Neutral Citation: [2013] IEHC 428

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 389 J.R.]

BETWEEN

AER LINGUS GROUP PLC

APPLICANT

AND

IRISH TAKEOVER PANEL

RESPONDENT

AND

RYANAIR HOLDINGS PLC AND COINSIDE LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Ryan delivered the 26th July 2013

Ryanair has been trying to take over Aer Lingus for a number of years. It first bid for the shares of its rival in 2006 and its third offer, made in July 2012, is the context of this application. The respondent made a ruling on the 20th May, 2013 at the behest of Aer Lingus as to the starting date of a 12 month moratorium on another bid by Ryanair and Aer Lingus is seeking to challenge that by way of judicial review. This is an application for leave and by agreement between the parties there was a telescoped hearing of the leave application and the application itself, on the assumption that leave had been granted. That does not dispense with the requirement on the applicant to establish substantial grounds for challenging the decision of the respondent.

The Factual Background
On the 19th June, 2012, Ryanair announced its intention to make an offer for the securities of Aer Lingus, in other words, a takeover bid. This was "a firm intention to make an offer" within the meaning of the Takeover Rules. At that point an offer period under the rules commenced which had the effect while it lasted of imposing restrictions on how Aer Lingus might conduct its affairs. The purpose of those provisions is to prevent a target company from taking certain steps to frustrate a bid. In the grounding affidavit for the application that is sworn by Mr. Gourlay, Aer Lingus complains about what it asserts are the severe restrictions on its business operations that have been imposed in recent years by reason of the repeated bids made by Ryanair.

On the 17th July, 2012, Ryanair made a formal offer for the securities of Aer Lingus to be acquired by its wholly owned subsidiary Coinside Limited by publishing the offer document.

On the 29th August, 2012, the European Commission announced that it had opened an in depth investigation (Phase II) under the EU Merger regime into the proposed acquisition on the ground of potential competition concerns.

On the same date, Ryanair issued an announcement that it intended to re-bid for Aer Lingus if the EC granted Phase II approval. The relevant part of the notice reads as follows:-

> **"Ryanair intends to re-bid for Aer Lingus if the EC grants Phase II approval**
> Following today's (29 Aug) decision of the European Commission to refer the acquisition of Aer Lingus to Phase II, Ryanair's offer lapses, in accordance with the Takeover Rules, with immediate effect, and all acceptances of the Offer to date are void.
>
> Ryanair intends to re-bid for Aer Lingus if the European Commission clears its offer following its Phase II review. The making of any such Further Offer will require consent* of the Takeover Panel to a derogation from the prohibition on making a further offer within twelve months after the date on which the original offer lapsed.
>
> In keeping with its policy to date, Ryanair will not make any comment other than the above on this process.
>
> ***The relevant Notes to the Takeover Rules specifically provide that the panel may grant consent in circumstances where a previous offer has lapsed as a result of a Phase II review by the European Commission, if following Phase II approval by the Commission, a new offer is made within 21 days of the issue of such a clearance."**
> The reference to the Takeover Rules is to rule 12(b)(i) which states:-
>
> > "If an offer would give rise to rise to a concentration with a Community dimension within the scope of the European Merger Regulation, it shall be a term of the offer that it will lapse if the European Commission either initiates proceedings in respect of the concentration under Article 6(1)(c) of that regulation or refers the concentration to a competent authority of a Member State under Article 9(1) of that Regulation before the first closing date of the offer or the date when the offer becomes or is declared unconditional as to acceptances, which ever is the later."

Thus, according to rule 12(b)(i) the Ryanair offer lapsed on the 29th August, 2012. This is not in dispute.

By letter of the 6th September, 2012 the Panel referred to the Ryanair announcement of the 29th August as giving rise to an offer

period in the category of a possible offer by reference to Rule 2.4. This distinguished the new offer from the previous one that had lapsed, which was a Rule 2.5 offer. These and other rules have to be considered later but it is sufficient for the present chronology to note them briefly.

On the 27th February, 2013 the European Commission announced its decision to refuse sanction to the Ryanair offer of 17th July by deciding to "prohibit the concentration."

In correspondence from the 11th March, 2013 Aer Lingus through its solicitors sought confirmation from the Panel that the Ryanair offer had lapsed on the 27th February, 2013 so that that date would be the beginning of a 12 month moratorium on a new bid from the same source. This was a reference to Rule 35.1 (a).

