[2008] IEHC 386

THE HIGH COURT

Record No. 2008 1049 SP

BETWEEN:

MANORCASTLE LIMITED

APPLICANT

AND

COMMISSION FOR AVIATION REGULATION

RESPONDENT

Judgment of Mr. Justice Charleton, delivered ex tempore on the 28th day of November, 2008

1. This is an appeal pursuant to statute against the decision of the respondent to refuse to renew the applicant's licence to act as a tour operator, which decision was made on the 24th of October 2008 and in effect caused the termination of the existing licence on the 31st of October 2008, which was the last day of its operation. However, under the Transport (Tour Operators and Travel Agents) Act 1982 ('the 1982 Act'), once an appeal against such a decision is taken the applicant is entitled to continue trading pending the determination of that appeal.

2. The history of the matter requires me to consider a number of facts. The appropriate method of examining those facts shall be determined after I recite them, as one of the crucial questions in this case is: what is the nature of the review that I am conducting? Is it a judicial review, a complete rehearing, or some combination of the tests laid down by the courts in the various cases involving such licensing decisions?

Factual Background

3. For a number of years, the applicant has carried on business both as a tour operator and as a travel agent. As I understand it, in 2008 it decided not to continue acting as a travel agent but wished to continue acting in the ordinary way as a tour operator. The first relevant date for present purposes is the 31st of July 2008, when the applicant was contacted by the respondent and questioned in relation to certain accounts, specifically its annual accounts up to the 31st of December 2007. Apparently, there had been an error in submitting these accounts and they arrived late as a result. That would not have been a serious issue, as far as the respondent was concerned, but for what emerged on the examination of those accounts.

4. I understand that the auditors employed on behalf of the applicant were L'Estrange & Company. They advised the respondent on the 25th of July 2008 that the applicant's licensable turnover during the period from the 1st of November 2007 to the 30th of April 2008 amounted to €1,293,699. The accounts which arrived with the respondent, which has a statutory entitlement to them, indicated a number of matters which the respondent regarded later as being disquieting. In the notes to the accounts which arrived in August or September, there is heading indicating a fundamental uncertainty in relation to the calculations. This reads:

> "The financial statements have been prepared on an ongoing basis. For the reasons outlined in Note 17, this basis may not be appropriate. Because of the potential impact of this uncertainty, we are unable to form an opinion as to whether the financial statements give a true and fair view of the state of the company's affairs, as of 31st December 2007. In all other respects, in our opinion, the financial statements have been properly prepared in accordance with the Companies Acts 1963 to 2006".

5. In the accounts, the note indicating a concern (note 17) made reference to a number of matters. These merit quotation. Under the heading "Going Concern" it says:

> "The financial statements have been prepared on the "going concern" basis which assumes that the company will continue in operational existence for the foreseeable future. During the year the company incurred a loss after depreciation of €630,105. The directors put €624,000 of their own funds into the company, some of which went in before and some after the year end. A number of factors would affect the company's ability to continue to trade for the foreseeable future:
>
> (1) The company will require the continued support of its bankers who provide overdraft and credit card facilities;
> (2) The company will have to cut its wages and overhead expenditure significantly to avoid a repeat of such losses;
> (3) The company did not [renew] its travel agency licence in May 2008, and hence will have to rely entirely on business from tour operators;
> (4) The ability of the directors to continue to support the business financially is now much reduced as a result of the personal equity which they put into the company to fund last year's losses. In addition, the current banking difficulties/credit crunch makes it far more difficult generally to borrow money. The directors may have difficulty trying to borrow further funds to support the company;
> (5) The company will require continued credit facilities from its suppliers, some of whom are overdue;
> (6) The economic downturn now being experienced is likely to have a bearing on many travel agents/tour operators".

6. Shortly thereafter, it became apparent that there had been an error made by the applicant, in that it had not actually applied to renew its tour operator's licence. There was a meeting on the 22nd of August 2008 at the offices of the respondent at which both parties were represented. The memo prepared in that regard indicates that the main object of the meeting was to discuss what were called the "disastrous results" for the year ending the 31st of December 2007. In that regard, I note from reading the accounts that the profit for the year ending the 31st of December 2006 was €64,223 while there was a loss for the year ending the 31st of December 2007 of some €630,105.

