

**THE HIGH COURT  
COMMERCIAL**

**2007 No. 1246 J.R.  
[2007 No. 134 COM]**

**BETWEEN**

**RYANAIR LIMITED**

**APPLICANT**

**AND  
THE COMMISSION FOR AVIATION REGULATION**

**RESPONDENT**

**AND  
DUBLIN AIRPORT AUTHORITY PUBLIC LIMITED COMPANY**

**NOTICE PARTY**

**Judgment of Mr. Justice Clarke delivered on the 20th day of May, 2008**

## **1. Introduction**

1.1 This judgment is supplemental to a judgment delivered by me in this case on 11th April last ("the previous judgment"). The parties are described in this judgment in the same fashion as they were in the previous judgment. Similarly, the various technical terms appearing in this judgment are used in the same way as previously. As appears from the previous judgment, the only order which I was prepared to make at that stage was one referring back the "review decision" to the CAR for the purposes of the CAR clarifying the extent to which statements contained within the relevant review decision paper concerning the inclusion of capital expenditure in the RAB formed, in the view of the CAR, part of its determination in the exercise of its statutory function on the one hand ("the statutory determination") or were simply indications of its current thinking on the other hand. (See para. 10.1 of the previous judgment). As is also clear from the same para., the direction concerned required the CAR to come to a revised decision making those matters clear.

1.2 On foot of that direction the CAR produced what is described as a clarification to which it will be necessary to refer to in detail in due course. In summary, however, the clarification suggests that, in the view of the CAR, those elements of the review decision concerning the inclusion of capital expenditure into the RAB formed part of its determination in the exercise of its statutory powers. In the light of that document it is necessary to now address the remaining issues which arise in these proceedings. However, I propose firstly setting out the terms of the clarification, together with the issues which now arise for decision.

## **2. The Clarification**

2.1 On foot of the direction given as a result of the previous judgment, the CAR issued a document entitled "Ryanair v. Commission for Aviation Regulation; clarification of review decision". As that document is brief I propose setting it out in full. It is in the following terms:-

"As part of the exercise of its statutory function to review its earlier determination and, if it saw fit, to amend that determination, the Commission for Aviation Regulation ("CAR") set out in its Final Decision on its Interim Review of the 2005 determination ("the review decision") the reasoning which led the CAR to the conclusions it reached on such review. The CAR regards such reasoning and the individual decisions which it takes in the course of such reasoning as an integral part of its determination in the exercise of its statutory functions. In particular, in the view of the CAR, statements and decisions contained in the review decision concerning the inclusion of capital expenditure in the Regulatory Asset Base ("RAB") form part of its determination in the exercise of its statutory functions. Decisions such as decisions on the inclusion of capital expenditure in the RAB have to be taken to enable the CAR to decide on the maximum level of airport charges or whether (on a review) a previous determination should or should not be amended. Thus, such decisions are regarded by the CAR as necessarily part of the formal exercise of its statutory powers.

The CAR's reference in the review decision to making no change to the existing determination was intended to be and, looking at the document as a whole, is, in the view of the CAR, clearly a reference to the fact that it decided to make no change to the maximum level of airport charges. So understood, there is in the view of the CAR no inconsistency between (a) the fact that some of the factual circumstances, reasoning and individual decision leading to the conclusion differ from the earlier determination and (b) the fact that the conclusion is to leave the maximum level of airport charges unchanged."

2.2 As is clear from the previous judgment, and in particular para. 10.1, the obligation on the CAR was to produce a revised decision clarifying the issues specified in that para. On that basis it is clear that the original review decision together with the clarification need to be read as one and represent a new, revised or clarified decision.

2.3 Subsequent to delivering judgment on 11th April last, the case was adjourned for mention to allow the CAR to consider its position. It was subsequently indicated on behalf of the CAR that the clarification which I have cited in full had been made. On that basis written submissions were exchanged between the parties as to the final orders which should, as a consequence, be made in these proceedings. Oral argument was subsequently conducted on 8th May, and this judgment is directed towards the issues raised together with the costs of the proceedings which were also addressed in argument on that date.