On the 20th May, following further correspondence from Arthur Cox on behalf of Aer Lingus, the respondent informed the applicant that the 12 month period of restriction on a new Ryanair offer was from 29th August, 2012.

The validity of a ruling or direction of the Panel may only be made by applying for judicial review within 7 days, unless extended, and leave cannot not be granted unless there are substantial grounds.

The Takeover Rules

The Takeover Rules have their statutory source in the Act of 1997 establishing the respondent as the body to monitor and supervise takeovers. They were amended to implement the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations, 2006 and they must comply with the General Principles specified in the Directive and embodied in Irish legislation. General Principle 6 with which we are concerned has changed its designation but not its form and states:

> "an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities."

In pursuance of the provisions of the Directive, the Panel is expressly empowered by legislation -Investment Funds etc Act, 2006--to grant waivers and derogations in exceptional circumstances but that is not a case that was made to the Panel on behalf of Aer Lingus in this instance and does not arise.

The rules that have to be considered are best understood in the setting of the process of a takeover offer such as happened in this case, with some reference to other relevant provisions.

The offer process began with the Ryanair announcement of the 19th June. That was made pursuant to Rule 2.5:--

> 2.5 THE ANNOUNCEMENT OF A FIRM INTENTION TO MAKE AN OFFER
>
> (a) An offeror may announce a firm intention to make an offer only when the offeror and its financial adviser are satisfied, after careful and responsible consideration, that the offeror is able and will continue at all relevant times to be able to implement the offer. Subject thereto, an offeror shall announce without delay its firm intention to make an offer.
>
> (b) When a firm intention to make an offer is announced, the announcement shall contain:
>
> (i) the terms of the offer;
>
> (ii) the identity of the offeror and, if applicable, of the ultimate controlling interests in the offeror;
>
> (iii) details of all relevant securities of the offeree in which the offeror or any person acting in concert with the offeror is interested, in each case specifying the nature of the interests in accordance with the applicable provisions of Rule 8.6(a); and details of all short positions of each such interested person in any class of relevant securities of the offeree in accordance with the applicable provisions of that rule;
>
> (iv) details of all relevant securities of the offeree in respect of which the offeror or any of its associates has received an irrevocable commitment or a letter of intent, including, in the case of an irrevocable commitment, the circumstances, if any, in which it will cease to be binding;
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> (v) all conditions (including normal conditions relating to acceptances, quotation and increase of capital) to which the offer or the making of it is subject;
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> (vi) details of any arrangement to which Rule 8.7 applies;
>
> (vii) a statement that a person interested in 1% or more of any class of relevant securities of the offeror or the offeree may have disclosure obligations under Rule 8.3, effective from the date of the announcement or, if earlier, the commencement of the offer period;
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> (viii) a responsibility statement as specified in Rule 19.2;
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> (ix) a statement that the announcement is being made pursuant to Rule 2.5 of the Rules; and
>
> (x) such information as may be required under Rule 4.1 (d); provided that if, for reasons of secrecy, it would not be considered prudent for an offeror to make enquiries for the purpose of including in such an announcement details of any relevant securities of the offeree in which persons controlling, controlled by or under the same control as one of its advisers are interested or have short positions, the offeror shall obtain the relevant details and report them to the Panel promptly following the announcement. If the Panel considers the interests or short positions concerned to be significant, it may require the offeror to make a further announcement.
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> (c) For the purposes of the Rules, an announcement by or on behalf of an offeror or by the Panel that the offeror has become obliged to make an offer pursuant to Rule 9 or Rule 37 shall (where that obligation is not subject to any pre-

condition of the kind referred to in Rule 2.2(b)) be deemed to be an announcement by the offeror of a firm intention to make that offer.

(d) Where the offer is for cash or includes an element of cash, the announcement of a firm intention to make an offer shall include confirmation by the offeror's financial adviser or by another appropriate person that resources are available to the offeror sufficient to satisfy full acceptance of the offer. If such confirmation proves to be inaccurate, the Panel may direct the person that gave such confirmation to provide the necessary resources unless the Panel is satisfied that, in giving the confirmation, that person acted responsibly and took all reasonable steps to assure itself that the cash was available and would continue to be available at all relevant times.