7. An explanation was sought in relation to the loss and, having regard to the statutory scheme, it is obvious that the respondent has the right to seek such an explanation. It has a duty to ensure that persons conducting business as a tour operator have the necessary financial resources to do so. The first explanation provided by the applicant was based on the chartering of unnecessary aircraft for the trip to Lapland in December 2007, a mainstay of the company's operation and something which it pioneered to the great satisfaction, I am sure, of those who have been on this trip. The second explanation concerned difficulties experienced with a Bulgarian ground-handler in relation to a matter in which the applicant believed that it had been wronged and in respect of which it was considering issuing legal proceedings in Bulgaria.

8.Despite those explanations in relation to the loss, the respondent had a number of other concerns in relation to the auditor's report,

the draft accounts and the "full accounts" which had been forwarded. The respondent was concerned that there had been no changes in the shares or shareholding to convert loans from the directors and that no management accounts had been prepared in relation to the current year, as of the date of the meeting of the 22nd of August 2008. The applicant regarded the preparation of such accounts as highly expensive but it was put in clear terms, it seems to me, by the respondent that it was necessary to have such accounts.

9. The respondent was also concerned that the expenses bill had jumped considerably and that the current bank account had been depleted over a number of years by approximately €400,000, which is perhaps understandable in the context of the unfortunate losses of the company. However, the balance sheet was in negative territory and also the respondent was concerned that the directors had injected in excess of €500,000 over one year by way of loans. The respondent was of the view that this stimulus was potentially insufficient. There were also a number of other general points that exercised the respondent's attention and in respect of which they addressed their concerns to the applicant.

10. I will deal with the issue of the appropriate test on this appeal in due course. I must also consider the limits of the Court's ability to critically review the evidence. Is the review by the court limited to evidence existing on the date of the decision, the 24th of October 2008, or is it possible for the Court to examine evidence arising after that date? It seems to me that one of the issues of greatest concern is whether or not there was sufficient allowance given by the respondent to a responsible company carrying on business for many years to make its case. I note that under the 1982 Act, the Minster, and now the respondent, cannot actually withdraw a licence or fail to renew it unless a reasonable opportunity is given for the company trading as a tour operator and having a licence in that regard to make submissions. I therefore continue by noting that on the 25th of August 2008, the respondent wrote to the applicant indicating some of its concerns in relation to accountancy matters and noting the desirability that the applicant should have an in-house accountant. Through the next number of weeks there was further communication, during which a suggestion was made that the directors' loans should be structured in a more concrete fashion so that they could not be withdrawn to the ruin of the company. It is unclear whether the applicant volunteered such a move or whether it was requested by the respondent. For present purposes, I am accepting that the applicant came up with this idea because that is the most beneficial interpretation.

11. On the 19th of September 2008, a letter of subrogation was written by the applicant for the attention of the respondent. That indicated that of the directors' loans amounting to over €600,000, as of the 30th of June 2008, €350,000 would not be withdrawn from the company, in other words recalled by the directors, without the express consent of the respondent. This assurance provided a degree of comfort. On the 19th of September, the application for a licence under the 1982 Act was made by the applicant. As I have already noted, it seems that it was the letter from the respondent of the 31st of July 2008, inquiring about the accounts, which caused the applicant to realise that there had been a mistake in this regard. The refusal of this licence is the focus of this statutory appeal.

12. Nothing turns on the application in itself or the wording thereof. Matters then proceeded because at this point the respondent was actively considering the renewal of the licence. On the 6th of October 2008, an e-mail was received by the applicant from John Mullaney in which the respondent indicated that it was still awaiting management accounts up to the 31st of August 2008 as well as a profit and loss account balance sheet in respect of the company in order to review the licensable turnover from the 1st of November 2007 and also to ascertain whether the current statutory bond, providing monies for travellers in the event of a collapse, needed to be increased. Each tour operator is required to have a bond of ten percent of projected or likely turnover available in the event of a crash in its business whereby persons may be stranded abroad and that money is then available to deal with their concerns about getting home and other distress they may suffer.

