in other sections of this Report, which we say is procedurally unfair. These are the most egregious examples to which we draw the Tribunal's attention.

THE CHAIRMAN: All you are saying is that this is just an example, and that their point that any unredacting should just be limited to section 7 and the related appendix F is wrong?

MR. KENNELLY: Indeed it is. This is the worst example. There are also redactions in para.7.103(a), there are redactions in para.8.33. As I shall explain by reference to the *BMI* case in this Tribunal, it does not lie in the CC's mouth or Aer Lingus to say those other redactions are irrelevant or they are not very serious, because we have no idea what is contained in those excised portions of the Final Report. They could be very long or short, we just do not know.

I should make one important point in relation to the CC's letter. The CC said in its letter, and Mr. Beard made the same point now, that because it took a broad brush approach to the likelihood of combinations and did not consider that any particular combination from Aer Lingus and another airline was likely, it follows, says the CC, that we do not need to engage with the detail of the evidence relied on by the CC. The flaw in that reasoning is that in reaching its broad brush view on likelihood, the CC relied on factual evidence. Its view was not reached in the abstract, and this is clear from the Decision itself.

Could I ask you to turn to the Decision, the Final Report ----

THE CHAIRMAN: You will give me some examples of that, will you?

MR. KENNELLY: I will. The Final Report, there is an index behind the application, and the Final Report is behind tab C1. I should just take you first to the summary at p.9, internal p.5, just to show how important this point is in the Decision and in our challenge. At para.13 the CC sets out five different ways in which they say Ryanair's shareholding could weaken Aer Lingus as a competitor. The first is that Ryanair's shareholding might affect Aer Lingus's ability to participate in a combination with another airline.

At para.14 the Tribunal will see how important this is. The CC says:

> "We formed the view that one mechanism of particular significance that would affect Aer Lingus's commercial policy and strategy was the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by merging with, entering into a joint venture with or acquiring another airline."

That is of central importance to the case.

If the Tribunal could then turn to para.7.24 of the Report, p.43 of the bundle, internal p.39, you will see the beginning of the relevant section, the heading at sub-para.(a) is "Aer Lingus's ability to participate in a combination with another airline", and I ask the Tribunal then to turn to para.7.47, p.44 (p.48 of the bundle), and this is the heading, "Evidence of potential combinations involving Aer Lingus in the period since 2006". This is the actual evidence upon which the CC makes its broad brush conclusion.

The Tribunal will see straight away, for example, at 7.48 that there is a reference, "For example [X]". Over the page, "The documents referred to in particular to [X]". All through paras.7.50, 7.51, 7.52, 7.53, 7.54, and 7.55, the page is littered with redactions.

If the Tribunal turns over the page you will see a new heading, "Other factors affecting the likelihood being involved in combinations". That is the end of the section on the evidence of potential combinations involving Aer Lingus.

Further evidence relied on by the CC for this crucial part of its Decision is at appendix F to the Final Report, and that is at p.178 and 179 of the bundle. It is better to go with the external bundle references, because the appendices are numbered differently.

THE CHAIRMAN: So what page number?

MR. KENNELLY: Page 178. The Tribunal sees this is the evidence relating to the issue of combinations involving Aer Lingus, and reference is made to submissions made by Aer Lingus on p.180, Ryanair and IAG at p.181. If the Tribunal turns to p.182 and sees at para.22 a reference to IAG's evidence, the Tribunal will see after the full stop at the end of that sentence an excision.

Paragraph 23, "IAG told us that [X]".

Then, very importantly, evidence from Lufthansa, and if the Tribunal goes to para.23, you will see in the first sentence, "One factor that would [X] was [X]". It begs the question, how is Ryanair to address the materiality of that material. Mr. Beard says that, of course, we know what was going on, we know what the CC was analysing and thinking. How can we work out what is being said there to the CC?

Similarly, at the end of that paragraph: "Lufthansa provided us with [excision]". At para. 30 Lufthansa said "[excision]".

THE CHAIRMAN: That is another airline.

MR. KENNELLY: Presumably. Again, the risk here is that one can start inferring, effectively trying to improve the draft potentially to assist the CC with no idea what that means.

THE CHAIRMAN: Some of it you can guess what it is likely to be.

MR. KENNELLY: Absolutely.

THE CHAIRMAN: But what you are saying is that is requiring you to speculate.

MR. KENNELLY: In circumstances where we have a right to make submissions as to the materiality of the procedural unfairness. Submissions we cannot make without seeing the material.

THE CHAIRMAN: You are not sure whether this will go anywhere because you may look at it and say: "It wasn't that important, we didn't need to know that" or whatever, you just do not know what your position is going to be.

MR. KENNELLY: Precisely, that is why Mr. Beard is wrong to say that as soon as we see this material we will rush back to the Tribunal and say: "Everything needs to be shown to Mr. O'Leary". We make no such submission. The external lawyers need to see the redacted material in order to assess whether we think we should come back and make an application for the external lawyers to see the underlying material, and this would be a very exceptional route to come back to the Tribunal and say that in exceptional circumstances it might be appropriate to show some of the material to the business, and we appreciate that is a very exceptional step, and the Tribunal will treat that with great care. That is not the application I am making today.

Over the page at 185 and 186, at para. 55 the Tribunal will see another 'scissors' and this is the point which comes out of the *BMI* Judgment, to which I shall take you in a moment, that could be several pages of text or it could be a sentence. It is one paragraph so we can guess how much material ----

THE CHAIRMAN: It is the sort of stuff that looks particularly sensitive, does it not? If you were Aer Lingus you really would not want that material to go into the public domain, let alone to a rival air ----

MR. KENNELLY: Let us be very clear, there is absolutely no suggestion that any of this confidential material will ever enter the public domain. My application today is that it be shown to the external lawyers, and that is as far as I go. There is a suggestion that it might be necessary, exceptionally, to show it to some other person who will have to apply to be entered into the ring. That is a different application, even that person would still be subject to the same undertakings.

At para. 59 ----

THE CHAIRMAN: You rely on 55, do you not?

MR. KENNELLY: Yes, we do. Over the page, paras. 65, 68, 75, and over the page, para. 77 is the end of the material referring to evidence relied on by the CC in relation to combinations with the Aer Lingus, the rest of the material goes to issues of synergies and so forth,

THE CHAIRMAN: So where do you stop, the end of 77?

MR. KENNELLY: That is the end of that particular section, just to indicate to you how heavily redacted that short section is, and that is a section of central importance to the decision and to our case.

Turning to the law, and of course, the requirements of procedural fairness in judicial review are well known, but we have the benefit in this Tribunal of a recent decision of the Tribunal in the *BMI* case to which we referred in our letter of 3rd October.

THE CHAIRMAN: Do you have a copy for me?

MR. KENNELLY: We do. And of course we have the CC's answer to our submissions and Aer Lingus' answer this afternoon. This Judgment of the Tribunal relates to a market investigation, which is obviously different to a merger inquiry, but the duties and issues of principle are the same. The issue in the *BMI* case was whether arrangements made for a data room were sufficient arrangements whereby external advisers could review confidential material within a particular room, and the Tribunal ultimately found that the arrangements made were inadequate to fulfil the requirements of procedural fairness. The important points here are the points of principle, and I ask the Tribunal to turn to p.17 para. 37 of the Judgment which sets out the requirements of fair consultation as a matter of public law. The famous speech of Lord Mustill is there set out from the *Ex Parte Doody* case, and the particularly relevant part is last paragraph, subpara.6 which says:

> "Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

As to what "gist" means in the context of these kinds of cases, the Tribunal applied its mind at para. 39(7) at p. 20 of the Judgment. There, the Tribunal said:

> "Whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the 'gist' of the case which he has to answer, what constitutes a gist of a case is acutely context-sensitive, indeed, 'gist' is a peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance. for the Commission to decide how much to reveal when consulting, we have little doubt that disclosing the 'gist' of the Commission's reasoning will often involve a high level of specificity."

Reference there is made to the Commission's practice, and the point is well illustrated by the approach taken by the Court of Appeal in the *Eisai* case, which concerned a judicial

review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved, say the Court of Appeal, a remarkable degree of disclosure and transparency in the consultation process, procedural fairness required the release of still more material. In that case the release of a fully executable version of an economic model used by NICE, not merely a read only version, so the consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision.