Such an announcement brings with it obligations to proceed expidiously to make the formal offer that is notified. It is to be contrasted with an announcement of a possible offer, which we also have to notice because of the designation by the Panel of the Ryanair announcement of the 29th August, 2012. Rule 2.4 provides:

2.4 THE ANNOUNCEMENT OF A POSSIBLE OFFER

Until a firm intention to make an offer has been announced a brief announcement by an offeror that it is considering making an offer shall satisfy the requirements of Rule 2 unless there are special circumstances requiring a more detailed announcement.

The announcement shall state that a person interested in 1% or more of any class of relevant securities of the offeree or, if the offeror is named, of the offeror may have disclosure obligations under Rule 8.3, effective from the date of the announcement or, if earlier, the commencement of the offer period.

An appropriate announcement must be made immediately after a firm intention to make an offer has been notified to the offeree board but there is a lesser obligation in the case of a possible offer. The rules are intended to provide a means of compelling an uncertain suitor to decide one way or the other, whether to proceed to firm intention or to back off. Rule 35.1 (b) is known as a "put up or shut up" order that is designed to achieve that.

A firm intention announcement is followed by a formal offer, as it was in this case on the 17th July, 2012, embodying the terms that were published a month earlier.

The next development was the intervention by the European Commission on the 29th August, 2012. Rule 12 (b) (i) was set out above but is repeated here for convenient reference:

If an offer would give rise to rise to a concentration with a Community dimension within the scope of the European Merger Regulation, it shall be a term of the offer that it will lapse if the European Commission either initiates proceedings in respect of the concentration under Article 6(1)(c) of that regulation or refers the concentration to a competent authority of a Member State under Article 9(1) of that Regulation before the first closing date of the offer or the date when the offer becomes or is declared unconditional as to acceptances, which ever is the later.

The Ryanair offer lapsed, accordingly. But that was not the end of the affair. Ryanair made its public declaration that it would renew the bid if it got approval from the Commission and was permitted by the panel to do so. We also have to look at the rule dealing with the consequence of the Commission's proceedings. This is Proviso (C) to the definition in Part A Rule 2 of "offer period"-

(C) where an offer lapses in accordance with Rule 12(b)(i) of Part B, an offer period (the "new offer period") relative to any new offer or possible offer which the offeror may make or propose to make in respect of the same offeree shall be deemed to commence at the time of such lapse (except that for the purposes only of Rules 6.1, 9.4, 11, 24.3(c), 25.3(d) and 37(b) of Part B the new offer period shall be deemed to have commenced at the time at which the offer period relative to the lapsed offer commenced) and, if the determination of the European Commission or the competent authority concerned prohibits the concentration concerned, the new offer period, if it has not previously ended in accordance with the foregoing provisions of this definition, shall end at the time of the communication of that determination to the offeror;

The final rule that must be set out is Rule 35.1 (a) that deals with the moratorium on another offer by the bidder:

RULE 35. RESTRICTIONS FOLLOWING OFFERS AND POSSIBLE OFFERS

35.1 DELAY OF 12 MONTHS

(a) Except with the consent of the Panel or as provided in Rule 9.3, if an offeror has announced a firm intention to make or has despatched an offer (not being a partial offer) and that offer has been withdrawn or has lapsed, neither the offeror, nor any person who acted in concert with the offeror as respects the offer, nor any person who following the expiry of the offer period is acting in concert with the offeror or any such person, may, within the 12 months after the date on which such offer is withdrawn or lapses, either:

(i) announce or make any offer in respect of the offeree; or

(ii) acquire any securities of the offeree if the offeror or any of the foregoing persons would thereby become obliged under Rule 9 to make an offer in respect of the offeree; or

(iii) acquire any securities of the offeree if the offeror and any of the foregoing persons hold securities conferring in the aggregate more than 49.95% but not more than 50% of the voting rights in the offeree.

The Ruling in Question

The ruling that the applicant seeks to challenge was notified to its solicitors by latter of the 20th May, 2013. The Panel determined that the restrictions under Rule 35.1 (a) apply to Ryanair during the 12 months ending on the 29th August, 2013. The letter explained the Panel's reasons: the rule referred to a firm intention to make an offer, that is, an offer under Rule 2.5; the Ryanair announcement of the 29th August was not a firm intention announcement because it did not comply with that rule; the rules represented a balance in the application of the Directive's General Principles; and the applicant had not made the case at the time or later that the

announcement was a Rule 2.5 one.

The Submissions

Aer Lingus submits that the Panel's ruling is wrong in law first because it makes an unjustified distinction between a takeover target that is the subject of a firm intention announcement under Rule 2.5 and one that is under the same restrictions as to the conduct of its business by reason of a possible offer announcement.