13. On the 10th of October 2008, the respondent sent what I would regard as a warning letter to the applicant. That warning letter went through a number of points. Firstly, an issue had arisen as to whether the applicant was due a VAT refund. There has been a great deal of argument in relation to this entitlement and also as to whether a VAT refund can be equated to money in the bank. I should say that I am taking the view that a VAT refund is in fact likely in relation to this company. Another concern was raised in relation to the fact that the respondent had suggested that the loans should be not simply the subject of a subrogation letter but should be converted into equity, but that this had not yet been done and had yet to be accepted by the applicant. As of the date of the warning letter, the loans merely remained the subject of a subrogation letter.

14. In addition, an issue was raised in relation to the management accounts up to August 2008 and as to whether the information that had been supplied was sufficient for evaluation purposes. The respondent further queried the negotiation of rates for a number of charter flights to Lapland for a Santa Claus-type experience, expressing concern was that there was no evidence of an ability to pay for these charter flights, notwithstanding a cash flow forecast. The respondent noted that charter contracts for the Christmas period of the 5th to 23rd December had not been supplied, nor had payment schedules been provided. The respondent raised concerns in relation to the bank overdraft which then stood at €100,000 which was authorised and personally guaranteed by a director of the applicant. In relation to the accrual of directors' loans and other debts of the applicant, the respondent indicated: "the Commission's concern that the company's financial condition is nothing less than grave".

15. The respondent went on to state that it remained to be convinced that it should further process the application and issue a licence as of the 31st of October 2008. On the 22nd of October 2008, a memo internal to the respondent was written summarising the financial situation of the applicant. It noted: that the loss for the year ending the 31st of December 2007 was €630,105, shareholders funds then being negative at €503,000; that a reduction in turnover from 2007 to 2008 to €470,000 had occurred, whereas costs had increased by €374,000; that the cash outflow for the year was €177,000; and that liquidity was bad; and that the asset ratio of debt to liquid assets was 0.55:1. The respondent is apparently of the opinion that a company should have an asset ratio of 2:1, but the applicant had a bank overdraft of €155,000 as of the 31st of December 2007. Following this, the relevant accounts were reviewed.

16. I also note in this context that a number of meetings took place between the parties. Among these meetings were those already noted and which are minuted, but also a number of meetings prior to the decision of the 24th of October 2008. It seems to me that the fact that meetings are held is important, not just from the point of view of the statutory and constitutional duty of an administrative body to provide reasons, but also owing to the fact that a singular responsibility has been placed on the respondent to exercise its expertise in assessing whether the material put before it as to solvency and ability to carry on trading is credible. In order to limit the danger to holiday makers of being stranded overseas, the respondent must determine whether an application is credible and whether it is made by persons who are regarded on a face-to-face meeting as being reliable.

The Refusal

17. On the 24th of October 2008, the refusal letter, which is the focus of this case, was issued. The decision to refuse a licence was

based upon the applicant's trading position which I have already described. The respondent was not satisfied by the applicant's sales figures. By way of an aside in this regard, I note that at the commencement of negotiations there were sales of around 290 to 300 passengers for the planned Christmas Lapland trip. As of the 29th of October, a number of days after the letter, there were sales of 710 passengers. At the date on which the affidavit on behalf of the applicant was filed in this case, sales stood at around 900. As of the date of hearing, I understand that they are at 1,000 passengers or thereabouts. The break-even point is 1,200 passengers, and I understand the maximum number of seats available is 1,474. The first flights are scheduled to depart in six or seven days' time.

18. As a second matter of concern, the asset ratio was noted as being 0.28:1, having further descended from 0.55:1. In addition, there was concern about bookings for travel as of the 1st of November and the amount that the company had on deposit with a view to paying for the flights and accommodation of those travelling. There was further worry in relation to a debt to Etihad Airways of €40,000. The respondent was concerned that there was no evidence of the existence of contracts in relation to the trips to Lapland, although this did not appear to be the case in respect of the Dubai trips that were the other proposed mainstay of the applicant's business. In addition, an overdraft of €100,000 had been authorised by the bank and guaranteed by the directors although this was not mentioned in the latest cash flow projection. The respondent also indicated that the business and organisational resources of the company were not adequate. The refusal letter stated:

> "The financial condition of the company is critical and the company's own resources to effectively manage the crisis have not been put in place. To address the Commission's urgent concern in that right, a commitment was made as of 25th August last to provide training in accounts to a member of your staff but this has not been met".