The next issue addressed by the Tribunal is who participates in the process, again a crucial issue in this case. Bearing in mind that all I seek before you today is disclosure to the external lawyers, and not disclosure to anyone from the business.

Reference is made to two Supreme Court Judgments, *Al Rawi* and *Bank Mellat*, which I am sure the Tribunal is aware of, going to the legitimacy of what are called 'closed procedures' as a matter of public law whereby the court and the Secretary of State in those cases sees certain secret material that the applicant, whose rights are in issue, does not see any of the particular material.

In *Bank Mellat*, and I am now quoting from para. 43 of the Tribunal's Judgment, para. 3 of *Bank Mellat*, the Supreme Court expressed itself, said the Tribunal, "in trenchant terms":

> "Even more fundamental to any justice system in a modern democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party knowing, or being able to test, the contents of that evidence and those arguments, or even being able to see all the reasons why the court reached its conclusions."

Here, what the CC, in more measured terms than Aer Lingus in trenchant terms is proposing, is a closed material procedure, that even Ryanair's external lawyers do not see these crucial excised parts of the final report.

At para. 49, interestingly, the Tribunal accepted the Commission's view, made again today, that the confidential information was extremely sensitive.

THE CHAIRMAN: I think for current purposes we can proceed on the basis that it is extremely sensitive and that is why you are proposing the confidentiality ring.

MR. KENNELLY: We certainly accept that the material is confidential. How sensitive it is we make no concession, but we have to accept it is confidential and we do so.

THE CHAIRMAN: We have seen the correspondence from the Commission when they said they regarded it as particularly sensitive, and that is why they redacted it to that extent.

MR. KENNELLY: Indeed, and we must accept that and that is why my application is limited to disclosure to external lawyers.

THE CHAIRMAN: And you say that during the consultation process you suggested a confidentiality ring and that was objected to.

MR. KENNELLY: Yes, it was.

THE CHAIRMAN: And, having looked at the correspondence, they did not give detailed reasons why they rejected it.

MR. KENNELLY: That is what we said at the time, yes, and we make that point again in our application to this Tribunal.

Importantly, at para.61 where the Tribunal says, "In this context the following points bear emphasis". They were addressing here the actual regime which was developed by the CC in this case.

I skip ahead, if I may, to sub-para.(2) over the page where the Tribunal accept:

> "… the Confidential Information in the Disclosure Room is clearly highly technical in nature, as is evidenced by the description contained in Recital V of the Personal Undertakings and, indeed, from the passages in the Provisional Findings that we were shown. Given the technical nature of the material, we consider it to be the case that a fair disclosure of the 'gist' of a case will require - as in *Eisai* - a high degree of disclosure and transparency on the part of the Commission.
>
> (3) This was borne out by the Applicants' submissions before us, which suggested that in order properly to respond to the Provisional Findings, the underlying data relied upon by the Commission would have to be understood, and that detailed and quite possibly highly technical responses would have to be prepared by the parties. Just as we are not inclined to second-guess the Commission in its determination of how to handle the Confidential Information, neither are we inclined to dispute that the applicants need to see this material in order to meet and prepare their response."

Obviously we place reliance on that sub-paragraph.

At para.62:

"The short conclusion is that consideration by the Applicants of the Confidential Information is the starting point for examining what fairness requires. It will be the applicants who will be affected by any adverse decision of the Commission, not their advisers. Implicit in this starting point is the fact that it is for the Applicants to decide how they wish to respond."

Again I place reliance on that.

The Tribunal will appreciate that that was a case where the external lawyers were allowed to see the confidential information, not in an effective manner, but they were given more access than is being proposed for Ryanair at this stage.

Turning then to the objections to this part of my application which are made by the CC, and I will not address the parts of the CC and Aer Lingus arguments that do not go to the broader application that I was going to make before we had the indication from the Tribunal this morning. Turning to the CC's letter ----

THE CHAIRMAN: Let me just find that.

MR. KENNELLY: I would ask the Tribunal to turn to p.4 of the CC's letter, which are the considerations which the CC urges the Tribunal to take into account. I am looking at the middle of the page, where the CC writes:

"Before the Tribunal concludes that any of it should be disclosed at all - even into a confidentiality ring - it is important therefore that it considers the following:

First, the sensitivity of the material and the attendant concerns about inadvertent disclosure or inappropriate use by confidentiality ring members."

If I can address that shortly, the Tribunal has seen the short list of names that we have put forward for the confidentiality ring. This Tribunal has, in many cases in which myself and Mr. Beard, in fact all of us have been involved, made far longer and more detailed confidentiality rings than this.

THE CHAIRMAN: It is just counsel and your instructing solicitors?

MR. KENNELLY: Precisely. There is no suggestion, and none has been made, quite properly, that any of us would be sloppy or inadvertent in our handling of this material. I think we can pass quickly over that particular concern of the CC. The second point that they make is that the CC would need to contact the third parties who provide the material and who request that the information should not be disclosed and should be excised. Again, I have to make the point that if all that is being sought is disclosure to a limited number of external lawyers who are giving strict undertakings of confidentiality, I do not understand why third

parties need to be informed at all. In those circumstances, there is no risk of any of the information being disclosed to Ryanair, still less to the public. Certainly, even if the CC decides it needs to take that step, to make that approach to third parties, that is not a reason to delay the provision of the information to the external advisers and for the progress of this litigation.

The third point is that much of the detail of the confidential material is illustrative of a general point and does not reflect findings that specific combinations are or are not likely to occur. I can address that point. It is true that the CC bases its final conclusion on a broad brush assessment, but the CC had to base that assessment on hard evidence. In fact, it is required, as a matter of law, to base its conclusions on hard evidence. That is what it sought to do and that is why it is important that Ryanair sees it in order to be able to address the materiality of the redacted material.

Fourthly, at (d), they say that Ryanair plainly has a very good understanding of the key general point and effectively does not need to see this material. That is the danger in which we find ourselves. It will be said at the final hearing that this evidence, these redacted portions, are immaterial, and even if we had had the material it would have made no difference. How can we respond to that submission without seeing it?

Finally, they say that the ability of Ryanair to put its case to the Tribunal, that it was unfair for the CC not to provide the material given the nature and terms of the CC's findings as part of the report. I have addressed that now several times.

The point is made after that that we should have satisfied the *Claymore* test. If the Tribunal thinks that the *Claymore* point is taken against us in relation to disclosure of the underlying evidence only, over the page the CC plainly thinks that the *Claymore* test is relevant also to disclosure of the redacted sections of the Report. This is the first two lines of p.5. The *Claymore* test, as the Tribunal knows very well, goes to disclosure of underlying evidence. It does not go to whether or not external lawyers should be shown redactions in a Final Report or a Decision.

THE CHAIRMAN: Certainly if you went for item 3, we would be looking at *Claymore*, I understand that.

MR. KENNELLY: Yes. Then the CC makes the point that this is all a ruse to extend the ring and include business people within it. I have already addressed the Tribunal as to why that is not the case. Plainly, any application to extend the ring would have to be made separately, and we would have to have evidence and a compelling case for that. We cannot even begin

to make the application without seeing the redactions in the Report, and in any event the extension of the ring is not for today.

I will not address you on other material, since that is not my application.

Timing has already been addressed.

Turning to the Aer Lingus submissions which are made in a letter from Cadwalader to the Competition Commission dated 7th October, which was not copied to Ryanair. It was sent only to the CC and was disclosed by the CC and the Treasury Solicitor to Ryanair today. It is important to examine this letter closely. Aer Lingus makes the point in its second paragraph that because the information is commercially sensitive, and I mean here the information in the redactions in the Final Report, not even Ryanair's external lawyers, providing undertakings to preserve its confidentiality, may see it. It says in terms that fairness does not require that Ryanair's advisers should have accessed that information in order to advance its case on this appeal because the information is so sensitive we may not see it. It is like a national security argument, except that Ryanair does not get a special advocate, even in this context.

Over the page, Aer Lingus make the point that somehow we are seeking to obtain by way of a case management measure what we are seeking by way of final relief, that somehow the external lawyers cannot see the redacted material without the Tribunal making a finding, a conclusive finding, that the CC acted unfairly in declining to provide the material to us at an earlier stage. We do not understand that submission. There is no need for the Tribunal to make that kind of finding prior to allowing the external lawyers ----

THE CHAIRMAN: We cannot come to a final view on that issue today. That is the whole idea of the relief you are seeking in the notice.