Secondly, it is illogical and even absurd that a company may at the same time be restricted and also protected from another offer.

Thirdly, the balance struck by the Panel renders General Principle 6 nugatory.

Fourthly, the terms of Rule 35.1 (a) do not specify that the announcement of a firm intention to make an offer is one that is made pursuant to Rule 2.5. The rule is not confined to an announcement made under Rule 2.5. There are references to Rule 2.5 in other rules that suggest that a firm intention to make an offer is not to be considered as being exclusively referable to that rule.

The words of Rule 35.1 (a) in their natural and ordinary meaning apply to the Ryanair announcement of the 29th August, 2012. Thus understood, the applicant submits that it "cannot be treated as implicitly containing the words 'pursuant to Rule 2.5', and that the announcement of the Notice Parties was an announcement of a firm intention to make an offer *simpliciter* in the circumstances.

Aer Lingus has been subjected to restrictions arising out of the successive Ryanair bids for an aggregate period of more than 550 days, which means that the Panel's interpretation and application of Rule 35.1 (a) is inequitable in light of the General Principle.

The Respondent's Submissions

> 1. The Panel argues that this point ignores the "put up or shut up" provision in Rule 35.1 (b), whereby a possible offer may be the subject of a deadline to make a firm intention announcement or back off. Although this option did not arise in the present case because the question was with the Commission, the argument is made in general terms based on a supposed inequitable comparison. It is not correct to consider the rule as conferring relief of management but it should be seen as establishing a balance between the interest of shareholders and the running of the company.
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> 2. The Panel submits that the allegation of absurdity confuses the impact on the offeree company of restrictions intended to prevent frustrating measures being taken with the separate question of the prevention for a time of another offer from the bidder.
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> 3. This point misunderstands the purpose behind restrictions on frustrating action and does not recognise the potential benefit to shareholders that may arise from an offer.
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> 4. To read Rule 35.1 (a) as referring to an announcement of a firm intention to make an offer of a kind different to the other rules would give rise to absurd results.
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> 5. The rules as a whole are a careful and sensitive balancing of the different interests that are involved when an offer is announced. There is a rationale to be discerned in the scheme of the rules whereby the various interests are balanced in accordance with the principles in the Directive to respect the rights ofthe bidder, the shareholders and the operation of the offeree.

Notice Parties' Submissions

> A. The Panel took General Principle 6 into account in reaching its decision and properly understood and applied Rule 35.1(a).
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> B. The grievance that Aer Lingus raises is primarily that it remained subject to the restrictions of an offer period, which is a consequence of the ruling made by the Panel on the 6th September, 2012 which Aer Lingus did not challenge.
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> C. Aer Lingus is not challenging the rules as being irrational or conflicting with the Directive or Community or domestic law.
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> D. The words of Rule 35.1(a) should be given their ordinary meaning; there is no ambiguity. The reference to a firm intention to make an offer is consistent with and refers to Rule 2.5.
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> E. The announcement of the 29th August, 2012 was not in fact a firm intention to make an offer. It was subject to Commission and Panel approval. The announcement of the 29th August, 2012 stated that "The making of any such Further Offer will require consent ... "
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> F. Aer Lingus is confusing the rules as to offer period and course of the offer with the provision in Rule 35.1(a).

The Approach

If a statutory body such as the respondent is shown to have made an error of law in the exercise of its functions and that has a significant impact on the interest of a concerned party, the court should generally be prepared to intervene. It is impossible and indeed unnecessary for this court to endeavour to state a rule that has no exceptions or qualifications. I am satisfied that the authorities cited by the parties justify the approach to this case that if I conclude that the Panel was wrong in its interpretation or construction of the rules and had chosen the incorrect date for the beginning ofthe moratorium under Rule 35.1(a), I should quash the decision. See *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34; *Radio Limerick One Ltd v Independent Radio and Television Commission* [1997] 2 IR 291; *Cork County Council v Shackleton* [2011] 1 IR 443.

The Directive required that certain minimum rules on takeovers had to be in place in each Member State. The respondent's Director General, Mr Ryan, in his replying affidavit says that the Panel reviewed and amended the Rules to ensure compliance with the Directive. When it is applying the rules it must also respect the General Principles. It is not required or permitted to prefer one General Principle over the other but there will obviously be circumstances that engage one more than another.