19. I think it is fair to note that a reply to the letter was sent on the 29th of October.. The reply indicated that the applicant felt that a number of concerns raised by the respondent had been addressed. First, the advance sales in relation to the Lapland trips by then stood at 710 passengers, a fact which I have already mentioned. Second, the directors were had made a resolution for the purposes of converting their loans into share capital and, as such, the asset ratio had markedly improved. Third, one of the directors had put in €100,000 from his own funds. Fourth, the debt of €40,000 to Etihad Airways had been reduced by €5,000. Fifth, there was a now schedule in place in relation to the trips to Lapland. Sixth, it was suggested that the company's overdraft was unlikely to be called in. Seventh, the cash flow projections were, in the applicant's submission, strong. In this regard, there was a reference to the VAT refund of some €298,000 which was said to be due. In addition, money had been saved on advertising costs.

20. As such, those were the respective positions of the parties. There are a number of preliminary points which I need to decide in this and I turn to them now.

Preliminary Issues

21. The first point that I have to decide is the time at which I should assess the respondent's decision. There are a number of possibilities. I could adjudicate based on the prevailing circumstances at the time the decision was made, namely the 24th October. I could adjudicate as of the date of this hearing, the 28th of November. Alternatively, I could adopt a hybrid approach and assess the main dispute as of the 24th of October but were I to see fit to impose conditions by allowing the appeal and granting a licence, I could deal with those conditions on the basis of up-to-date information.

22. The second preliminary issue which I must determine is the appropriate test for this appeal. Are these proceedings a re-hearing, a judicial review, or an assessment of whether the decision is probably incorrect on the merits? Is it the case that if the decision is incorrect on the merits, the court must impose additional conditions to ensure that the objectives of the 1982 Act are complied with? In this regard, I turn to those objectives. The intended effect of any piece of legislation is something that must be gleaned from the Act in full and not simply surmised by considering one section in isolation. Adopting this approach, it is clear that the purpose of the 1982 Act is to protect persons who are travelling as holiday-makers and to avoid the scandal which had arisen from time to time prior to its entry into force whereby a travel agent or a tour operator might collapse and persons might be stranded in all kinds of exotic places unable to get home and demanding money from their relatives and national embassies etc.

The Relevant Law

23. Section 4 of the 1982 Act provides:

> "A person shall not carry on business as a tour operator or hold himself out, by advertisement or otherwise, as carrying on such business unless he is the holder of a licence under this Act authorising the carrying on of such business."

24. Section 5 of the 1982 imposes the same restriction in identical terms in respect of travel agents.

25. Section 6 of the 1982 Act deals with the issue of licences. It provides:

> "(1) The Minister shall grant a licence to carry on business as a tour operator or as a travel agent to a person if he is satisfied that such person complies with the requirements of this Act.
> (2) The Minister shall refuse a licence to carry on business as a tour operator or as a travel agent if he is not satisfied that such person complies with the requirements of this Act.
> (3) Without prejudice to the generality of subsection (2) of this section, the Minister shall refuse a licence under this Act to a person if he is not satisfied that:
>
> > (a) the financial, business and organisational resources of such person and any financial arrangements made or to be made by him are adequate for discharging his actual and potential obligations in respect of the activities (if any) in which he is engaged or in which he proposes to engage if the licence is granted, or
> > (b) having regard to the past activities of such person or of any person employed by him or, if such person is a body corporate, having regard to the past activities of any director, secretary, shareholder, officer or servant of the body corporate, such person is a fit and proper person to carry on business as a tour operator or travel agent, as the case may be.
>
> (4) A licence granted under this Act may contain such terms and conditions as the Minister may think appropriate and specifies in the licence.
> (5) A licence granted under this Act shall remain in force for such period as the Minister thinks fit and specifies in the licence."