MR. KENNELLY: Precisely, which is why I fail to understand the point Aer Lingus is making there.

The next paragraph as to the weighing of the factors, at the end of p.2, and this is the really dangerous area that we are in if Ryanair is not allowed to see the material.

THE CHAIRMAN: Let me just look at that. (After a pause) Yes, thank you.

MR. KENNELLY: At the end of p.2 Aer Lingus says, sixth line from the bottom:

> "In any event, it is obvious from the provisional findings in the Final Report what the character of the information is …. It consists largely of names of Aer Lingus potential M&A partners, and details of explanations …"

and so forth. Aer Lingus is saying it really is not very important, this material, so do not worry about it. I am afraid I am not able to contradict that, but fairness, as a matter of law,

does not require Ryanair to take what Aer Lingus says about the materiality of this evidence on trust. We need to see, or the external lawyers at the very least, need to see the material in order to be able to make the submissions that we are entitled to make on materiality.

Finally, over the page, the second paragraph beginning, "Second", Aer Lingus make the point that this information is highly commercially sensitive. It says that the Tribunal does not need to know the name, detailed explanations in order to understand disclosure of this information would cause serious damage to the legitimate interests of Aer Lingus and its potential MNA partners. Again, I fail to understand this point. No damage would be done unless they are suggesting that the external lawyers, who are subject to the strict requirements of confidentiality, would somehow disclose this information to Ryanair or to the public.

THE CHAIRMAN: Are you aware of any case where a confidentiality ring has been imposed and there has been an inadvertent disclosure?

MR. KENNELLY: I am not aware of any such case. I certainly have never been involved in such a case. If anyone knows, Mr. Beard will know of a case.

THE CHAIRMAN: Mr. Beard perhaps can tell us in reply. I fully understand what is being said here and I can see that if I was Aer Lingus I would be very concerned about this type of material going into the hands of a rival airline. You are saying you do not need to worry about that because you can trust the counsel team and your solicitors to make sure that your undertakings are not breached.

MR. KENNELLY: Precisely, because there are very serious professional disciplinary consequences if any of us is careless with material. We all practise in this area and we all rely on a high degree of trust between the lawyers and external advisers, and it would be unthinkable that any of us would be, as I said, careless with this material. It would be a matter of professional disciplinary action.

There are some cases in this Tribunal where confidentiality hearings are very extensive and there are some debates about whether, in some circumstances, internal in-house lawyers may see material and there are debates about whether the undertakings are sufficient and so forth. We are not in that area here today at all. We are asking only that the information be provided to Lord Pannick, to Mr. Jones, myself, and my instructing solicitors.

Finally, Aer Lingus make the point, third, that Ryanair's outside counsel would, in any event, have no ability to evaluate the information and comment on it meaningfully without the input of their client. I may be relying on that point if I have the opportunity to come back before you again, but that is not relevant to my application today.

THE CHAIRMAN: It might be. I would like to hear what you say about that, because if it is your case that you cannot evaluate the information and comment on it without going back to your client then that may be a material factor in whether or not we order redacted disclosure.

MR. KENNELLY: How, sir? How can I say whether I am able to make submissions in relation to redacted material or not without having seen it, without even being able to guess what it says in relation to those paragraphs which are entirely excised? We are very familiar with the case, the external lawyers, we have been working on it for a long time. It might be possible for us to make submissions in relation to it without external assistance from our clients.

THE CHAIRMAN: Assuming for present purposes I accept, prima facie, the second point, that it is highly commercially sensitive and it could cause serious damage to the legitimate interests of Aer Lingus, and its potential M&A partners. If it appears that the most likely course would be if we ordered disclosure is that you are going to come back and say: "I cannot deal with this material without going back to our client", we are back to square one if, at the end of the day, we take the view that your client should not see it.

MR. KENNELLY: I see your point but this Tribunal is not in a position to say whether that is a likely outcome or not. There is a great deal of ----

THE CHAIRMAN: You said a minute ago that you rely on this sentence later on.

MR. KENNELLY: I said I "may" do, it may be necessary. If the material is highly technical I may have to come back and say it. But there is a great deal of evidence in this case already about what certain airlines have said. If, for example, the redacted material refers to a submission made by an airline that was contradicted by an earlier statement that is a point that the lawyers can make. At the very least, the external lawyers need to be in a position to address the material. The issue of whether or not we need external assistance from our clients is a different matter that will need to be brought back before you. But this Tribunal, to be clear, should not simply assume that this redacted material contains evidence which, of necessity, would require input from the Ryanair business, that is not a safe assumption the Tribunal can make. At the very least ----

MISS DALY: We cannot assume the opposite of that?

MR. KENNELLY: No, but in the interest of procedural fairness, in order to be able to address materiality the presumption is that the external lawyers, the starting point is the external lawyers get to see the material and then we can review the material, which is our duty in this case, and decide how best to address it, address the issue of materiality before the Tribunal in this judicial review.

THE CHAIRMAN: You say that that should not influence us today and we will be left to argument further down the line if necessary?

MR. KENNELLY: Precisely and, of course, that will be supported, as you say, by evidence, and careful particularity will be provided in any request. What I am saying is, at the very least, the external lawyers need to see the unredacted report.

THE CHAIRMAN: Can you just help me? I have seen the parts of the report that you specifically referred to today, because it is the stuff that you refer to in your pleading under Ground 2, but what other parts of the final report do I need to look at which have been redacted that you are looking to see? I know you say you want to look at all of it but it may not be the case that you need to see all of it.

MR. KENNELLY: All of the substance of the report contains redactions, and we say insofar as the report in its entirety is material the redactions must be material.

THE CHAIRMAN: Not necessarily, that may not follow. But you have taken us through certain parts and I have understood the points you are making on those parts.

MR. KENNELLY: It may be we have a list where redactions have been made and where we are unable to decipher what is being said which, of course, is the purpose of the redactions. In no particular order, just demonstrating the kind of redactions that appear outside of the sections I have been talking about, in relation to remedies – a very important issue because Ryanair propose various remedies and the effectiveness of them were tested by the CC and there is a big dispute about that. At 8.3.3 they say:

> "However, there are other forms of combination which could still be inhibited by Ryanair notwithstanding Ryanair's proposed remedy and which would otherwise impact on Aer Lingus' competitiveness on routes between Gt. Britain and Ireland."

About half way down that paragraph there is a reference to Aer Lingus wanting to enter into partnership with another airline, and this type of arrangement was discussed between Aer Lingus and [X] in 2013 as one possible deal structure."

THE CHAIRMAN: You want to know who the name of that other airline?

MR. KENNELLY: As I said, that might be something. We would say it might well be something, but we would say if Ryanair had this information, subject to the confidentiality protections that we offered in the course of the process, Ryanair might well have been able to make submissions on this issue which might have changed the Commission's mind. I should say when Ryanair sought the information during the process we did not seek it willy-nilly, we sought it to the protections of confidentiality and strict requirements it was to be used only for the purpose of the procedure.

Moving back in the document, para. 7.103(a). I referred earlier on to redactions in relation to the disposal of Heathrow slots. The Tribunal will recall I took you to where the CC said there were five different ways in which the Ryanair shareholding is said to weaken Aer Lingus as a competitor. One of the issues is in relation to the disposal of Heathrow slots – a very important issue – and here there are redactions at 7.103(a), and again the external lawyers ought to be able to look at that material to determine what we can say about the materiality of the procedural unfairness in withholding that information from Ryanair.

As a general point, I am afraid I do not have a comprehensive list of all the redactions. My submissions are general in that, as we said in our pleading, if it is not appropriate then it is not possible for Ryanair to make submissions as to the potential materiality of each and every redaction. We are not in a position to do that. All we can do is say to the Tribunal that in the first instance the external lawyers ought to be able to see the unredacted report. There is no risk of prejudice … will be determined on their own merits.

THE CHAIRMAN: Thank you very much, Mr. Kennelly. Mr. Beard?

MR. BEARD: Mr. Chairman, members of the Tribunal, if I may, I will start off with some law.