All of the parties appeal to the ordinary meaning of the words of the rules. The applicant adds the gloss that General Principle 6

should inform the construction of the rules and Rule 35.1(a) in particular. While there is some disagreement in the submissions as to the mode of application of the General Principles, it is not clear from the applicant's submissions and argument just how General Principle 6 is to be employed in the construction of Rule 35.1(a).

I think that the correct approach is to look at the rules, seeking the meaning of the words in light of general rules of construction and the Interpretation Act, 2005 and then to ask whether the General Principles have an impact on the meaning of the relevant provisions.

Discussion

Aer Lingus has been under restriction as to its business activities for protracted periods since Ryanair made its first offer. Defending the takeover bids has been costly and time consuming. The restrictions have interfered with the business. Applications have had to be made to the Panel for liberty to do anything that might be thought frustrating action under the rules.

A company that has been the subject of repeated takeover offers will obviously want to get maximum respite from its pursuer. Rule 35.1(a) specifies 12 months so it is a disappointment, to say the least, for the company to discover that the time ran from a date in the past and included a period when it was under restriction. There is something anomalous about the situation.

But if the Panel has correctly interpreted the rules, that is not something that can be relieved in this proceeding. The rules are not challenged by the applicant.

It is also the case that the applicant is not without remedy or relief from unreasonable burdens if that is the situation. The Takeover Panel Act, 1997 provides at section 8 (7) that the Panel may grant derogations and waivers in exceptional circumstances and the Regulations confirm that: SI 255/2006. Recital (6) of the Directive expresses the policy that takeover regulation "should be flexible and capable of dealing with new circumstances as they arise".

These measures envisage that an interested party will apply for derogation or waiver in circumstances that it considerous to be unduly burdensome and unreasonable. The General Principles can be invoked.

The rules have to be understood and interpreted against this background.

Under the Takeover Rules, the process of an offer begins with an announcement. When an announcement is made under either Rule 2.4 or Rule 2.5, an offer period begins. If it is the latter, that is an announcement of a firm intention to make an offer. An announcement made for the purpose of Rule 2.4 is that an offeror is considering making an offer. The heading of the rule is "The Announcement of a Possible Offer." There is a fundamental difference between the two announcements but each triggers the beginning of an offer period.

From the time of either announcement, the target company is subject to restrictions under Rule 21 that are intended to prevent certain actions that might be taken to frustrate the offer or possible offer. The company that makes a rule 2.4 possible offer announcement can be compelled to proceed further with a firm intention announcement under rule 2.5 or else to announce a withdrawal. This is known as a "put up or shut up" notice and is issued under rule 35(1)(b). That was the notice that Aer Lingus wished the Panel to issue before the Commission announced its decision on the bid. An announcement of a firm intention to make an offer is made under rule 2.5. That is a statement containing the details of the bid that is to be embodied in the formal offer document.

If a bid is referred for Phase II investigation, the rules provide that it is to lapse in such a situation. See rule 12(b)(i). The lapse of the bid in this manner may be considered somewhat notional as Mr. Sreenan SC for Aer Lingus says. But that is what the rules say and there is no challenge to the operation of that rule.

The effect of proviso (C) in the definition of offer period is to put in place a new offer period that is deemed to have commenced at the time when the previous, real offer actually lapsed in accordance with rule 12(b)(i). So there is a real offer that lapses on referral for Phase II consideration. Then a new offer period is deemed to commence, which concludes at the time of notification of the determination by the Commission or other agency when that notification is in the negative in respect of the bid. Since the new period that is deemed to commence is a notional one, it could perhaps be argued on a reading of paragraph (C) that there does not have to be an actual new offer or indication of an offer or a possible offer but that is not what happened.

The deemed offer period under paragraph (C) commences when the original offer lapses. It is relative to any new offer or possible offer which the offeror may make or propose to make in respect of the same offeree [except that for the purposes of some rules the beginning of the offer period of the new offer is backdated to that of the lapsed offer] and if the determination of the European Commission or the competent authority concerned prohibits the concentration concerned, the new offer period, if it has not previously ended in accordance with the foregoing provisions of the definition, ends at the time of the communication of that determination to the offeror.

The question at issue is the interpretation of rule 35.1(a). The Panel ruled that

> (i) the Ryanair bid of July, 2012 lapsed on the 29th August, 2012;
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> (ii) a new offer period operated because of the announcement of the 29th August, 2012;
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> (iii) that announcement was in the category of rule 2.4 and not rule 2.5;
>
> (iv) therefore the twelve month moratorium under Rule 35.1 (a) dated from the date the bid lapsed.