26. Section 13 of the 1982 Act creates a security arrangement known as 'the Bond'. It provides as follows:

"(1) A tour operator or travel agent shall, before a licence is granted to him under this Act, furnish evidence acceptable to the Minister that the tour operator or travel agent, as the case may be, has entered into an arrangement satisfactory to the Minister for the protection of persons who, during the period of validity of the licence, enter into contracts with him relating to overseas travel.
(2) The arrangement referred to in *subsection (1)* of this section is in this Act referred to as "the Bond".
(3) The Bond shall provide that, in the event of the inability or failure of the tour operator or travel agent concerned to meet his financial or contractual obligations in relation to overseas travel contracts, a sum of money will become available to the Minister, or to any person nominated or approved of by the Minister, as trustee, to be applied for the benefit of any customer of the tour operator or travel agent concerned who has incurred loss or liability because of such inability or failure to meet financial or contractual obligations.
(4) The sum of money referred to in *subsection (3)* of this section may be applied for all or any of the following purposes:

(a) to provide travel facilities for any customer of the tour operator or travel agent concerned who is outside Ireland and who is unable to make the return journey provided for in the overseas travel contract by reason of the inability or failure of the tour operator or travel agent concerned to fulfil his financial or contractual obligations in relation to such overseas travel contract;
(b) to reimburse a customer of a tour operator or travel agent for any reasonable expenses necessarily incurred by such customer by reason of the inability or failure of the tour operator or travel agent to meet his financial or contractual obligations in relation to an overseas travel contract;
(c) to refund, as far as possible, to a customer of a tour operator or travel agent any payments made by him to the tour operator or travel agent in respect of an overseas travel contract which could not be completed by reason of the inability or failure of the tour operator or travel agent to meet his financial or contractual obligations in relation to such overseas travel contract;
(d) to defray any reasonable expenses incurred by the Minister, or provide for any payments by the Minister, on behalf of a customer of a tour operator or travel agent in respect of an overseas travel contract which could not be completed by reason of the inability or failure of the tour operator or travel agent to meet his financial or contractual obligations in relation to such overseas travel contract.

(5) The Minister or, as the case may be, the person nominated or approved of by the Minister, as trustee, shall keep all proper and usual accounts, including an income and expenditure account and a balance sheet, of all moneys received by him on foot of a bond and of all disbursements made by him from any such moneys.
(6) As soon as may be after the end of each year, accounts kept in pursuance of this section shall be submitted to the Comptroller and Auditor General for audit and, immediately after the audit, a copy of the income and expenditure account and of the balance sheet and a copy of the report of the Comptroller and Auditor General on the accounts shall be laid before each House of the Oireachtas.
(7) Without prejudice to any existing right of a customer of a tour operator or travel agent to recover damages in relation to the standard of accommodation or service provided pursuant to an overseas travel contract, nothing in this section shall be construed as enabling such customer to recover any damages out of any sum of money made available under the Bond."

27. It should be noted that the responsibilities of the Minister for Transport under the 1982 Act have largely been delegated to the respondent. The respondent's duty, therefore, is to ascertain, on a yearly, half-yearly or quarterly basis, the turnover of each particular tour operator or travel agent and to ensure that they have lodged at least ten per cent of their likely turnover for the year. Section 15 of the 1982 Act also establishes a Travellers' Protection Fund under which money gathered from travellers by way of a tax on those going through airports is retained by the respondent in case a problem should arise of the type which I have already described.

28. Given the concerns which underpin the 1982 Act, it is not surprising that Section 6 specifies a number of prerequisites which must be satisfied before the respondent can grant a licence. Section 6(3)(b), for example, makes reference to the past activities of the person seeking the licence. That, it seems to me, requires the respondent to consider whether the applicant has been involved in a prior disaster which has left people stranded or other such serious activity perhaps in an unrelated type of business.

29. Section 7 of the 1982 Act confers on the respondent the power to impose certain conditions before a licence can be granted. When the respondent imposes conditions, it does so with the objects of the 1982 Act in mind.