Perhaps *BMI* is a useful place to begin the consideration, since it includes some discussion of some of the relevant case law. The reason why it matters is precisely in relation to the paragraph of *Doody* to which Mr. Kennelly has referred, which is on p.17 of the *BMI* decision. The reason this matters is because Ground 2, which is the only Ground which Mr. Kennelly has referred to, as giving rise to concerns supposedly warranting the disclosure of material into a confidentiality ring, is a challenge that says that it is a basic principle of procedural fairness that a person should know the case against him and have an opportunity to respond to it. For these purposes, I am happy to interpolate, have an effective opportunity to respond to it. That is precisely what is being said in *ex parte Doody* at point 6:

> "Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he is informed of the gist of the case which he has to answer."

The gravamen of the challenge here is, did we have an effective opportunity to put our case?

In due course this Tribunal will see the acreage of documentation and material that Ryanair put forward in relation to these matters. For today, the question is, in order to know the gist of the case and to be able to argue they did not know the gist of the case, do the external lawyers need to see the redacted material in the confidentiality ring? That is what this

amounts to. The difficulty we have is the generality of the application that has been made really does not explain that properly to us.

BMI was a very, very different case because in *BMI* what was being considered, as one member of the Tribunal in particular will be very familiar with, Miss Daly, was a situation where detailed numbers were being fed into a model and the question was, were the parties that were affected by the outturn of that model able to look at the numbers sufficiently in a disclosure room. Essentially, the contention, and I paraphrase, by Spire and BMI and HCA was, "Well, you only let us have a couple of people go into a closed room during two days, they could not bring anything very much out and then they were stuck, nothing more could be said about it and this was critical to the report". It is different. Mr. Kennelly keeps referring to the material that is redacted as being akin to data. It is not. These are highly sensitive submissions made by third parties to the Competition Commission.

The Competition Commission takes very, very seriously the protection of confidentiality of information provided, in particular information provided by third parties rather than merger parties, because this system will not work unless we can get information from third parties. We will not get information from third parties if they think there is a material risk that their key rivals in the market, the people with whom they are fighting all the time, are going to find out their views about strategic issues.

Mr. Kennelly says, "Oh, well, it does not matter if it is only going to the external lawyers, you do not even need to tell these people what is going on". They do need to know because they are concerned that they provided this information to us on the basis of complete confidence. That is why it is redacted. That is why, if we were to go any further, we would need to consult them. It is also why it is simply not right to say a confidentiality ring will solve these problems.

THE CHAIRMAN: What we are being told is that there is no question at this stage of material going to Ryanair, it is only going to go to counsel and solicitors, and that quite often sensitive material is included and put into a confidentiality ring and they say, "Well, you can trust us to make sure that the confidentiality of third parties is maintained". That is what they are saying. What is your reply to that?

MR. BEARD: The problem with confidentiality rings is that they just are not perfect. Ironically, that is part of *Claymore* that is highly germane, because in *Claymore*...

THE CHAIRMAN: You will have to give me a copy of *Claymore*.

MR. BEARD: Let me hand one up. I am only going to refer to one paragraph. (Same handed) It is p.35. Just to be clear, this was about disclosure of documents, it was not about bits from a report. At para.115, p.35, it says:

> "Whilst the Tribunal is prepared, in some cases, to order disclosure within a confidentiality ring (as happened earlier in this appeal), such confidentiality rings have disadvantages. There is undoubtedly scope for error. The amount of information disclosed within them should be kept to a minimum necessary to do justice in a case. They should not be overloaded."

That comment is apposite. Sir, you asked about, are there problems with confidentiality rings? Constantly, is the answer - constantly. One of the major cases that has been heard by this Tribunal this term has involved a material breach of a confidentiality ring that has had to be taken up with the relevant solicitors involved. I am loath to give further details of the identity of the solicitors and the case in point. I can provide that to the Tribunal, but that is my instruction.

More broadly, what we can say is that counsel and instructing solicitors, particularly it has to be said counsel, make slips during submissions all the time in proceedings. There is a constant process of being alerted to material having been disclosed in the course of submissions and it effectively being removed from transcripts. That is an imperfect way of dealing with these matters, because of course it ends up mattering who is sitting at the back of the court as to whether or not there has been a real material breach rather than just a formal breach.

Those sorts of breaches are a real risk, and they are a real risk that it is quite proper that people who are providing highly sensitive commercial material should be able to comment upon the possibility of if a ring is being contemplated. That is why the CC says, "We would have to talk to the people concerned". In relation to s.7, we have identified that there will be seven parties that we would have to talk to. If it is across the whole report, we think it would be around 15.

If I may, I will go back to *BMI*, some more of the law. Mr. Kennelly went through various provisions of *BMI*, and he, in particular, highlighted the section at p.20, which is para.39(7), which is referring to Lord Mustill's sixth proposition and the nature of a "gist". What Lord Mustill was saying was - and of course this is in the context in those cases of an adversarial procedure, not an inquiry that has resulted from the fact that Ryanair went out and bought these shares, not that - in adversarial proceedings you are entitled to a gist, because if you have got a gist then you will have an effective opportunity to comment.

He cited the *Eisai v. NICE* case. *Eisai v. NICE* was very much more like *BMI*, because *Eisai v. NICE* was to do with getting hold of numbers in a working model that was the crucial part of the Decision in question. It is materially different from the circumstances we are dealing with today. So *Eisai v. NICE* and *BMI* on their facts do not help Mr. Kennelly, and actually these references to "gist" are positively detrimental to his case.

Then it goes on ----

THE CHAIRMAN: You are saying that the bits that are redacted are not particularly technical or complex issues, you are saying you can hide things like the identity of a person, you do not need to look at that material to understand what is being said, whereas if you are looking at data case then obviously you do need to look at the data?

MR. BEARD: That is precisely it.

THE CHAIRMAN: As said in line 3, which is that a case is "acutely context-sensitive". So you are looking at the context here?

MR. BEARD: Yes. I am going to come back to the report, if I may, because obviously ----

THE CHAIRMAN: You will need to, yes.

MR. BEARD: Understood, but I was just going to move through the law and then come back to the report, if I may. I am picking up some points along the way. I am sorry if I am digressing slightly. Let us just move on to the *Al Rawi* and *Bank Mellat* cases. These are cases in a different world. *Al Rawi* was concerned with a situation where people of UK citizenship or nationality who had been detained in Guantanamo Bay were suing the Government, including the security services, for damages in relation to their detention in Guantanamo, and the UK's alleged complicity with the US in that supposed unlawful detention. What was being said in that case was, "Look, we, as the UK Government, might have some material that is germane to whether or not you were detained properly, but unfortunately it is very sensitive and we do not think we can give it to you, but we want to be able to rely on that in defence of these claims". The court said, "We can see the issue there, but the fundamental principle of fairness means you cannot do that, you have to make a choice", and it is only Parliament that could introduce a formal closed material procedure which would allow you, as the Government, to rely on this sensitive material as a defence to these Guantanamo Bay damages claims. That is a very different situation.

Bank Mellat was to do with a freezing order imposed by the Treasury in relation to suspected terrorist involvement with Iran in relation to ----

THE CHAIRMAN: It did not involve terrorism.

MR. BEARD: I am sorry, it is not terrorism, it is sanctions concerned with association with Iran and carrying out the financial transactions related to Iran.

Bank Mellat and *Al Rawi* both recognised that if you are getting the gist of the case there is not an unfairness. There is not a closed procedure in operation. Indeed, although Mr. Kennelly referred at para.43 to the quote from *Bank Mellat* at para.3, and said, you have the right to know, he emphasised, the full case. Unfortunately, we do not have copies of *Bank Mellat* for the Tribunal. I did not realise it was going to be referred to. I happen to have my copy of *Bank Mellat* with me. Paragraph 6 of *Bank Mellat*, so three paragraphs on from that which is quoted here and which Mr. Kennelly relies upon:

> "The importance of the requirement that a proper summary or gist of the closed material be provided is apparent from the decision of the House of Lords in *AF (No. 3).*"

THE CHAIRMAN: I am familiar with the two cases.

MR. BEARD: I realise that, sir, but I think it is important. Mr. Kennelly was suggesting full case required, it is not. They do not vary the law and they are in a different world entirely.

THE CHAIRMAN: Yes.

