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THE HIGH COURT

[2007 No. 1245 J.R.]
[2007 No. 133 COM]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

RYANAIR LTD

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENTS

AND
DUBLIN AIRPORT AUTHORITY PLC, FINGAL COUNTY COUNCIL, THE PORTMARNOCK COMMUNITY ASSOCIATION AND AN TAISCE
NOTICE PARTIES

Judgment of Mr. Justice Clarke delivered the 11th day of January, 2008

1. Introduction

1.1 The need for an expansion in the facilities available at Dublin Airport has been the subject of broad agreement for some time. However, the precise way in which those facilities should be provided, the nature, specification and scale of the facilities, and the parties to provide them, has been the subject of considerable controversy. These proceedings arise out of one aspect of that controversy.

1.2 In these proceedings the applicant ("Ryanair") seeks to challenge and have quashed a decision of the respondent ("The Board") to grant a planning permission for the development of a second terminal at Dublin Airport ("T2"). The first named notice party ("The DAA") had applied for and obtained the relevant permission. However the DAA has now brought an application seeking an order, pursuant to the inherent jurisdiction of the court, dismissing or striking out the proceedings on the grounds "that the proceedings cannot be properly maintained by reason of an agreement made between (*inter alia*) the applicant and the DAA on or about the 15th of March, 2006 ("the settlement agreement") and/or that, having regard to the settlement agreement, the proceedings are an abuse of process". The term T2 is used to refer to the specific proposal now under challenge.

1.3 The issue which I have to decide is whether that application should be allowed and whether the proceedings should, therefore, be dismissed or struck out on that basis.

1.4 The agreement referred to as the settlement agreement was an agreement entered into between the parties to previous litigation concerning the provision of a second terminal at Dublin Airport. Those parties included Ryanair and the DAA. It will be necessary to refer in more detail to those proceedings in due course. However it is clear, and common case, that those proceedings were settled as a result of which the proceedings concerned were struck out and Ryanair entered into an agreement which precluded it from challenging certain developments at Dublin Airport. The net issue on this application is as to whether the challenge with Ryanair now brings against the grant of planning permission for T2 is a challenge which is in breach of the terms of that agreement. As a subsidiary issue Ryanair also argues that the DAA are now precluded from seeking to have the proceedings dismissed on the basis of that agreement, by virtue of the fact that the DAA did not object to Ryanair engaging in the planning process both by making observations hostile to the development to the planning authority (Fingal County Council) and by appealing the determination of Fingal County Council to the Board.

1.5 It should be finally noted that none of the other parties to these proceedings participated in the application. The Board appeared at the commencement of the hearing, purely out of courtesy to the court and for the purposes of indicating that the Board would abide by any order made. As will be seen the Board was not a party to the settlement agreement and has, therefore, no direct legal interest in the issues raised as to the effect of the agreement on the current proceedings.

1.6 I turn first to the background to the issue.

2. Background Facts

2.1 As part of the process which has led to the decision to construct a second terminal at Dublin Airport in the manner which is the subject of the planning permission granted by the Board, the Government decided, on the 18th of May, 2005, that such a terminal should be commissioned and constructed by the DAA and that, in due course, the operator of the terminal should be selected by an open competition. Immediately thereafter Ryanair announced its intention to challenge the Government decision and, in July, 2005, instituted proceedings in that regard naming An Taoiseach, the Minister for Transport, the DAA, Ireland and the Attorney General as defendants ("the 2005 proceedings").

2.2 It should also be noted that there has been a lengthy history of disputes between Ryanair and the DAA (sometimes involving other parties as well) concerning the manner in which Dublin Airport is operated. Many of those disputes have given rise to litigation of one sort or another. Much of that litigation continued in being during the period which is relevant to the issues in this case.