2.4 It is important to recollect the issues which remain for decision as a result of the previous judgment. For the reasons set out in the previous judgment all of the arguments put forward on behalf of Ryanair which concerned the merits of the decision taken by the CAR were rejected. In the light of the lack of clarity which I identified as to whether those aspects of the review decision concerning the inclusion of capital expenditure in the RAB formed part of the statutory determination, I left over until after the clarification directed had been received, a final consideration both of the proper construction to be placed upon the statutory determination and questions as to whether Ryanair was entitled to pursue the arguments relied on at the hearing within the ambit of the case as currently pleaded. I propose, therefore, to address the issue of the proper construction of the statutory determination and, having done so, to consider the specific issues which remain for decision within these proceedings being the issues arising from the debate as to whether the case as ultimately argued was within the pleadings and whether there remains any basis for Ryanair's challenge to the decision of the CAR.

2.5 However, before going on to deal with the substantive issues which arise, it seems to me to be appropriate to make a number of observations concerning some points made both in the written submissions and in the course of the oral hearing. I now turn to those

preliminary observations.

### 3. Some Preliminary Observations

3.1 Some aspects of the submissions made on behalf of Ryanair require comment. Firstly, it was suggested on behalf of Ryanair that the CAR had not complied with the direction which I had given as a result of the previous judgment. This is, in my view, manifestly incorrect. Ryanair placed reliance on para. 8.12 of the previous judgment in which I made certain general comments on the importance of there being absolute clarity as to what elements of any document recording decisions of the CAR amount to the formal exercise of statutory powers on the one hand, or amount to the giving of indications or guidance concerning current thinking on the other hand. However, it is clear that that para. enunciated a general principle rather than imposed any direct obligation on the CAR. The passage from the judgment which indicated the precise obligation which was to be placed on the CAR by virtue of the direction which I made is to be found in para. 10.1, in which passage the CAR was required to clarify the extent "to which the statements contained within the decision paper concerning the inclusion of capital expenditure in the RAB form, in its view, part of its determination in the exercise of its statutory function on the one hand or simply indications of its current thinking on the other hand".

3.2 It is manifestly clear, therefore, that the only obligation placed by that direction on the CAR was to clarify one matter as specified. The fact that a general observation concerning the desirability of a single decision document (containing both statutory determination decisions and guidance) making the distinction between such matters clear was made elsewhere in the judgment, did not impose on the CAR any obligation to clarify any other aspects of its decision. The reason for this is obvious. The only aspect of the decision which was under challenge in this case was the inclusion of capital into the RAB. It was not, therefore, necessary to consider whether there might or might not be other aspects of the decision in respect of which legitimate confusion might arise as to whether those aspects formed part of the statutory determination. The only aspect of a potential lack of clarity as to what might amount to a statutory determination or mere guidance, which was relevant in these proceedings, concerned the admission of capital into the RAB. It was for that reason that the actual direction set out at para. 10.1 was confined to that matter. I am, therefore, totally satisfied that there is no substance in the contention made by Ryanair that the CAR did not provide the clarification which it was directed to do.

3.3 A second point made by Ryanair suggested that it was impermissible for the CAR to include capital in the RAB where the only practical purpose of such inclusion would be to effect maximum charges in future regulatory periods (and not, therefore, those applicable during the current regulatory period). That submission, quite frankly, flies in the face of para. 9.8 of the judgment in which I indicated that I was satisfied "that there is nothing inappropriate in the making of an immediate decision as to the inclusion...of assets into the RAB even though the effect of such inclusion... may have its principal, or indeed only, practical consequences for user charges during some subsequent regulatory period". (Emphasis added). It is again manifestly clear that I came to the view that it was permissible to include capital into the RAB even though the *only* practical effect of its inclusion would be solely in a subsequent regulatory period. The attempt by Ryanair to argue this point amounted, therefore, to a clear and impermissible attempt to re-open an issue which had already been decided against them.

3.4 The third and final preliminary observation concerns the status of the original decision as revised in accordance with the clarification. On this aspect of the matter it is necessary to comment on the arguments made by both Ryanair and the CAR. The CAR argued that it was clear from the original review decision that the decision to include capital in the RAB amounted to part of the statutory determination. Frankly that argument seems to me to be also inconsistent with the previous judgment. If what the CAR asserts to be clear was, in fact, clear, then it would have been wholly unnecessary, and indeed inappropriate, for me to make the direction which is set out at para. 10.1 of the previous decision. It was the very fact that it was not clear as to whether the change in the RAB formed part of the statutory determination (for the reasons which I sought to analyse in the previous judgment) that led me to give the direction concerned.