MR. BEARD: As I say, he then went on to deal with some of the issues arising in relation to the particular circumstances of *BMI*. The broad point is, very definite material, context dependent, concerned with data. If one turns on to para.61 where the Tribunal says, "In this context", having explored what has been going on with this disclosure room arrangement, "the following points bear emphasis", and then they talk about the nature of the undertakings that had to be given and the circumstances of the operation in the disclosure room. Then at (2):

> "Given the technical nature of the material, we consider it to be the case that a fair disclosure of the 'gist' will require - as in [*Eisai v. NICE]* - a high degree of disclosure and transparency on the part of the Commission."

- context dependent related to data. (3) the same issue. Then we come down to 62, which was quoted by Ryanair in its correspondence. The bit that they quoted was:

> "… consideration <u>by the applicants</u> of the Confidential Information is the <u>starting point</u> for examining what fairness requires."

With respect, that is a misleading edit of that quote. The short conclusion is that consideration by the applicants of the confidential material is the starting point for examining what fairness requires. That is the correct quote because it draws on the context the nature of the material and the nature of the restrictions in question. It is not the answer

to this case. That probably deals with *BMI* and the nature of the law. I probably do not need to go to the terms of Ground 2 itself. As I say, what is at issue is: do they need this material in order to be able to proceed with their case that they did not have an effective opportunity to comment?

Mr. Kennelly goes on about the materiality of these redacted passages, that is not really the issue. The issue is: can they say properly: "We did not have a proper opportunity to comment here." We did not know what was going on. We did not know the gist of the case.

THE CHAIRMAN: But that is their case. They are saying they did not know enough, the redactions mean, presumably in the provisional report, meant that they did not know what was in there, and until they know what is in there they do not know whether they have a case on Ground 2. It is all fairly circular.

MR. BEARD: May I try and break the circle.

THE CHAIRMAN: Break the circle for me, yes.

MR. BEARD: I will do my very best. I will start at para. 12 of the summary in the report, if I may, at tab C1 in the bundle.

THE CHAIRMAN: The simple point is that if this was a disclosure application I would fully understand what your points are, but what they are saying is that this is the Decision, which is the basis for saying that they have to give up almost 25 per cent of Aer Lingus, and they are saying: "How can we really deal with this without knowing what the arguments are and what the points are?" You say: "We have given you the gist, we have given you enough to form that view, you had an effective response", because I am sure the responses are fairly voluminous, I have seen some of them in bundle 3, and they come back and say "No, we still did not have enough." They are saying: "We cannot come to a view as a Panel whether or not they did have enough, unless it is unredacted". So we are going around, maybe it is a circle or a spiral, but how do you break that?

MR. BEARD: Let me put it this way: in deciding whether or not, and the extent to which, unredacted material should be provided to the confidentiality ring, the CC in its letter set out a series of considerations that need to be borne in mind. Those considerations include: the nature of the grounds that we are talking about, and the nature of the ground we are talking about is: have they had an effective opportunity to put their case? Has there been a gist provided? I am just going to come on to where we say the gist is set out in outline.

THE CHAIRMAN: What they will say is that that is one of the issues at the end of the day for the substantive hearing, namely, whether or not they had enough of the gist to make proper

representations. They are saying do not make a decision today on Ground 2 as to whether or not the gist was provided in a way sufficient to comply with the duty of procedural fairness. They are not asking us, as I understand it, to decide whether or not the gist was provided.

MR. BEARD: No.

THE CHAIRMAN: They are saying "We need to see this material in order to know whether or not that requirement was complied with".

MR. BEARD: Let us take it in stages. We accept that they were not provided with certain elements.

THE CHAIRMAN: Of course, that goes without saying, but what they are saying is they need to know whether or not they were provided with the gist and they are saying what you have given is not enough of a gist for them to comply with the duty of procedural fairness.

MR. BEARD: Yes.

THE CHAIRMAN: What I am not going to do on a preliminary application like this is to decide one of the substantive issues in the case.

MR. BEARD: It cannot be decided today, we entirely accept that. The consideration that you have to ask yourself is, is it right when they have been provided with a redacted version and they can then look at that material and say: "That was not enough of a gist of the case. We were not given an effective opportunity to comment on the basis of the material we had", is that sufficient for them to be able to pursue Ground 2. Not "What is the nature of the gist". We come on and argue about that in due course. That is the question that you have to consider today. If you decide that, notwithstanding all of the other matters, it is appropriate for their external legal counsel to see these extra bits so that they can argue about whether or not what they actually saw was or was not a gist in these circumstances, then you would end up allowing them to have at least some part of the report unredacted.

THE CHAIRMAN: Well, that is what they are saying.

MR. BEARD: We say at the moment the considerations you have to bear in mind are the extent to which you can actually look at the material and the way the case is put and say: "We can let them make that argument about whether the gist is sufficient, without their lawyers having to see those additional bits."

THE CHAIRMAN: Can I just make a note of that.

MR. BEARD: That is why the CC has been careful in its letter to set out what it understands the application to be, what it understands the grounds to be with which it is dealing, and what it understands the considerations to be that this Tribunal should take into account, and it

recognises in the end that, as a matter of fairness, this step needs to be taken then, of course, we understand the position, and we do not pretend that in other cases there have not been confidentiality rings, but we do think that that this Tribunal has to think carefully about these issues in circumstances where very general applications were being put forward.

THE CHAIRMAN: I have no doubt, and I think it is even conceded on behalf of Ryanair, that the application – certainly Ground 3 – as currently drafted is hopeless. There is no way that I would order general disclosure in that way. But, what I have said, and I think it is accepted, that a more focused application will be listened to. But what is being said today is that "I cannot make that focused application, or I would be in a better position to make that focused application once I have seen an unredacted version of the Decision" and that is the way forward.

MR. BEARD: I quite understand. I think it is necessary, just briefly, to look at parts of the report, if I may.

THE CHAIRMAN: Of course, I think that would be very helpful. At the moment, insofar as I have been taken to parts of the report, I am not inclined to say they can have the whole report totally unredacted in relation to bits I have not been taken to, because I cannot make the assessment as to whether or not they need to see that. But I have been taken to certain bits and we can form a view on those certain bits.

MR. BEARD: Let me focus on those then.

THE CHAIRMAN: Focus on those then.

MR. BEARD: If we can start with the summary? If we start at para. 12 – Mr. Kennelly started at para. 13.

> "We found that Ryanair had the incentive to use its influence to weaken Aer Lingus' effectiveness as a competitor which would not exist for a shareholder which was not in competition with Aer Lingus, and we would expect Ryanair to act on this incentive."

So it is incentive and an expectation that Ryanair would act on it.

> "We assessed the various ways in which Ryanair's minority shareholding could serve to weaken Aer Lingus as a competitor by influencing its commercial policy and strategy relative to the counterfactual."

- the counterfactual being the absence of Ryanair's shareholding.

> " We recognise that we could not predict with certainty all the ways in which Ryanair's shareholding might affect Aer Lingus' commercial policy and strategy, and nor were we required to determine which individual scenarios were more

likely than not to occur. Instead, in making our assessment as to whether there had been, or was likely to be …"

- so it is a prognostication about the future as well:

"… we applied the probabilisitic test on the basis of all the relevant evidence in the round. However, in order to reach an overall view we looked in particular at whether Ryanair's shareholding might:

(a) affect Aer Lingus's ability to participate in combination with other airlines …"

- and that is the one bit that Mr. Kennelly focused on. But you also need to have reference to (b), (c), (d) and (e), because these are all manifestations of the way in which Ryanair, having incentives to adversely affect competition, had the opportunity and ability to do so. The reason I emphasise that is because, although it is quite right that the Competition Commission considered all these matters in the round, and it did consider the evidence put before it, what it was considering was the incentive, ability and opportunity of Ryanair to weaken competition.

What we see in section 7 (p.39) is this assessment of the competitive effects of the acquisition that has just been summarised, or we have just seen in the summary.

7 is an assessment of the competitive effects, and then we look at the relevance of the European Commission's findings – we will leave that, that is another discussion for another day.

Turn on to p.37: "Effects of the acquisition on Aer Lingus's commercial policy and strategy". So this is the general question that is being considered, and then down the page at 7.16 you see the section entitled "Ryanair's incentives" and it comes with the conclusion that it did have the incentive to weaken competition.

Then it looks at the mechanisms by which that could happen, which are the (a), (b), (c), (d) and (e) in the summary para. 13. It is in relation to (a), Aer Lingus's ability to participate in a combination with another airline is one mechanism or potential mechanism by which Ryanair's shareholding could affect Aer Lingus's commercial policy and strategy. The reason this is important is because the gist of the case we are talking about is incentive ability and opportunity, and you are checking what sort of mechanisms there are.