2.3 It would be fair to say that the underlying basis of much of the complaint which Ryanair makes concerning the operation of Dublin Airport is connected with a contention on the part of Ryanair that the costs associated with the operation of the airport, as passed on to operating airlines (such as Ryanair), are too great. In that context the nature of the proposed second terminal was a subject of some controversy based on a contention on the part of Ryanair, that, amongst other things, the terminal would be built on too great a scale and to too high a standard, thus generating higher operating costs which would, it was said, in turn be passed on through operating airlines to their customers. It should also be noted, in that context, that Ryanair proposed to build a different second terminal at a different location in the airport complex than that settled on as appropriate for T2.

2.4 In the context of the general proposal for a second terminal at Dublin Airport, a master plan had been developed. In June 2001, the Board of Aer Rianta (the predecessor in title to the DAA) advertised for consultants to develop such a master plan. A consortium comprising of Project Management Group, Skidmore Owings & Merrill Architects and TPS were appointed to prepare the master plan and any relevant planning applications. In March 2003, the Board of Aer Rianta adopted the master plan produced by that consortium which recommended the construction of additional terminal facilities abutting the existing Terminal One.

2.5 Thereafter, the government decision to which I have referred in May 2005, announced the so called "Aviation Action Plan" which required the DAA to deliver a new second terminal by 2009 and also to bring into operation an additional pier (Pier D) in the existing

terminal by 2007.

2.6 Subsequently, in June 2005, the Board of the DAA decided to appoint expert consultants to review previous master planning work in relation to Dublin Airport and included in the remit of those consultants a requirement to consult with the main home based carriers. In that regard, in July 2005, the DAA appointed Pascall and Watson to conduct that review over a period of approximately three months. In September 2005, Pascal and Watson completed their work and issued a report which was entitled "Capacity Enhancement Recommendation Report for Dublin Airport" and which made a series of recommendations in relation to, amongst other things, the location, operation and capacity of the proposed new terminal and associated pier facilities. The DAA adopted that report as its Medium Term Masterplan ("the Pascall and Watson Plan"). In December 2005, the DAA, having gone through the mandated competitive procurement processes required by both EU law and domestic regulation, appointed a consortium led by ARUP and incorporating Pascall and Watson Architects and Mace Construction Managers as the project management and design team for the T2 project.

2.7 However prior to that, the DAA had made a statement on the 20th of September, 2005, which announced that the DAA had approved plans to build a fifty thousand square metre passenger terminal at Dublin Airport which would have a capacity of up to fifteen million passengers per year and would cost between €170,000,000 and €200,000,000 depending on design and specification. The terminal was stated to be a "core component" of a €1.2 billion, ten year framework development programme and also noted that the Board had approved Pascall and Watson's recommendations which were described as "the blueprint to build the dynamic airport gateway this city and country require". It would also appear that the location and specification for the terminal were as advised by Pascall and Watson and also that the same firm had provided "indicative costings".

2.8 It would appear that the above describes the state of play in relation to the progress of the plan to build T2 as of the time of the settlement agreement in March 2006. The DAA had made the announcement to which I have referred. In addition it had appointed the ARUP led consortium to produce detailed proposals and that consortium was in the course of developing those proposals but had not produced specific plans.

2.9 It is against that background that the settlement needs to be considered. It is said by Mr Michael O'Leary, the Chief Executive of Ryanair, in affidavit evidence before the court, that Ryanair was, in substance, pleasantly surprised by the announcement of the DAA, in that it felt that both the scale and cost of the proposed T2 was not as large or lavish as had been feared (from Ryanair's perspective). It is also said by Mr O'Leary that there was, at the relevant time, considerable progress in discussions which had been held between him and the Chief Executive of the DAA, Mr Declan Collier, in relation to the various other operational matters which had been the subject of controversy and, in many cases litigation, over the years. In a sense peace appeared to have broken out. It is said that it was against that background that the settlement arrangement was entered into. It is now necessary to turn to the settlement agreement itself.