30. Section 8 of the 1982 Act gives the respondent discretion to revoke an existing licence in certain specific circumstances, where it is no longer satisfied that:

(a) the financial, business and organisational resources of the holder of the licence or any financial arrangements made by him are adequate for discharging his actual and potential obligations in respect of the business for which he has been granted a licence, or
(b) having regard to the manner in which the holder of the licence is carrying on his business, he is a fit and proper person to carry on business as a tour operator or travel agent.

31. The applicant argues that if the respondent had in fact harboured such serious concerns in relation to the applicant's business, it would have revoked the licence in July, August or September of this year. I remain unconvinced by this argument. As I have already outlined, the purpose of the 1982 Act is to protect holiday-makers. No issue arose as to their welfare in the respondent's dealings with the applicant until recently, when the proposed trips to Lapland and Dubai were considered.

32. Section 9 of the 1982 Act creates an appeals procedure, and that is this case, which applies where the respondent proposes to revoke a licence. It provides as follows:

(1) Whenever the Minister proposes to revoke, other than pursuant to *section 10* of this Act, or to vary the terms and conditions of, a licence granted under this Act, he shall notify the holder of the licence of his proposal and of the reasons for such proposal and shall, if any representations are made in writing by such holder within seven days, consider the representations.
(2) Whenever the Minister refuses to grant a licence or decides, having considered any representations that may have

been made by the holder of a licence, to revoke the licence or to vary any term or condition of the licence, he shall notify the applicant for, or as the case may be, the holder of, the licence of the refusal or decision and such applicant or such holder may within seven days appeal to the High Court against such refusal or such decision.
(3) On the hearing of an appeal under this section in relation to a refusal to grant a licence under this Act or in relation to a decision of the Minister to revoke, or vary the terms and conditions of, a licence granted under this Act, the High Court may either confirm the refusal or decision or may allow the appeal and, where an appeal is allowed, the Minister shall grant the licence or shall not revoke, or vary the terms and conditions of the licence as the case may be.
(4) A decision of the High Court on an appeal under this section shall be final save that, by leave of that Court, an appeal from the decision shall he to the Supreme Court on a specified question of law.
(5) An appeal shall not lie in any case where the Minister refuses to grant a licence to an applicant who does not comply with the provisions of *section 13* of this Act or in any case where the Minister revokes a licence pursuant to *section 10* of this Act.
(6) Where, after the commencement of *Part III* of this Act, a person appeals against a decision of the Minister to revoke or vary any term or condition of a licence or appeals against a refusal of the Minister to grant a licence, such person shall not, pending the determination of the appeal, carry on business as a tour operator or travel agent unless he complies with the provisions of *section 13* of this Act.

33. As such, the 1982 Act gives the licence-holder the right to make representations where revocation is proposed. This statutory entitlement is informed by the constitutional property right which the licence-holder possesses. The duty resting on the respondent is to notify the holder in a general way that it has concerns, but that duty cannot be simply cast on the respondent in isolation because it is clearly the obligation of those who are applying for this statutory privilege to satisfy the respondent that firstly, they are fit and proper to carry on the business and secondly, that their financial business and organisational resources are adequate to discharge their potential obligations. One of the questions posed in this appeal is whether or not the applicant was afforded the right to make representations and whether those were dealt with in some kind of an underhand way, by way of a pre-plan on behalf of the respondent. I am absolutely satisfied on the papers that there was no underhand dealing by the respondent. I am further satisfied that the applicant was given a full right to make whatever submissions were needed.

34. One particularly noteworthy aspect of the appeals process is the fact that if the High Court considers that the appeal should be allowed, the respondent is automatically obliged to grant a licence. The ordinary position in judicial review is that when the High Court finds a decision to be erroneous, the matter is returned to the original decision-maker for re-consideration. This is clear from the decision of the Supreme Court in *Glencar Exploration v. Mayo County Council* [2001] IESC 64. This unique mechanism under the 1982 Act is therefore an extremely important condition in determining what the scope of the appeal is. I now turn to the two questions of the point in time at which the adjudication should take place and the standard of review.