All of the redactions that are cited in Ground 2 (barring one that has just been raised in submission) are the ones that have been referred to today are all concerned with this section, and they are concerned with the situation of the Competition Commission saying: "That is our theory, that is our concern, what do third parties say about that?" What evidence do we have?

It is difficult in those circumstances, and that is why it is reasonable for the Tribunal to have this in mind as a factor. If that is the gist of the case that is being dealt with why is it that Ryanair needs to be probing the specific identities of particular third parties and what they said in relation to these matters, because Ryanair is well able to consider whether or not the Commission in these sections has set out a sufficient gist of that case to enable it effectively to comment upon it.

So when we come on and turn through this subsection about this particular mechanism by which Ryanair's shareholding could affect Aer Lingus' commercial policy and strategy, what you get is the ability section, starting at 7.26 – The role of Ryanair's minority shareholding, so it is looking at the way it can operate.

Then you go over the page to a section on p.42 about "Consolidation in the airline industry". What is being considered here is incentive opportunity and ability and what is going on more generally in the airline industry here.

Then we have "Views of airlines on the likelihood of a combination involving Aer Lingus" and, as we have stressed, it is not identifying any particular combination, it is the possibility of combination.

Then we get to the section where the majority of the specific requests are made. It is evidence of potential combinations involving Aer Lingus in the period since 2006.

What is being said here is that you need to have all of those redacted pieces of information provided to your lawyers because otherwise you cannot argue about whether or not you have got a sufficient gist. We say that the Tribunal is entitled to look at that with a sceptical eye.

We understand the concerns about fairness. We can understand a party coming along and saying, "We cannot see this and that bit here and there, we are worried about that". But you do have to focus on the nature of the Ground, you do have to focus on the question of whether or not, given the risks that are attendant in confidentiality rings even being provided to conscientious lawyers like Mr. Kennelly and his instructing solicitors who we quite understand will not be sloppy and will seek not to be inadvertent in any disclosure. In circumstances where you are dealing with highly sensitive material that third parties will be extremely concerned to protect, because that is what they told us on the way, that in those circumstances this Tribunal needs to be cautious before it says any part of this material needs to be provided into a confidentiality ring.

As I say, the majority of the redactions so far as we can see in the main part of the Report are in this section running through to section 7.84. It appears that now there are additional

questions being raised about 7.103 and Heathrow slots. So far as we know, they are not referred to in any of the submissions put forward, nor is para.8.33. In those circumstances, if the Tribunal is saying, "Well, what is it that they really need to be able to see in order to be able to assess whether or not they have seen a sufficient gist here to be able to have an effective opportunity to put their case?" we say that, given that they have not even referred to them in their pleaded case, it is not right that those should be considered as necessary.

THE CHAIRMAN: Thank you very much.

MR. BEARD: Just a couple of very brief points: if there are further concerns in relation to the precise terms of any order that this Tribunal might want to make, there would need to be some further submissions on the terms of any order.

THE CHAIRMAN: Of course, because you may need to consult with third parties and all sorts of things.

MR. BEARD: Yes, there may be a range of considerations. The only other thing is that Mr. Kennelly in the course of submissions referred to previous correspondence. We do not have that here. If we are going to deal with what has been in previous correspondence then we ----

THE CHAIRMAN: I have certainly read what is in the three bundles in relation to the arguments before the Competition Commission. As I noted before, what I found was lacking was a detailed explanation as soon as to why a confidentiality ring would not be sufficient protection in the circumstances. You have addressed that today. Thank you very much.

MR. BEARD: Unless I can assist you further, those are my submissions.

THE CHAIRMAN: No, that is very helpful.

MR. FLYNN: Sir, if I may briefly address the Tribunal now that we have *locus*.

THE CHAIRMAN: You do, yes.

MR. FLYNN: You, I think, have seen the letter that we wrote to the Treasury Solicitor before having that ----

THE CHAIRMAN: I have read your letter, I was shown the relevant parts.

MR. FLYNN: Sir, if I may just make my points very quickly, I am certainly not going to repeat that letter to you. That was in relation to ----

THE CHAIRMAN: Your letter was very helpful in relation to, let us say, the broader application which we are not dealing with today. So just make any points specifically in relation to those parts of the Decision that are referred to under Ground 2 of the notice.

MR. FLYNN: Yes, sir, I think that is right. The application when Mr. Kennelly stood up was for everything. I think it is now narrowed down to those specific points. If I may say, sir, in

respect of that, the application is still not adequately particularised for the Tribunal to be sure today, as it needs to be, that Ryanair has not had an adequate opportunity to respond to the Commission's case in respect of those points. That is the point, in my submission ----

THE CHAIRMAN: Say that once more.

MR. FLYNN: I said, and I say it on the hoof, I think what I said was, the Tribunal needs to be satisfied today that Ryanair has not had an adequate opportunity to make its case in relation to the points which essentially go to the discussions with third party airlines. That is the question that you ----

THE CHAIRMAN: I do not need to be sure. You introduced the word "sure".

MR. FLYNN: In my submission, you do, sir, because the question is not is material redacted. If I may say so, Mr. Kennelly's case is essentially inside out, because he says, "This we cannot see, so we have not been able to comment on it". The question for you is, can they make the case they want to do without seeing that? Mr. Beard has, on the go, as it were, taken you to various paragraphs of the Report which set out the Commission's case, but you do not know in what way Ryanair is not able to make the case that it needs to get home on that. If I may, sir, I would suggest that your first instinct was actually the right one, which is that this application should be adjourned, or certainly should not be granted today. If they want to renew it under the liberty to apply and possibly widen it or possibly narrow it, that is essentially a matter for Ryanair.

THE CHAIRMAN: When I said it should be adjourned, I am primarily concerned about the application for disclosure of the underlying documents and counsel for Ryanair quite prudently took the hint and said, "No, today I am just going for the relevant parts of the Final Report".

MR. FLYNN: My submission is that even in that respect, sir, you have not had the case sufficiently particularised on the Ryanair side, and there has been no opportunity for a response to that in the detail that it requires either by the Commission or particularly by Aer Lingus, because we have not, until today, been a party to that.

Confidentiality rings are not like a sort of free drink, it is not something that you get just because you bring an application before the Tribunal. They are something to be granted carefully for specific reasons and tailored for the specific circumstances. This is plainly not a reflection on the propriety of anyone representing Ryanair. There is a reason for caution about confidentiality rings generally. Professor Beath will remember the times in the *Pay TV* proceedings where counsel inadvertently for one or other party referred to a name or a number, it is out there, the transcript has to be managed, but there may be journalists,

there may be commercial people in the room because it was not a ring section, you have to be very careful indeed.

THE CHAIRMAN: I am sure that, having had the debate today, people are going to be very careful.

MR. FLYNN: Indeed, sir, I am just saying that however careful people are - I have done it myself, I try to be careful - there is a risk. That is what happens in court. Other things happen in other circumstances. This is not a prediction, it is simply one of the reasons why you have to be careful.

THE CHAIRMAN: If we are going to make any order on the application in favour of Ryanair, I think we will have to have a detailed discussion as to how large this confidentiality ring is, and various protections, and also how do we deal with the position of third parties? Should they be consulted before any final unveiling of the relevant passages. I have not had time to discuss this with my colleagues, but if we are going to then clearly some thought has to be given at that stage.

MR. FLYNN: You do not need me to labour the point. The points are made in our letter - the sensitivity of the material from the perspective of Aer Lingus and from these third parties. The sensitivity will plainly go even to their identity. So there is a big handling issue in considering how that might be dealt with.

I think the point has already been made that this is not technical information. Obviously you do not know what is behind those scissors marks. Ryanair do not. I do not in many cases. One can see, as the Commission has said, that in many cases it will simply be names, it will be dates, it will be details of discussion, but you need to be sure that Ryanair does not know enough about those discussions to make a response and to make its case on fairness.

Much has been made of the *BMI* case. Miss Daly will remember that I was counsel for the applicant in that case. There was a case where the applicants were saying, "The procedure is unfair, there are things that we have not been allowed to see or to make use of in the data room", and none of the applicants applied to see that data. The case was made on the basis of, "This is what has happened, we have not been able to see it, we do not know what is behind the scissors marks. "The Tribunal did not know what was behind the scissors marks, did not ask to see what was behind the scissors marks, the case can be determined on that basis.