3. The Settlement

3.1 The settlement agreement is, in fact, in very simple terms. In the 2005 proceedings Ryanair, as plaintiffs, were represented by Messrs A & L Goodbody with the State defendants being represented by the Chief State Solicitor and the DAA by Arthur Cox. The genesis of the settlement terms is to be found in a letter of the 14th of March, 2006, from the Chief State Solicitor to Messrs A & L Goodbody's which contains the following provisions under the heading "settlement proposal":-

> "1. Ryanair withdraws its challenge to the validity of the Government Decision, the subject of these proceedings.
>
> 2. Ryanair confirms and agrees with the Defendants not to bring any further challenges against or arising out of or connected with the Government's Decision of the 18th of May 2005 concerning T2 or in respect of any implementation in whole or in part of the Medium Term Masterplan for infrastructural facilities prepared by Pascall and Watson in September 2005 (including the plan for the new Terminal and associated pier facilities) (Pier E) which the DAA may decide to effect.
>
> 3. The proceedings to be struck out with no Order as to the Costs".

That letter was addressed to A & L Goodbody on behalf of Ryanair.

3.2 On the same date Arthur Cox, for the DAA, wrote to A & L Goodbody, noting their understanding that discussions had taken place between counsel for Ryanair and counsel for the State defendants, which had led to a provisional agreement subject to the approval of the relevant clients. Arthur Cox confirmed on behalf of the DAA, that the DAA was prepared to settle the matter on terms which are set out in that letter and which are identical to the terms contained in the letter from the Chief State Solicitor to A & L Goodbody. However, Messrs Arthur Cox included an additional provision in their letter in the following terms:-

> "We wish to confirm that the terms of settlement set out above comprise the full and complete agreement as regards settlement of these proceedings and there are no further terms or collateral agreements. In particular the letter of 20th February, 2006, from Michael O'Leary to Declan Collier relates to a number of operational issues at Dublin Airport which are separate and distinct and form no part of these proceedings or their settlement".

3.3 On the following day A & L Goodbody wrote to Arthur Cox confirming that Ryanair was prepared to settle the matter on the terms set out at paras. 1-3 and also confirmed what was stated in the paragraph of the Arthur Cox letter which I have just quoted.

3.4 It would also appear that the Chief State Solicitor confirmed the agreement of the State authorities to a settlement on those terms. On that basis the parties settled the proceedings and, in accordance with para. 3, the proceedings were struck out with no order as to costs.

3.5 In substance therefore the question which I have to decide is as to whether those terms of settlement, and in particular para. 2, preclude the challenge which Ryanair now brings to the decision of the Board. That question, in turn, depends on the proper construction of the settlement agreement. I therefore turn, briefly, to the legal principles to be applied in addressing the construction of an agreement such as that with which I am concerned.

4. Construction of Agreements – The Law

4.1 In truth there was little real disagreement between counsel as to the proper principles to be applied. As it happens leading counsel for Ryanair and one of the senior counsel instructed on behalf of the DAA, both appeared before me in *BNY Trust & Anor v. Treasury Holdings* [2007] IEHC 271. In Section 4 of the judgment in that case, I reviewed recent authority on the question of the construction of written agreements and set out my conclusions as to the principles to be derived from those authorities. I see no basis for departing from the views which I expressed in that judgment and find it unnecessary to repeat them here.

4.2 In particular I see no reason to depart from the views which I expressed to the effect that the subjective evidence of a party as to what that party believed or intended when entering into a contract is inadmissible and is contrary to the basic principle which is to the effect that contractual agreements in writing should be objectively construed.

4.3 Against the background of those principles it is necessary to address the issues of construction which arise in this case.

5. Application to Facts of this Case
5.1 Para. 2 of the settlement agreement commits Ryanair to two things. Firstly Ryanair is not to "bring any further challenges against or arising out of or connected with the government's decision of the 18th of May, 2005, concerning T2". Secondly Ryanair is not to bring any challenges "in respect of any implementation in whole or in part of the medium term masterplan for infrastructural facilities prepared by Pascall and Watson".