3.5 However, likewise Ryanair now seek to suggest that the clarification is clearly an attempt to change the previous decision which, Ryanair suggests, clearly did not involve a change in the determination and which, consequently, it is said, could not have involved a change in the capital admitted into the RAB. For like reasons that argument is, in my view, inconsistent with the previous judgment.

3.6 The previous judgment is, I trust, expressed in careful terms. It does, indeed, make clear that the CAR is not being invited to alter its statutory determination in any way. The CAR was merely required to clarify which elements of a relevant document were, *in its view*, part of that statutory determination.

3.7 On the basis of those observations it seems to me to be appropriate to turn to what seems to be the only real issue of substance (as opposed to procedural questions) which remains for decision. That is the question of the proper interpretation of the statutory determination by the CAR in the light of not only the original review decision, but also the clarification. It is also important to note that the CAR was directed to make a clarification as to what, *in its view*, constituted part of the statutory determination. It is clear that the court is not, necessarily, bound by any such clarification. Likewise it is clear from the previous judgment that, once the relevant clarification had been made, it would "then be possible to make a judgment as to the status and validity of that part of the document" (see para. 8.14). I would also emphasise the comment made later in the same para. where I indicated that a court "must construe a binding statutory decision as it finds it and if a proper construction, resolving any ambiguities in accordance with established legal principles, does not accord with the views of the decision maker, then the courts interpretation must, nonetheless, prevail".

3.8 It is that task which must now be attempted. The CAR has made a revised decision which makes clear that those aspects of the original review decision concerning the inclusion of capital in the RAB form, in its view, part of the exercise of its statutory determination function. In the light of that fact it is necessary, as indicated in the previous judgment, to approach the question of the proper construction of the statutory determination in accordance with proper legal principles. I, therefore, address that question.

### 4. The Construction of the Determination

4.1 For the reasons which I have already indicated I cannot accept the submission made on behalf of the CAR to the effect that a reading of the review decision as a whole necessarily makes clear that the alteration in capital admitted into the RAB formed part of the statutory determination. Likewise, I cannot accept the argument of Ryanair to the effect that the statement in the review decision to the effect that there was to be no change in the determination can be viewed without reference to the remainder of the document, so as, as Ryanair argued, to make it clear that the inclusion of capital into the RAB was not part of the statutory determination. There is, in my view, a clear ambiguity. That ambiguity needs to be resolved in accordance with established legal principles, the most important of which is to the effect that the text of the document (or documents) needs to be considered as a whole and in its context. It is clear that the decision to include capital into the RAB came about as a result of a process during which all parties, including Ryanair, made representations concerning the amount and timing of the inclusion of capital into the RAB. That consideration of making such a decision was "on the table" during the process is without doubt. Indeed, as I pointed out in the previous decision, Ryanair made cogent argument as to why it was preferable that any decision on the inclusion of capital connected

with the Terminal 2 project into the RAB should be made then rather than later. The context includes, therefore, the fact that consideration was being given as to whether it was appropriate to make an immediate decision as to the extent, if any, to which it was appropriate to include capital into the RAB, even though the consequences of such inclusion might, in practical terms, be in future regulatory periods. The clarification issued by the CAR makes clear that, in its view, the decision concerning the immediate or early admission of capital into the RAB formed part of the statutory determination. As I have indicated I do not consider myself bound by that clarification.

4.2 The arguments put forward to Ryanair to the contrary do not, however, seem to me to be weighty. A number of materials are referred to which, it is said, are inconsistent with the clarification. Reliance is placed on paras. 6 and 7 of the statement of opposition which are in the following terms:-

"6. The effect of the Determination was that airport charges should not be altered and that the Determination of September, 2005, in respect of the airport charges, as varied on 22nd June, 2006, should remain unchanged.

7. It is admitted that the respondent included in the paper containing the Determination indications as to the proposed treatment of capital expenditure (CAPEX) incurred in respect of Terminal 2 during the regulatory period 2006 – 2009 in the regulatory period 2010 onwards..."