The essence of the argument made by Aer Lingus is contained at para. 95 to its written submissions. That reads as follows:-

> "The response of the respondent in its statement of opposition, and indeed the Verifying Affidavit, is for the most part posited on the proposition that the words 'pursuant to Rule 2.5' must indeed be read into rule 35(1)(a) of the Takeover Rules. In particular, the oft repeated argument that the applicant has conceded at various staged that the August 2012 announcement by the notice parties did not constitute an offer within rule 205 completely misses the point: the applicant makes no issue but that the August 2012 offer did not meet the conditions of rule 2.5, but contends that rule 35(1)(a) cannot be treated as implicitly containing the words 'pursuant to rule 2.5', and that announcement of the notice parties was an announcement of a firm intention to make an offer *simpliciter* in the circumstances."

It is clear, therefore, that the question to be decided in this application is the meaning of the expression "a firm intention to make an offer" in rule 35(1)(a). In my judgment the expression has to be given a consistent meaning in the rules. I can find no basis for saying that it means something different in rule 35(1)(a) from Rule 2.5. A firm intention to make an offer is an important and specific concept in the rules. When it is announced, it gives rise to a specified chain of events.

The relevant part of Rule 35.l(a) is"... if an offeror has announced a firm intention to make or has dispatched an offer (not being a partial offer) and that offer has been withdrawn or has lapsed, ...".

It is relevant to the interpretation of this provision to note that it concerns a firm intention to make an offer as well as an offer that has been dispatched and that the offer in question is not a partial offer.

The Aer Lingus submission treats the situation that arose on the disallowance of the Ryanair proposal as being the same as arises if an offer has lapsed or been withdrawn. It is noteworthy that that is not the expression used in proviso (C) dealing with the offer period as defined in preliminary rule A2. The term used there is that that the offer period ends with the communication of the determination of the relevant authority to the offeror. Proviso (C) does not refer to an offer that has lapsed, but rather to an offer period that has ended.

The applicant points out that in other places in the rules there is reference to an offer under rule 2.5 and even a firm intention to make an offer under rule 2.5. The suggestion is that by using these terms the rules are indicating that a firm intention to make an offer is not a specific technical term that must be understood in all circumstances in the rules as having the same meaning. The canon of interpretation as to giving the same meaning to expressions where they appear several times in a document or a body of rules is applicable here but it is not an absolute principle that cannot allow for some small measure of variation of reference. An iron rigidity of interpretation may be unreasonable and that I think is the case that is suggested by Aer Lingus.

It is true, as Mr Barniville SC for the respondent pointed out, that there is no consistent pattern in the rules and sometimes a firm intention to make an offer appears on it own, sometimes it is accompanied by a reference to rule 2.5 and on further occasions there is only a reference to rule 2.5. My view is that this proposition is going too far in suggesting that as a matter of interpretation of the rules as a whole, one can discover differences of usage that imply a variety of meanings. Such variations as occur are small in number compared with uses that are similar and the former are not significant.

It also seems to me that Aer Lingus is confusing the restraints under which an offeree company must operate with the relief that is afforded to a target company under rule 35. The rules strike a balance between the rights and obligations of the two parties in a takeover transaction. Indeed, two parties is an insufficient categorisation because there are more parties when one includes the shareholders of the offeror company and connected parties and similarly with the offeree.

Rule 35.1(a) has to be seen in its context by reference to the process of a takeover. The rules envisage that there may be no more than the possibility of a bid being made, to begin with. In those circumstances, a simple announcement under rule 2.4 is sufficient. This conveys information about a possible bid to relevant parties and it begins a period of involuntary restraint on the target company. At this point, there is no bid, there is merely the possibility that an offer will be made. If the potential bidder decides not to proceed, it must make an appropriate announcement. If it does that, it may not make a bid for a period of twelve months. If the bidder decides to proceed, it now makes an announcement of a firm intention to make an offer. That is covered by rule 2.5. There are specific requirements and essentially all the relevant details of the offer have to be set out in this announcement. Next comes the offer itself. An offer may be withdrawn or may lapse in a variety of circumstances.

