Case No: C3/2012/0690

Neutral Citation Number: [2012] EWCA Civ 760
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(MR JUSTICE SALES, MR WILLIAM ALLAN and MS JOANNE STUART)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 28th May 2012

Before:

LORD JUSTICE KITCHIN
and
MR JUSTICE NORRIS

- -

Between:

BAA LIMITED — **Appellant**

- and -

THE COMPETITION COMMISSION — **Respondent**
and
RYANAIR LIMITED — **Intervener**

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Mr Nicholas Green QC and **Mr Martin Chamberlain** (instructed by Herbert Smith LLP) appeared on behalf of the **Appellant**.
Mr Daniel Beard QC (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.
The **Intervener** did not appear and was not represented.

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Judgment

(Approved)

Lord Justice Kitchin:

1. This is an application by BAA Limited ("BAA") for permission to appeal against a decision of the Competition Appeal Tribunal ("the Tribunal") dated 1 February 2012 and its consequential order dated 12 March 2012 dismissing BAA's application under section 179 of the Enterprise Act 2002 for a review of the decision of the Competition Commission ("the CC") in a report dated 19 July 2011 requiring BAA to sell Stansted Airport ("the 2011 report"). Under Section 179(6) of the Act an appeal lies to this court on any point of law arising from the Tribunal's decision.

2. The background to this application may be summarised as follows. On 19 March 2009 the CC published a market investigation report on the supply of airport services by BAA in the UK ("the 2009 report"). It found a number of features of the market gave rise to an adverse effect on competition, including the common ownership by BAA of Heathrow, Gatwick and Stansted airports. It also found that to remedy the effect of this adverse effect BAA should be required to divest itself of both Gatwick and Stansted.

3. In May 2009 BAA brought a challenge to the 2009 report by way of judicial review in the Tribunal. In its judgment of 21 December 2009 the Tribunal allowed the challenge on the ground of bias, quashed the 2009 report and remitted the matter back to the CC for reconsideration. The CC appealed and by its judgment of 13 October 2010, this court allowed the appeal. The 2009 report is therefore lawful.

4. Nevertheless, and in the light of the time which had elapsed since the publication of the 2009 report, the CC decided to consult on the question as to whether there had been any material change in circumstances such as to justify a departure from the remedies decided upon in that report. It carried out a first round of consultations and then published a provisional report setting out the findings and decisions it was minded to make. It then carried out a second round of consultations before publishing the 2011 report in its final form.

5. The CC accepted there had been a material change in circumstances since the 2009 report in that the new coalition government, formed after the general election in May 2010, had reversed the policy of the previous government and decided not to allow the construction of new airport runways in the south east.

6. Another significant development had also occurred in the interim. In April 2010, BAA sold Gatwick. This provided the CC with more concrete information about how the competitive effects between the London airports would develop in practice. It also provided a basis for BAA to submit that no further remedial action in the form of the sale of Stansted was necessary.

7. The consequence of the CC's acceptance that there was a material change in circumstances was that it was required to consider whether common ownership of BAA's remaining two London airports gave rise to an adverse effect on competition and, if it did, whether the benefits of the divestiture remedy outweighed the costs, including the cost to BAA.

8. In its 2011 report the CC decided both these questions against BAA and confirmed its decision that BAA must divest itself of Stansted according to a specified timetable.

9. BAA then challenged the lawfulness of the 2011 report before the Tribunal on four grounds, only two of which are now maintained upon this application for permission to appeal.

10. The first ground on this application (and the fourth before the Tribunal) is that, in assessing whether the divestiture remedy remained proportionate in the circumstances of 2011 and in setting an appropriate divestiture timetable, the CC took into account the monetary cost to BAA of selling Stansted, that is to say, the transaction costs, but failed to take into account a relevant consideration, namely the substantial impairment to shareholder value for BAA flowing from the requirement to divest itself of Stansted within a relatively short specified period in depressed market conditions.

11. The second ground (and the first before the Tribunal) is that the CC's analysis of the benefits likely to accrue from the separate ownership of Heathrow and Stansted was flawed. An important aspect of that submission concerned the question whether customers would switch between Heathrow and Stansted if the two were in separate ownership, known as substitutability of the two airports. BAA argued, and maintains upon this application, that on a proper interpretation of the 2009 report the CC found there was very limited substitutability between Heathrow and Stansted; that in the 2011 report the CC misconstrued or misunderstood its earlier finding; and that it therefore left out of account a factor relevant to the extent of any benefit that would accrue from separate ownership.

12. All of the grounds of challenge, including the two maintained upon this application, were dismissed by the Tribunal in its decision of 1 February 2012.

13. The Tribunal rejected the first ground for two reasons. First, it considered that in the course of the consultation leading up to the 2009 report and the consultation leading up to the 2011 report, BAA never suggested it would suffer a loss of this character and it was not open to BAA on a review before the Tribunal to seek to introduce a wholly new submission and support it with evidence not relied upon before the CC.

14. Second, and more fundamentally, it considered BAA's argument was wrong in principle. It held that where, after a market investigation, the CC concludes that a company must divest itself of a business in order to remedy an adverse effect on competition and ensures that the company has an appropriate opportunity to realise a fair market price for the business, there is no further complaint that can properly be made that the action required by the CC is disproportionate. The best objective indication of the value of the business is to be given by the market which can be expected to take account of how the business and market will operate in the future. Moreover, reference to a market price that might be obtained in a future optimally timed and voluntary

sale disregards the fact that the involuntary sale is necessary to remedy the adverse effect on competition.

15. Mr Green QC, who has appeared on behalf of BAA at various times throughout these proceedings, contends that the Tribunal fell into error in making each of these findings.