5.2 One overall issue of construction and, depending on the result of that question, one issue of fact, arises. The issue of construction centres around the question of whether, as the DAA asserts, Ryanair is precluded from bringing any challenge in respect of T2, or whether, as Ryanair asserts, challenges are excluded only where the proposed T2 can be said to be an implementation of the Pascall and Watson Plan. A subsidiary question, in the event that Ryanair are correct, concerns the parameters within which a development of T2 can be said to be an "implementation" of the Pascall and Watson Plan.

5.3 Obviously if the DAA are correct then no question arises as to the comparison between the terminal currently the subject of the favourable planning decision of the Board with the proposals set out in the Pascall and Watson Plan. On the other hand if Ryanair are correct then it will be necessary, as a matter of fact, to compare the Pascall and Watson Plan with the proposal which is now the subject of planning permission, for the purposes of ascertaining whether the development which is now under challenge can be said to be an implementation of the Pascall and Watson Plan.

5.4 Ryanair's case centres around the fact that the settlement was reached in the context of a situation where, for many years, Ryanair had opposed what appeared to it to be excessively expensive schemes for the extension of Dublin Airport. It says that the settlement was, therefore, reached against a background where it had become apparent (on the basis of the announcement of the DAA to which I have referred in some detail) that the scheme proposed in accordance with the Pascall and Watson Plan was more modest in scale and, perhaps more importantly, significantly more modest in cost, than Ryanair had, from its perspective, feared. It is said, therefore, that viewed against that background the settlement should be seen as precluding Ryanair only from challenging a proposed development which was at least broadly in line with the Pascall and Watson Plan. There is also an implicit suggestion that the fact of progress in relation to the disputes concerning operational matters is a matter which could effect the proper construction of the settlement agreement. However, in the light of the clear wording of the para. from the Arthur Cox letter to which I have referred and which was agreed to by Ryanair, no such contention is tenable.

5.5 In addition, notwithstanding the recent evolution in the principles applicable to the construction of written agreements intended to have legal effect, to which I referred in BNY Trust, the starting point for any construction issue remains the text of the agreement itself. The reasons for this are obvious. The fifth principle identified by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR and approved by Geoghegan J., speaking for the Supreme Court, in *Analogue Devices v. Zurich Insurance* [2005] 2 ILRM 131, notes that the reason why words should be given their "natural and ordinary meaning" stems from the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. This is all the more so when the written form is agreed with the benefit of expert advice on all sides. The logic of this position is clear. Whatever may have been in the minds of parties as they approach an agreement, they choose to give effect to their agreement by putting it in writing in a specific form.

5.6 It would be to entirely and inappropriately devalue the written form into which parties have chosen to put their agreement, not to pay significant attention to the way in which the agreement is expressed in the document under consideration. It would, in my view, be to put the cart before the horse to start with a consideration of what the parties were trying to do and only then to apply ones mind to what they in fact did by entering into an agreement in the terms of the written document under consideration. Rather one should start with the document but using, as an aid to its construction, the context in which it was entered into by reference to any material background facts which would bear upon the way in which a reasonable and informed person would have interpreted the document in question.

5.7 I fully accept that, insofar as it may be appropriate, a court in construing the settlement agreement in this case should have regard to the fact that the settlement occurred against a background of complaints by Ryanair about what it perceived to be a grandiose proposal and an announcement by the DAA of a proposal which, in Ryanairs view, was a lot less grandiose than Ryanair had feared. However the fact remains that Ryanair signed up (metaphorically) to the text proposed by the Chief State Solicitor. That is the form in which the parties agreed that the proceedings should be settled and the starting point has to be to give all due weight to the precise way in which that settlement agreement is cast. I, therefore, turn to the text of the agreement.