It is not a closed material procedure. This is not a case where anyone is suggesting that the court should know more than Ryanair. This is a case where the Commission can and should be allowed the opportunity to defend its position in the way that it handled it. So it should

have the opportunity to say to this Tribunal, "We devised a procedure, we considered confidentiality, we considered the needs for Ryanair to have a perfect opportunity to meet its case, and this is what we came to, right or wrong, over to you, the Tribunal". You cannot, in my respectful submission, determine that today.

Mr. Kennelly, if I may say so, did not put the point that was made in our letter quite in the terms that we would have put it, which is perhaps not surprising. Essentially, this is to put the cart before the horse, this is to have the result before the argument, the release of the information to a confidentiality ring would actually be the logical consequence of them persuading you in the first place that it was unfair. It is simply the cart before the horse.

In my submission, the Commission's Decision can be defended in its proper terms. There is no need for Ryanair to see what is behind the material they cannot see. There is no need for Aer Lingus to see what is behind the redactions that we cannot see to support the Commission, there is no need for the Tribunal to see it either.

As I say, if Ryanair wishes to renew the application with more detail and convince you, that may be something else. At this stage, in my submission, it is not made out.

I am going to stop there because, apart from anything else, I have broken my glasses and I cannot read my other notes!

THE CHAIRMAN: Do not worry, that has been very helpful. Mr. Kennelly, very briefly?

MR. KENNELLY: If I may say, just by way of background, it is important to recall when one talks about counsel making slips and the CC having a right to defend its Decision, this is a Decision which, if upheld, would force Ryanair to divest nearly 30 per cent of the Aer Lingus stock. This will result, it is our case, in hundreds of millions of euros losses arising out of a forced sale.

THE CHAIRMAN: You have made that point in your grounds. I fully understand that this is a very important case for Ryanair, and it is also probably a very important case for everyone in this court. That goes without saying.

MR. KENNELLY: Turning to the key points that Mr. Beard made, he said that ----

THE CHAIRMAN: The key point that you have to address is, do you need to see the unredacted parts to make your case that you have not been given the gist? That is the spiral that we just need to focus on.

MR. KENNELLY: Indeed, and there are two different aspects to that. The first is, Mr. Beard says we have the gist. How can this Tribunal be satisfied that we have the gist when the Tribunal does not see the whole Decision? The Tribunal saw appendix F, the Tribunal saw paras.28 and 30, 55, 65, and 68. I do not need to take you back to those.

THE CHAIRMAN: So your point is - let us cut this down - whether or not you have the gist, you say, "We do not know that until we see the unredacted parts". That is your first point.

MR. KENNELLY: The Tribunal will not know if we have the gist.

THE CHAIRMAN: Yes, of course, what is the second point?

MR. KENNELLY: The second point is that Mr. Beard says that we can say we did not get the gist, but that is not right. In any procedural fairness case, a key question is whether the unfairness was material, did it make a difference that this evidence was redacted? We need to see the material in order to be able to address that issue.

Mr. Beard made a separate point that third parties provide this information assuming it be kept confidential. The CC is not in a position to provide an absolute guarantee of confidentiality. In this process third parties provide evidence in documents to the CC, subject to the CC's duty to act fairly in its procedure and subject to the gateways under the Enterprise Act which permit the CC and this Tribunal to disclose information in certain circumstances.

Mr. Beard says the redacted material is not particularly technical or complex. He infers that from the context surrounding the excisions.

THE CHAIRMAN: It does not look particularly complex.

MR. KENNELLY: The CC is in a position to make that submission because it has the full material. We cannot respond because we cannot see the material. The Tribunal cannot decide definitively, it must just rely on assurances and that is not good enough, we say, in a procedural fairness case.

He referred to the *BMI* case and 'gist' and I ask the Tribunal, before taking its decision, to come back again to what 'gist' actually means in a context where a complex ----

THE CHAIRMAN: It very much depends on the context of the case, I understand.

MR. KENNELLY: Exactly. My point is the issue of combinations between Aer Lingus and other airlines is central, and it is a legal requirement that the CC rely on evidence in reaching its conclusions, and the evidence is so heavily redacted that we cannot make submissions as the materiality of the procedural unfairness. This is not some ancillary or subsidiary point, this is the key aspect of the final report. Although Mr. Beard sought to downplay the issue of combinations, I refer you back to the summary and to s.7 of the report, which emphasises the importance of this issue of combinations. I should also say that, since the Tribunal suggested they were minded not to order passages to be unredacted if they were not drawn to your attention I must, in fairness, draw your attention to the passages which I did not take you to.

THE CHAIRMAN: Is it referred to in your grounds?

MR. KENNELLY: They are not referred to in that part of the grounds, no. As far as I am aware they are not referred to.

THE CHAIRMAN: It is a bit late to rely on that in reply. It is not in your grounds. Your complaint in Ground 2 is: "We were not given", let us say "the unredacted parts of the provisional report and, as a result, procedural fairness was not complied with." You picked your best points and if you are not going to win on those particular paragraphs you are not going to win at all on that.

MR. KENNELLY: That is correct, but that does not mean I cannot also make the points in relation to the less egregious examples of procedural unfairness.

THE CHAIRMAN: What are they, then?

MR. KENNELLY: Paragraph 4.38 of the final report – this goes to the crucial issue of disposal of Heathrow slots.

THE CHAIRMAN: The Heathrow slots point, yes.

MR. KENNELLY: I have already explained to the Tribunal why that is important and I have taken you to the passage of the final report which explains that. Paragraph 8.40.

THE CHAIRMAN: Is 8.33 referred to in the grounds? I cannot remember seeing it.

MR. KENNELLY: It is not referred to in the grounds, no, but I did take you to it.

THE CHAIRMAN: You did, yes. So the ones which are not referred to in your grounds that you want are 4.38, 8.33 ----

MR. KENNELLY: 8.40. My learned friend, Mr. Jones makes a good point which I will put to you. Of course, we have referred in our grounds to the excisions which, to us, appear to be the most important, and that is what we said in our grounds. These excisions may be more important, we just do not know. If we saw the material we would be able to decide. That is why it is important the Tribunal do have regard to these before making its final decision as to which bits of unredacted ----

THE CHAIRMAN: Which is the next one?

MR. KENNELLY: The next one is in appendix F, p.191, and at the end of para. 94 there is a new sentence which is entirely redacted, and this relates to an important issue of whether if Aer Lingus combined with another airline would it be more efficient than it currently is. That second step is necessary before the CC gets home on its finding of an SLC.

MR. BEARD: Mr. Kennelly might want to reflect on that request. I think it might be a Ryanair redaction.

MR. KENNELLY: Oh, forgive me.

THE CHAIRMAN: Well, it does not matter if it is a Ryanair redaction.

MR. KENNELLY: We will check that.

THE CHAIRMAN: If it goes to Aer Lingus you may not be too happy.

MR. KENNELLY: We have no objection to this going to Aer Lingus subject to the confidentiality ring. We do not make the same point against Aer Lingus as they make against us.

THE CHAIRMAN: So you want 94 to be unredacted.

MR. KENNELLY: Yes. And p.193 para.3(e). The entire paragraph is redacted. This goes to why Aer Lingus may seek to issue new shares. It is one of the five bases for the CC's finding that I took you to in the summary at p.220, para. 52(b).

THE CHAIRMAN: What appendix is this?

MR. KENNELLY: J – and that is it.

THE CHAIRMAN: Right.

MR. KENNELLY: I appreciate I should have addressed those in opening, but in view of the importance of the issue.

THE CHAIRMAN: That is fine, sometimes points develop as you go along.

MR. BEARD: I do not know if the Tribunal needs any submissions in relation to those additional matters?

THE CHAIRMAN: Yes, it would be helpful.

MR. BEARD: Plainly, in relation to Ground 2 there is no reference to concerns about the effectiveness or the ability of Ryanair to respond in relation to issues relating to section 8, appendix G and appendix J. It is just inappropriate now in reply, on the hoof, to be asking for those paragraphs to be unredacted.

THE CHAIRMAN: You are saying G and J?