4.3 It is said that those paras are inconsistent with the assertion that those aspects of the review decision which deal with the inclusion of capital expenditure into the RAB amount to part of the statutory determination. I accept that the paras are capable of being construed in a number of different ways. However, para. 6 refers to the determination in respect of airport charges as being unchanged. There is no doubt that that aspect of the determination (i.e. the final figure fixed in respect of maximum charges) remained unchanged. While ambiguous I am not satisfied that those paras could provide any reasonable basis for Ryanair's submissions.

4.4 Likewise the various passages from the affidavit evidence of the Commissioner relied on need to be seen in the context of the Commissioner making clear (as seems to be the case), that there had been no pre-determination of the actual maximum charges for the next regulatory period.

4.5 I am not, therefore, satisfied that there is anything inconsistent between the clarification and the views (albeit sometimes expressed in ambiguous terms) of the CAR as set out in the statement of opposition and, to a lesser extent, in the affidavit evidence.

4.6 On that basis it is clear that it is necessary to look at both the review decision and the clarification so as to construe the terms of the statutory determination. I am satisfied that, on a proper construction of the documents taken as a whole and taken in their context, and notwithstanding the ambiguity introduced into those documents by the unfortunate phraseology used concerning the lack of change in the determination, the statutory determination, properly construed, is to the effect that the determination was in fact changed in the sense that there was an alteration in an important building block of the regulatory model even though other counterbalancing changes did lead to there being no alteration in the maximum price permitted. For those reasons I am satisfied that the proper construction to be placed on the statutory determination of the CAR is that it gave effect to a change in the original determination by virtue of the alteration of the RAB.

## **5. The Consequences**

5.1 In the light of that finding it is, therefore, necessary to return to the precise issues which arise in these proceedings.

5.2 Firstly, as indicated in the previous decision, it is necessary to consider whether the case as made by Ryanair was encompassed within the original application for leave. While there is no doubt that Ryanair sought to challenge, in general terms, the inclusion of capital expenditure in the RAB, I am not satisfied that the case as originally made involved a challenge on the basis that a purported inclusion of capital in RAB took place outside the context of a formal statutory determination. If there were to be any doubt about that matter it is only necessary to refer to the list of issues prepared by Ryanair dated 24th October, 2007. Eight issues are set out in that list. Issues two and four to eight inclusive concerned the "merits" of the decision made by the CAR. Issues one and three are those concerned with the principle behind the inclusion of capital expenditure into the RAB. It is clear that issue one sought to challenge such inclusion on the basis that it occurred at an interim review. There is nothing in the text of that issue to suggest that it was to be contended that the allowance of capital expenditure into the RAB was impermissible by virtue of the fact that it was contained within a portion of the review decision which did not form part of the statutory determination. The only hint that such an argument might be made is the reference, in parenthesis, in issue one to "commitment, indication and/or clarification". To say the least of it, it is by no means clear that the point ultimately sought to be relied on was intended to be raised by that issue.

5.3 Issue three involved a contention that the review for the next regulatory period was rendered redundant by the inclusion of capital in the RAB. This, again, does not encompass the issue ultimately relied on by Ryanair.

5.4 However, it does seem to me that it is likely that the documentation exchanged between Ryanair and the CAR was such that both parties were, to some extent, at cross purposes. Having regard to the fact that the argument as ultimately made was at least directed to the same general issue (albeit in a materially different way) to the original claim as made in the statement of grounds and to the fact that the absence of clarity may have been, at least in part, due to the parties being at cross purposes, it is not my view that Ryanair could properly have been excluded from making the case which it sought to make on procedural grounds alone and, if necessary, I would have been prepared to extend time for an amendment to the statement of grounds to enable that point to be properly raised, if it had proved to be a ground upon which Ryanair would otherwise have succeeded.

5.5 In addition, and having regard to what I have found in the previous judgment to be a significant lack of clarity as to the precise elements of the review decision which amounted to part of the statutory determination of the CAR, I am of the view that there were substantial grounds, sufficient for the purposes of leave in a case such as this, for Ryanair's contentions under this heading.