6 The Text of the Agreement
6.1 The first portion of para. 2, as I have pointed out, commits Ryanair to refrain from challenging not only the relevant Government decision concerning T2 but also prevents Ryanair from bringing any challenge "arising out of or connected with" the Government's decision. Those terms are wide indeed. The text should also be seen against the background of the fact that para. 1 of the settlement agreement requires the discontinuance of the then existing proceedings. When para. 2, then, speaks of precluding challenges against "or arising out of or connected with" the decision, it clearly intends to go further than merely preventing a reactivation of the existing proceedings or something broadly similar to them. If it was only intended to prevent such a reactivation then the relevant paragraph could have been simply expressed in terms which precluded Ryanair from bringing again proceedings which were broadly similar to those which were about to be discontinued.

6.2 It follows that the parties must have intended to agree a wider restriction on Ryanair's entitlement to challenge, by the inclusion of the words "arising out of or connected with" the decision in relation to T2. It is also important to keep in mind that the Government's decision was to the effect that a second terminal should be built by 2009. It was clear that in order for that timescale to be achieved there would have to be an early preparation of a planning application and that it was important that any such planning application would not be subjected to unnecessary delays by challenges. Those proposing a second terminal could not, of course, guarantee against third party challenges, but it seems to me to be clear that what was both "in it", from the Government's and DAA's point of view, in the settlement was that Ryanair were being precluded from being such a third party challenger. It is also important to note that the Government decision did not mandate any particular location for or size of the proposed second terminal. The decision merely required that the terminal be constructed by the DAA leaving its operation up for grabs as a result of a further process to be engaged in. The Government's decision is not, therefore, confined to the terminal proposed in the Pascall and Watson Plan and adopted as part of the Masterplan, for that report, and the terminal proposed in it, post date the Government decision.

6.3 Counsel for Ryanair did not give any concrete example of what might have been precluded by the first part of para. 2 if it did not have the meaning asserted by the DAA, that is that it precluded any challenges in relation to the second terminal. It is difficult to see what meaning could be attributed to it if it does not have the wider construction contended for by the DAA. As I have pointed out, it would do serious injustice to the wording of that portion of para. 2 if it were held to be confined to excluding challenges of the same nature as those which were included in the proceedings which were settled by the very agreement itself. It must follow that the agreement precludes a wider range of challenge than simply a direct attack on the government decision itself. It is clear that in order that the government decision be implemented (particularly having regard to the timescale required by that decision) there would have to be an early and effective planning application. It seems to me clear, therefore, that a challenge to a planning application for a second terminal is a challenge "arising out of or connected with" the governments decision. If not that, then what other form of challenge has been excluded beyond a reactivation of something broadly similar to the challenge contained in the litigation which was discontinued. But it is equally clear that the first part of para. 2 is not confined to the T2 specified in the Pascall and Watson report. It includes any second terminal.

6.4 I am, therefore, satisfied that any challenge to a planning application for a second terminal in Dublin Airport is precluded by the first part of para. 2 of the settlement agreement. Lest I be wrong in that view I propose to go on to consider whether, in any event, the challenge now mounted would be in contravention of the second part of the same para..

6.5 What is precluded by that aspect of the para. is a challenge "in respect of any implementation in whole or in part of the medium term masterplan". The reference to the medium term masterplan is, of course, a reference to the Pascall and Watson report as adopted by the Board of the DAA for the purposes of that plan. It is therefore clear that Ryanair are precluded from challenging an implementation of the Pascall and Watson Plan. As I have also noted the Pascall and Watson report dealt with many other matters beyond T2. If the Pascall and Watson report were only concerned with T2, then there might well be an argument that the first part of para. 2 could not be construed in isolation from the second part. If the second part of the para. only committed Ryanair not to challenge an implementation of the Pascall and Watson Plan in respect of T2, then it would be difficult to see how any meaning could be given to that portion of para. 2, unless the first portion of the same para. were similarly confined to the implementation of the Pascall and Watson Plan. Otherwise nothing would be added by the inclusion of the second part of the para.. However, it is clear that the Pascall and Watson Plan deals with many other items of infrastructural development and that, therefore, the second part of para. 2 precludes, independently, a challenge to those elements, using the Pascall and Watson report as a convenient means of identifying the items in respect of which challenge is precluded.