MR. BEARD: Appendix G, appendix J, and the other paragraphs that have not been referred to in the grounds, so 4.38, 8.40, 8.33 and, so far as we can see, 7.103(a), because in the grounds the focus is all on that section to do with combinations, and what is said in the grounds is: "We did not have the gist of what the case was in relation to the ability of Aer Lingus to enter into combinations". That is the ground that is pleaded, the rest of it is an expansive fishing expedition. It is not particularised and it is being dealt with on the hoof. The fact that we are getting a new shopping list in reply is simply an illustration of that. As we have said previously it should be the absolute minimum that goes out. If, therefore, it is the material that has been referred to in relation to that section that is focused on in Ground 2 that is one matter as we made clear in the letter, and the considerations we have set out are

those that we say the Tribunal should balance in relation to it. These other materials are not necessary.

THE CHAIRMAN: Thank you very much, we will rise for a few minutes.

(Short break)

(For the text of the Tribunal's Ruling on confidentiality see [2013] CAT 25)

THE CHAIRMAN: We now need to deal with the directions for the remainder of this case. Can we look at the letter on behalf of the Competition Commission of 9th October and just go through those directions one by one. We have dealt with the first, which is the appropriate forum is England and Wales. We have dealt with the second one, Aer Lingus requesting to be in the proceedings be allowed, though I do have some points about that – we will come back to that in a second – because what I do not want to happen is that Aer Lingus repeat, in effect, the submissions we are going to be getting from the Competition Commission. The most assistance we will get is in things that you have not specifically covered, Mr. Beard, in your submissions.

The timing for your defence and any supporting evidence, 4 pm on 13th November 2013 seems sensible to me.

As regards the intervening party, the statement of intervention and any supporting evidence by 4 pm on 20th November, subject to in your statement of intervention please take account of what is in the defence of the respondent and, insofar as you agree with anything just cross-refer. I do not want a repetition of points that are already covered.

MR. FLYNN: Well understood and, indeed, standard practice here. I wonder, given the timetable, whether we might have two weeks for that because experience suggests we will not see the defence until ----

THE CHAIRMAN: Yes, it is sensible, if what you are really going to do is to prune down because you do not want duplicity that is perfectly acceptable. So 27th November.

MR. FLYNN: Thank you.

THE CHAIRMAN: The applicant can be permitted to file and serve a reply by 4 pm on 11th December. Mr. Kennelly it is down to you. I have some other points to make with you on your pleadings, but on the reply point ----

MR. KENNELLY: May I address an earlier point in relation to the notice of application. After seeing the redacted material it may be necessary in a very short time frame to amend the notice of application. That is what was done in the *Akzo* case.

THE CHAIRMAN: This information may still be pretty confidential information and you may want to deal with that by way of a separate schedule so you may just say: "Additional points arising out of the unredacted version" and serve that as a separate document, and they can reply to that as a separate document.

MR. KENNELLY: That is one way. The normal practice in the Tribunal is to have confidential passages in the pleading and those are then coloured so that counsel sees that they are confidential and does not ----

THE CHAIRMAN: You can do that, that is fine.

MR. KENNELLY: But it would be in the body of the application. It would be easier because the amendments we make would feed into the body of the application, to do it in the body of the application.

THE CHAIRMAN: Do it in the body – so you may want to have time to amend your notice.

MR. KENNELLY: Yes, and that would be the first stage, because presumably the information would be provided relatively quickly by the CC, and then I think we suggested two weeks to make that amendment and any additional evidence, because of course this goes to evidence also.

THE CHAIRMAN: We have now got a February date, so the timetable does not need to be as tight as perhaps envisaged.

MR. KENNELLY: I do not suggest for a moment to eat into the CC's time for doing its defence.

THE CHAIRMAN: Let us just start off with the first stage. Mr. Beard, how long will it take to provide the unredacted version of the decision in section 7 and appendix F.

MR. BEARD: That is just the note that I have passed back behind me. I will turn and ask those behind me.

THE CHAIRMAN: Because that will feed into your timetable.

MR. BEARD: We think we can do it in a week, the anonymisation process and so on.

THE CHAIRMAN: So you have seven days then to provide the information.

MR. BEARD: Obviously the confidentiality ring can be built in the meantime.

THE CHAIRMAN: You are not going to disclose until you have the confidentiality ring, of course not.

MR. KENNELLY: That means we would have the information by 17th October.

THE CHAIRMAN: Yes, so you would need a bit of time.

MR. KENNELLY: Although we hear what the Tribunal is saying, we are grateful for the indications which you have given us, but we still need to consider whether to make any

further application to you in relation to the underlying evidence, and so some time needs to be allowed for such an application if one is made on advice.

THE CHAIRMAN: I think what we will do is we are going to give a timetable for the amended notice and then I am not going to hold back the timetable just in case you may or may not provide a disclosure application. We can deal with that at relatively short notice, but I do think we need to fix a timetable now.

MR. KENNELLY: Of course. I was only suggesting a short time so that if we made such an application and further evidence came out it would need to be addressed in the defence, but I hear what the Tribunal is saying. We ask then for two weeks from 17th.

THE CHAIRMAN: So what does that give you?

MR. KENNELLY: It gives us until 31st October.

THE CHAIRMAN: So you are saying 31st October for the amended notice.

MR. KENNELLY: Yes.

THE CHAIRMAN: It should not impact much on the defence because this is only going on to Ground 2. You should be able to still file your ----

MR. BEARD: Subject to anything that is said from those behind me, I think the sensible course may be to say if this is the Tribunal's timetable, we stay with that. If it turns out that some grand exegesis emerges from Ryanair that is going to require us to have more time we will raise it.

THE CHAIRMAN: Yes, that is fine, so you will have liberty to apply to extend time for serving your defence.

MR. BEARD: We can carry on in the meantime.

THE CHAIRMAN: So amended notice – 31st October 2013. As I said, if there is going to be any application for disclosure I think you fully understand what is required for that and we will try and accommodate it at relatively short notice. I would not have thought we would need more than two hours for that application.

MR. KENNELLY: Indeed, there may be some exchange of skeletons.

THE CHAIRMAN: Of course, you can sort that out with the Registry. So we are still back to the defence on 13th November. Intervening parties statement of intervention 27th November. Your reply – any proposals now we know what the timetable is?

MR. KENNELLY: Because Aer Lingus has been moved forward by a week we would ask that we also be moved forward by a week.

THE CHAIRMAN: So that is the 18th?

MR. KENNELLY: Yes. The next stage is the skeleton argument and the CC, very kindly, have landed us with the drafting of the skeleton argument right through the Christmas holiday.

THE CHAIRMAN: We can move it slightly now we know the date of the hearing.

MR. KENNELLY: Indeed, I would, personally, be very grateful.

THE CHAIRMAN: It can be put back to 15th?

MR. KENNELLY: Yes.

THE CHAIRMAN: Then I propose for the respondent, 22nd January and for the intervening party, I want yours afterwards because I do not want any duplication, how many days do you need after the respondent's skeleton to file yours.

MR. FLYNN: I am just looking to see what day of the week it is. (After a pause) 22nd January is a Wednesday, so we get it on the Wednesday evening ----

THE CHAIRMAN: What about the following Monday?

MR. FLYNN: What about the following Tuesday was what I was going to say.

THE CHAIRMAN: What is the date then you are proposing.

MR. FLYNN: That is 28th.

THE CHAIRMAN: 28th January. Then the bundle and so on – we do not need the bundle until ----

MR. KENNELLY: We can do the bundle by 3rd February.

THE CHAIRMAN: That is fine. We have already directed the estimate is three days, and the dates we have already given you.

MR. FLYNN: Might I make a point, I think it goes without saying – but it has gone without saying – I am assuming that Aer Lingus counsel and solicitors would also be in the confidentiality ring.

THE CHAIRMAN: Yes, that was accepted on the part of Ryanair.

MR. FLYNN: It was in argument I just want to make sure it is part of the order, and clearly we are only going to be responding to what they have to say, but I think that would be necessary.

THE CHAIRMAN: Mr. Beard?

MR. BEARD: No objection.

THE CHAIRMAN: And you have already agreed. Sorry to keep you for so long. You envisage sorting out the confidentiality ring by Monday, is that all right?

MR. BEARD: Yes, that would be the intention because I think we have a boiler plate undertaking, by the sound of it, that we can circulate and use.

THE CHAIRMAN: Thank you very much everyone.