5.6 Had there been, therefore, two separate hearings rather than the sensible amalgamated approach to which the parties agreed and which I outlined in the previous decision, I would have been prepared to grant Ryanair leave to amend the statement of grounds and leave to seek judicial review on the basis of the contention that it was arguable that a purported binding decision to include capital expenditure into the RAB had been made outside the confines of a statutory determination. For the reasons set out in the previous decision all other grounds were not, in my view, arguable to the point of providing substantial grounds for a challenge and I would not have granted leave in respect of any such grounds.

5.7 It follows that had there been two separate hearings Ryanair would, in my view, have been required to seek and obtain an amendment but, having obtained that amendment, would have obtained leave on the limited grounds which I have identified.

However, for the reasons set out in this judgment it also follows that at the substantive hearing, the case made in relation to those grounds would have failed on the basis that a proper construction of the review decision led to the conclusion that there had been an alteration in the determination by the inclusion of additional capital into the RAB. For the reasons set out in the previous judgment I am of the view that there is nothing impermissible about such a course of action.

5.8 It follows that Ryanair's claim must be dismissed in its entirety. That leads to the question of costs.

## **6. Costs**

6.1 The basic starting position must be informed by the fact that Ryanair have failed in these proceedings and are prima facie liable to pay the costs, not only of the CAR, but also of the DAA who had a vital interest in the issues raised. It is necessary, however, to give consideration as to the extent to which there might legitimately be any amelioration in that position by virtue of a number of factors:-

A. The fact that I am satisfied that leave would have been granted albeit on a much narrower basis than that asserted, in the event that the statutory process of a two stage hearing had, in fact, occurred.

B. The fact that I was satisfied that significant difficulties were encountered by virtue of what I found to be a lack of clarity in the review decision of the CAR; but

C. Also taking into account the fact that I was satisfied that, in order to make the case in respect of which leave would have been given, Ryanair would have required an amendment to the statement of grounds.

6.2 In all those circumstances it seems to me that the justice of the case will be met by confining the CAR to 50% of the costs of the proceedings. No reduction in the costs of the DAA would appear to be appropriate as the DAA could not be said to bear any responsibility for any lack of clarity in the decision of the CAR. I will, therefore, award the DAA the full costs of these proceedings including all reserved costs. I will award the CAR 50% of the full costs of these proceedings including any reserved costs.

## **7. A Final Point, an Appeal?**

7.1 I would wish to make one final comment. As is clear from the previous judgment there was considerable debate between the parties which centred on the statutory entitlement of a party such as Ryanair to appeal a decision of the CAR. As pointed out in the previous judgment there are at least two possible bases upon which the Minister who, as I pointed out, took the view that no appeal lay, may have come to such a view. It is no part of my function in this case to make any definitive ruling on such matters, most particularly because the Minister is not a party to these proceedings.

7.2 One possible basis upon which the Minister may have been advised that an appeal did not lie may be that a view was taken (whether rightly or wrongly) that an appeal did not lie from a determination on an interim review as a matter of the proper construction of the Act. If that was the view of the Minister and if the view was correct in law then it would, of course, potentially expose a lacuna in the legislation but other than drawing attention to that possible fact, it does not seem to me that it is open to this Court to do anything about any such possible lacuna. If, of course, the view of the Minister on that issue was as stated but is wrong in law, then Ryanair had an effective remedy by bringing proceedings against the Minister at the relevant time.

7.3 An alternative basis for the Minister's view may have been that the Minister may have been advised that an appeal lay, in principle, from a decision on an interim review but did not arise on the facts of this case, because there had been, in the view of the Minister, no change in the determination. In the light of what I have described as the unfortunate wording of the decision of the CAR it is easy to see how the Minister could have come to such a view. However, it is clear that, if the Minister did come to that view, he was, however understandably, incorrect, in that it has now been established that there has been a change in the statutory determination.

7.4 In addition, in that context, it is important to note that para 10.1 of the original judgment required the CAR to come to a revised decision which made clear the matter specified in that para. The clarification document together with the original decision of the CAR on the review process amount, therefore, in my view, to such a revised decision, which in turn I have interpreted as giving rise to a change in the statutory determination. There could, in my view, no longer, therefore, be any basis for a proper conclusion that no appeal lay solely on the grounds that there had been no change in the determination. Whether that fact can or should alter the Minister's position is a matter which is, at least initially, for the Minister and may well be dependent on the basis of the Minister's earlier advice. It would be inappropriate for me to say anything further on this issue.