6.6 It also seems clear to me that a challenge to a planning permission for any element of the Pascall and Watson Plan amounts to a challenge "in respect of any implementation" of the plan. The question which arises is as to whether it is possible to argue that the current proposal could not be said to be an "implementation" of the Pascall and Watson Plan at all. It is important to note that the basis upon which it is said that the proposal encompassed in the current planning permission does not amount to an implementation of the Pascall and Watson Plan is because, it is said, it is significantly larger and disproportionately more expensive than the proposal contemplated by the Pascall and Watson Plan. That issue is factually contested by the DAA but for the purposes of construing the agreement it is necessary to consider whether, if it could factually be established that it was so, a challenge to a second terminal which was larger and materially more expensive than that contemplated by the Pascall and Watson Plan would be precluded by the terms of the second part of para. 2.

6.7 The difficulty with the construction which Ryanair seeks to place on the second part of para. 2 is as to determining the criteria by reference to which it might be said that a particular proposal was not an implementation of the Pascall and Watson Plan. Two practical issues of difficulty arise. Firstly the Pascall and Watson Plan itself is quite general in terms and proposes broad parameters both of scale and cost. It is important to emphasise that the report, as adopted as the Plan, did not involve a specific carefully costed proposal but rather dealt with broad generalities as to the location, general scale, and a range of possible costings. It is implicit in the report that further detailed consideration would have been necessary in order to formulate a precise proposal which would go to planning. It is, of course, the case that the Pascall and Watson report itself (and the Medium Term Masterplan based on it) were not in the public domain as of the time of the settlement and were not, in detail, known to Ryanair. The only detailed knowledge which members of the public (including, in this context, Ryanair) would have had, was to be found in the announcement of the DAA to which I have already referred. However it remains the case that Ryanair signed up to a settlement agreement by reference to the Pascall and Watson Plan and must, in my view, therefore be bound by its terms. Those terms are general rather than specific.

6.8 In that context the second question arises as to how far outside or beyond the parameters specified in the Pascall and Watson Plan, a particular proposal would have to be, in order that it might be said not to be an implementation of the Pascall and Watson Plan itself. Would 5% in scale or 10% in cost be enough. If not where would the line be drawn. It is difficult to avoid the conclusion that if Ryanair wished to free itself from being precluded from challenging a T2 proposal which was larger or more costly than what it believed it was signing up to, it should have insisted on specific terms being included in the settlement agreement by reference to which a determination could be made as to whether a particular proposal was inside or outside the scale in relation to which challenge was not permitted. There is, of course, nothing in the agreement to indicate how one might go about reaching a conclusion as to whether a particular proposal was or was not permitted to be challenged.

6.9 It does not seem to me, therefore, that the second part of para. 2 can be construed in a way which would open to challenge a proposed implementation of a development contained in the Pascall and Watson Plan, simply because the proposal differed, even to some material extent, from what is specified in the Pascall and Watson Plan. This is particularly so in respect of those aspects of the Plan which are, in themselves, expressed in general and non prescriptive terms. To take any other view would be to impose on the contract a set of criteria which the parties clearly did not address let alone agree.

6.10 However it does seem to me that it would, in theory, be possible for Ryanair to be absolved from its obligation not to challenge (at least so far as the second part of para. 2 is concerned) if could be said that a proposal was so wholly different in character from the terms of the Pascall and Watson Plan that it could be concluded that it was not, in reality, the same proposal at all. Obviously the extent to which that situation could be said to exist in respect of any aspect of the Pascall and Watson Plan would, in turn, depend on the degree of specificity contained in respect of that proposal in the report itself. The wider the degree of latitude which the report itself gives then the greater amount of divergence, even from the specified parameters identified in the report, that would be needed to enable a proper conclusion to be reached that a proposal was not, in reality, a proposal contemplated by the report at all.