If an offer would give rise to a concern about concentration, ie. a competition issue, the European Commission may institute proceedings for an investigation either by the Commission itself or by a domestic authority. If that happens, rule 12(b)(i) provides that the bid lapses. It does that because there is implied in a bid that may give rise to a competition issue that the bid will lapse if it is referred for investigation under Phase II of the Directive.

If a potential bidder makes an announcement of a possible bid, as contrasted with a firm intention to make an offer, the restrictions come into operation as mentioned above. They interfere with offeree, company's capacity to operate its business otherwise than in the ordinary course, so it is quite a significant interference. If the matter does not proceed, the target company can invoke rule 35.1(b) seeking from the Takeover Panel an order to the potential bidder to announce either a firm intention to make an offer that it is not going to make an offer. This is known as a "put up or shut up" order.

In this case, Aer Lingus sought such an order from the respondent in the period between September 2012 and February 2013. That was expressly predicated on the basis that the announcement made by Ryanair on the 29th August, 2012, was a rule 2.4 announcement. That is of course the precise opposite of the case Aer Lingus is now making, a point to which the respondent and the notice party have drawn attention. But that is not decisive, in my view. If the case being put forward by Aer Lingus is correct, then it is a case of a misapplication of the rule, because the Takeover Panel misunderstood it. It is of course understandable that Mr Bamiville, SC for the respondent and Mr Hayden SC for the notice parties would draw attention to this interpretation and apparent change of heart and of mind by the applicant.

It seems to me to be irresistible that the expression "a firm intention to make an offer" refers and can only refer to an offer within the meaning of rule 2.5. The expression as used in rule Rule 35.1(a) must be understood as meaning the same thing when used elsewhere in the set of rules.

Rule 35(1)(a) requires that there should have been a firm intention to make an offer and that the offer has lapsed. It cannot be doubted in this case that there was a firm intention by the notice parties in June 2012 and that it lapsed in accordance with rule 12(b)(i) on the 29th August, 2012. The Ryanair announcement made on that date did not conform with Rule 2.5. Neither did it constitute a firm intention to make an offer, considered independently because it was doubly conditional. It was made at a time when the takeover bid had just been referred for Phase II investigation. It was conditional first on getting approval from the European Commission and secondly, obtaining the consent of the respondent. It is reasonable to assume that the second part would not have been difficult if the bid had been approved for competition purposes but that does not dispose of the condition.

Mr. Sreenan SC for Aer Lingus points out that most if not all contracts have conditions. But this is not a case of a contract that has conditions; it is an intention, even a firm one, that was subject to a condition precedent. Unless the condition was fulfilled, there could be no offer. Ryanair said that they would make a bid if it was approved by the Commission. Even if one assumes as Mr. Sreenan submits that Ryanair did indeed have a firm intention to make an offer in the event that the bid was approved by the Commission, that does not remove the precondition. It is not as if there is a feature of the offer that is going to be affected by the condition, but whether there is going to be any offer at all. It seems to me that it is properly described as an announcement of a possible offer,

which is made pursuant to Rule 2.4, but on no basis can it be described as a firm intention to make an offer.

I conclude that Rule 35.1(a) applies, as it expressly provides, to the period of 12 months "after the date on which such offer is withdrawn or lapses". The reference in the rule is to the requirements that are spelled out in Rule 2.5. The rule cannot by any legitimate construction be thought to create another kind of announcement known by the same name but possessing wholly different characteristics.

Neither can the General Principles taken together or No.6 alone impose into the rule a meaning that is contrary to its clear words. It is noteworthy that the Directive does not include a requirement to put a moratorium in place. One cannot look to the Directive and general principle 6 which is contained in it for guidance on the length of the moratorium or its starting point when the Directive does not contain a provision about a moratorium of any kind. It seems that the practice in other countries in the EU varies from no moratorium to twelve months.

In the circumstances, the grievance that Aer Lingus has arises from the consequences of a correct reading rather than from any misunderstanding of Rule 35.1(a). The fact that the application of the rule may give rise to a less than satisfactory consequence for a party affected is not a reason to apply a meaning that the words do not bear. This is especially apt when there is a wide flexible jurisdiction that even allows rules to be waived in a proper case.

My conclusion is that the application for judicial review cannot succeed. The case is not about the rules but the Panel's interpretation of them. The applicant has not established substantial grounds because it has not shown that the reading by the Takeover Panel was wrong or even questionable.

Accordingly, for these reasons I hold that the applicant has not established substantial grounds and I refuse leave to challenge the Panel's ruling of the 20th May, 2013.