16. As for the first, Mr Green submits that BAA did indeed raise the point before the CC in 2009 and yet there was nothing in the 2009 report to indicate that the CC had taken it into account. Accordingly the matter was taken up before the Tribunal. In support of this submission Mr Green has referred us to various passages in the transcript of the proceedings before the Tribunal and to paragraphs [217] to [228] of the 2009 judgment of the Tribunal.

17. Mr Green continues that the CC responded that it had undertaken a "balancing process", that is to say, an evaluation of the important benefits of bringing competition to the market against the possible detriment of forcing a sale too quickly. Further, the CC submitted it had formed the view that the timetable it had arrived at was such that it would not damage the competitive process or BAA. Moreover, submits Mr Green, these arguments are also recorded in the 2009 judgment.

18. Mr Green then took us to the findings of the Tribunal in its 2009 judgment and in particular paragraphs [246] to [263]. He submits that these findings reflect the acceptance by the Tribunal that it was obvious that the shorter the period allowed for the disposal, the greater the risk of impact on the proceeds realised; and that an analysis which took into account only the quantified cost elements of divestiture would have been flawed. Nevertheless the Tribunal found BAA had not established the CC had failed to take proper account of the risk of a loss of value when determining the timescale within which the divestiture must take place.

19. Mr Green continues that, based on the CC's submissions and the Tribunal's findings, BAA understood the CC had undertaken an analysis of the loss of value attributable to a forced sale of Stansted and further, that during the period leading up to the 2011 report the CC simply updated its thinking. Accordingly, the issue having been determined by the Tribunal in 2009, BAA did not submit evidence as to the loss attributable to the fact of a forced sale in the 2011 proceedings.

20. But then, says Mr Green, the 2011 report was published and this appeared to BAA to suggest that the only costs taken into account by the CC were the costs of divestiture. This provoked BAA to enquire whether the CC had in fact carried out an analysis at all. By letter dated 16 November 2011, Treasury Solicitors confirmed that the CC considered there was no loss to BAA arising from the timescale laid down in the divestment timetable and therefore the CC did not carry out an exercise of seeking to assess, whether quantitatively or qualitatively, the extent of any such loss. To seek to assess the extent of a non-existent loss would have been futile.

21. It follows, says Mr Green, BAA cannot be criticised for failing in 2011 to invite the CC to undertake an exercise which it claimed to have undertaken in 2009 but had not in fact carried out.

22. It seems to me that the answer to these submissions may well be the very short and pithy submission advanced in response by Mr Beard QC on behalf of the CC, namely that the only loss relied upon by BAA over and above any direct divestment cost was the loss resulting from an inadequate divestment period and that, since the divestment period set by the CC was and is sufficient to permit an effective marketing and divestment process to be undertaken and thereby the fair market value to be obtained, there was no further loss to evaluate. This is not, however, an issue which it is possible to resolve on this application and accordingly, although not without some hesitation, I have reached the conclusion that BAA has established that it has a real prospect of success on this point on appeal.

23. That brings me to the second finding, that there can be no loss attributable to a sale under compulsion if a sufficient time is allowed to enable an orderly sale to be achieved and the market value to be obtained.

24. I believe that this finding does raise a point of principle and that it is one which may be of some importance to divestiture orders generally. Mr Green has taken us to a number of references which do at least arguably suggest the CC has accepted that a forced sale in adverse market conditions may have a detrimental effect on achievable value. We have also been referred to passages in the 2009 report and the 2011 report which give some idea of the factors which may underlie such an effect, such as a limited number of bidders, a lack of available funding, that bidders require CC approval and that restrictions are imposed by the CC on the structuring of the disposal, for example to prevent a disposal in portions to different purchasers or in different stages. Finally, there is the fact that this is a forced sale, as bidders are obviously well aware. These points have even greater force when considered collectively and do in my judgment merit consideration by the full court.

25. Moreover, Mr Green submits the rulings of the Tribunal in 2009 and 2011 are inconsistent. He contends that, on its true interpretation, the 2009 ruling does recognise the need to take account of the loss of value to BAA attributable to a forced sale in determining the proportionality of any remedy. This is a matter to which I have referred and is, in my judgment, arguable.

26. In conclusion therefore I would give permission to appeal on the first ground of appeal on the basis that, overall, I believe it does have a real prospect of success.

27. That brings me to the second ground of appeal and this I can take relatively shortly. It turns on the proper interpretation of the 2009 report and the findings made by the CC as to the substitutability of Heathrow and Stansted. Mr Green has referred us to various paragraphs in the 2009 report which may be understood to amount to findings that there is very little scope for airlines to switch services from Heathrow to Stansted; that there is little or no scope

for competition for long haul or transfer passengers; and that any potential for Heathrow to constrain other airports is limited to short haul flights. He submits the Tribunal has therefore erred in concluding that the 2009 report provides a basis for finding that, absent new runway capacity, there is nevertheless strong substitutability between Heathrow and Stansted or between Heathrow, Stansted and Gatwick.

28. I recognise that the answer to Mr Green's submissions may be that BAA has simply cherry picked or, as Mr Beard has put it, filleted passages from the report and that Mr Green's submissions disregard the context in which they appear and other important findings. These are matters which can only be explored properly upon a full appeal and I would therefore give permission upon this ground too.

29. Finally, I consider it is plainly in the public interest that this appeal is heard as soon as possible, both to provide certainty and to prevent the effectiveness of the market investigation process being undermined. I am therefore minded to direct that the appeal be expedited.

Mr Justice Norris:

30. I agree with the order proposed by my Lord.

Order: Application granted