6.11 I should emphasise that in coming to that view, I am considering the construction of the second part of para. 2 alone. That view does not alter the conclusion which I have already expressed to the effect that the first part of para. 2 precludes any challenge to the second terminal. However, if I am wrong in that view, I would have come to the conclusion that the second part of para. 2 precluded any challenge to a second terminal (including a challenge to a planning permission) unless the terminal as proposed was so different from the parameters identified in the Pascall and Watson Plan, as to make it something different entirely. Having come to

that view I should also consider whether, on the facts of this case, and in the event that I am wrong as to the construction of the first part of para. 2, the proposed T2 under consideration in this challenge could be said to be so different to that contemplated by the Pascall and Watson Plan as to be something different entirely.

7. Is this Terminal 2 Something Entirely Different

7.1 As I have noted on a number of occasions the Pascall and Watson Plan specifies a second terminal which is said to be between 40,000 and 60,000m² (nett – the gross figures would seem to be significantly larger) and which might cost of the order of €200m depending on size and certain aspects of the specification and depending on which aspects of the overall plan were regarded as part of the costs of T2. The proposal which is the subject of the planning application amounts to seventy five thousand square metres and is undoubtedly likely to be more expensive for, it would appear, a number of reasons and not only the larger size.

7.2 It is, however, important to note a number of the provisions of the Pascall and Watson report. In the summary of the key recommendations of the report (on p. 3), and having identified the proposed location for T2, the report says the following:-

> "The appropriate scale of the first phase of the Terminal development needs to be assessed against a range of criteria to ensure that it meets not only the initial requirements of the users but is capable of being expanded in a logical manner with as little disruption as is feasible. For example it might be prudent to oversize the initial build, and not fit out all of the available floor space; or alternatively to construct the entire substructure for a subsequent expansion phase".

Details of the proposed elements of the plan are set out in appendixes and in particular appendix C which is headed "Indicative Scale/Development Parameters". Para. 1.0 of that appendix concerns the Terminal and includes a range of costs per m² from a number of experts with the lowest being €3,340 from the London based consultancy E.C. Harris and the highest being €3,800 from Bruce Shaw being costs consultants to Ryanair. T2 is described as being 98,420-70,000 m² which is presumably a gross figure, and would appear to convert to 40,000 to 60,000 m² nett. However it is further noted that "the sizing of a Terminal is best realised by establishing a brief and breaking down the individual functional demands so that they can be translated, via design development process and sign-off gateways, into specific spatial design solutions". It is also clear that the costings were tentative in that para. 1.0 of appendix C also notes that it was necessary to verify if the costs included 15% design and PM, 5-15% risk & contingency. Finally it is noted that the minimum spatial requirements were dependent on the analysis of a large amount of variables which are set out.

7.3 I am not persuaded, particularly having regard to the fact that, on its own terms, the Pascall and Watson Plan requires further work to be done before determining the precise parameters of the proposal to go to planning and, indeed, the phasing of the development, and that, insofar as it is specific, it gives quite broad ranges both of size and expense, that it can be said that the proposal now under challenge is something entirely different from that contained in the Pascall and Watson report. It is undoubtedly bigger. It is undoubtedly dearer. But it is not, in my view, something entirely different.

7.4 If Ryanair had wished to impose parameters on the scale and expense of the development which it was precluded from challenging, then it should have done so by including within the terms of the agreement, specific provisions detailing either the limits on the proposal which it was precluded from challenging or clear criteria by reference to which an independent observer could objectively judge whether the differences were such as would remove the obligation not to challenge.

7.5 I am, therefore, satisfied that Ryanair is precluded by the terms of the settlement agreement from mounting the challenge which is contained in these proceedings. I have come to that view principally because I am satisfied that these proceedings amount to a challenge connected with the government decision in respect of the second terminal, but even if I am wrong in that conclusion I would have remained of the same view, because I am not satisfied that, on any construction, Ryanair is absolved from its obligation not to challenge save in respect of a proposal which is so radically different from that contained in the Pascall and Watson Plan as to amount to something entirely different. For the reasons which I have set out I am not satisfied that this proposal can be so characterised.

7.6 There remains only for consideration the estoppel argument put forward on behalf of Ryanair to which I now turn.

8. Estoppel

8.1 Under this heading Ryanair argues that the DAA is now precluded from seeking to have Ryanair prevented from mounting the challenge in these proceedings because the DAA did not prevent Ryanair from engaging as an effective objector or opponent in the planning process which led to the grant of the impugned planning permission by the Board.

8.2 In its original replying affidavit Ryanair, contended that its involvement in the planning process had not been the subject of any objection on the part of the DAA. However it is now accepted that, in the course of the planning process (some four months before the Board decision which is sought to be impugned in these proceedings) Mr Collier wrote to Mr O'Leary on the 23rd of April 2007 indicating that the DAA "have a legally binding agreement with Ryanair that it will not challenge the development of T2". It does not appear that there was any direct response to that letter but some six weeks later Mr O'Leary wrote to the Chairman of the DAA, indicating that there was no agreement from Ryanair "that we will accept the development of an €800m T2 which is badly designed and in the wrong location, when this facility can and should be built on the North apron at a fraction of the cost proposed by Ryanair". It is worthy of some little note that one of the specific matters that was determined by the Pascall and Watson Plan was that, contrary to Ryanair's position, the second terminal should not be built on the North apron. The reactivation of the contention that the second terminal should be built on the North apron is clearly a challenge to the implementation of the Pascall and Watson Plan. Neither is it obvious that the quality of the design, as such, was a matter open to challenge even on the basis of the case as now put on behalf of Ryanair.

8.3 Be that as it may it is clear that the question of Ryanair's entitlement to object in the planning process was raised in the course of that process. It is fair to state, of course, that the DAA did not take any steps to preclude Ryanair from being so involved.

8.4 The DAA suggest that the settlement agreement only precludes Ryanair from becoming engaged in legal challenges having regard to the fact that the word challenge is used in the context of a legal challenge in the first para. of the settlement agreement. It does not, however, seem to me to be necessary to determine whether the DAA would have been entitled to preclude Ryanair from acting as an objector at the planning stage. The DAA raised the question during the planning process and Ryanair maintained, somewhat belatedly, that the proposal was outside the scope of the restrictions imposed by the settlement agreement on Ryanair. In those circumstances it does not seem to me that the DAA can be said to have been guilty of any form of action or inaction which would warrant reaching a conclusion the DAA is now estopped from raising the question of Ryanair's entitlement to challenge by way of judicial review the decision of the Board to grant planning permission for T2.

8.5 On balance I am inclined to the view that a person making observations in the course of a planning application before the planning authority (even if those observations are negative) could not be regarded as challenging the proposed development. I would be inclined to the view that the bringing of an appeal against the grant of permission to the Board would, however, amount to a challenge. If no party chooses to appeal to the Board then the original notification of an intention to grant permission by the planning authority converts into a planning permission automatically. A distinction can, therefore, be made between an appeal to the Board which imposes a significant additional aspect to the process and the making of observations to the planning authority which, while they may be designed to dissuade or otherwise adversely influence the grant of a planning permission in respect of the application as made, nonetheless do not, in fact, alter or in way delay the process as whole. While it is true to state that Ryanair undoubtedly incurred cost in mounting an appeal to the Board, Ryanair also obtained the benefit of having its views considered by the Board and it does not seem to me that it can be said that Ryanair has acted to its detriment by reason of any inaction on the part of the DAA. In any event the DAA did, in fact, raise with Ryanair the propriety of Ryanair's actions having regard to the settlement agreement. Against that background it does not seem to me that an estopple can lie.

9. Conclusions

9.1 I am, therefore, of the view that the DAA are not precluded from bringing this application. For the reasons which I have already indicated I am satisfied that Ryanair are prevented, by reason of the settlement of the previous proceedings and the terms of that settlement, from maintaining the challenge to the grant of permission by the Board which is at the heart of these proceedings. In those circumstances I am satisfied that the proceedings should be dismissed.