The Point of Adjudication
35. In relation to the time of the adjudication, I have decided as follows. In *Balkan Tours v. Minister for Communication* [1988] ILRM 101, a decision was made to revoke the applicant's licence in circumstances where it had distributed brochures containing an inaccurate reproduction of its licence. On the facts, Lynch J. held that the revocation of the licence would cause damage to the applicant which would be disproportionate to its fault. He was satisfied that the publication of the falsified tour operator's licence in the brochure was done without positive intention on the part of the applicant and instead arose through carelessness or negligence. However, in overturning the decision, Lynch J. imposed a number of conditions upon the applicant. Firstly, he ordered that that €1,000 be paid towards the costs the respondent, a substantial contribution in 1988. Secondly, he ordered that the applicant's brochures had to be corrected and that all necessary efforts had to be made to retrieve the inaccurate brochures within Ireland. The High Court further held that the applicant was obliged to comply with the statutory requirements henceforth and that the Minister would not be inhibited from revoking the licence again, should there be any cause to do so. In the course of his judgment, Lynch J. reviewed the jurisdiction under section 9 of the 1982 Act and, in particular, the date at which the assessment of suitability for a licence should be made. Lynch J. held that the High Court, on appeal from the Minister's decision by virtue of section 9 of the 1982 Act, must ascertain all the relevant facts of the case whether they were before the Minister or not at the time he refused the licence and then give effect to them. He stated at page 107:

> "It seems to me that *subs. (4)* envisages that the High Court is to ascertain all the relevant facts of the case whether they were before the Minister or not and is to give effect to them. There is in particular one aspect of the case which has been clarified before me and which was not clarified for the Minister and is of crucial importance. It now appears clearly that the printers acted on their own initiative in not using the plaintiff's 1985/86 licence as reproduced in their 1986 brochures as the basis for setting up the print for the 1987 brochures because of technical difficulties about doing so. Again, the printers acted on their own initiative and without any instructions from or knowledge on the part of the plaintiffs… I am satisfied that the brochures were not deliberately circulated by the plaintiffs with knowledge that the copy licence reproduced therein was grossly inaccurate and in the hopes that the plaintiffs might be let away with that form of brochure and escape the expenses of correction."

36. As such, in *Balkan Tours* the High Court was concerned with its ability to assess matters which had only come to light after the decision of the Minister had been added. However, the matters in question had not in fact occurred subsequent to the making of the decision. Instead, the printing firm had simply come clean after the licence had been refused and had admitted that it was their error which had caused the revocation of the licence. There was no question in that case of the company having mended its hand in light of the decision. I therefore do not regard that decision as being authority for the proposition that evidence of what has happened after the revocation of the licence is generally admissible.

37. This finding is not necessarily determinative of the issue however, because it is important to turn to the actual wording of the Act noting, in particular, the function which the Court has. The Court must review a decision of an administrative tribunal which is essentially concerned with business and finance. That is not something that is within the normal expertise of the courts. On the other hand, in *Glancré Teoranta v. Cafferky* [2004] 3 IR 401, Finnegan P. noted that it is within the jurisdiction of the High Court to decide whether or not something is or is not an exempted development under the Planning Acts. He held, therefore, that where an appeal under that legislation comes before the High Court, the appeal is to be regarded as a *de novo* hearing. As a matter of law, therefore, the actual function being exercised by the Court is of the utmost importance in deciding the parameters of review. A number of decisions have been cited as to the matters which may be taken into account. I note, for example, the restrictive view taken by Kelly J. in *Murray v. The Pensions Ombudsman* [2007] IEHC 27. I further note that in *Glancré*, Finnegan P. took a somewhat different view. He stated the following at page 406:

> "In exercising its discretion as to whether further evidence should be admitted on an appeal the High Court should adopt the

practice of the Supreme Court under O. 58, r. 8 of the Rules of the Superior Courts 1986. In *B v. B* [1975] I.R. 54 at p. 65 Walsh J. said:

> "If in the opinion of this Court on the hearing of any appeal the examination of further evidence by this Court is necessary or desirable then, in my view, the Court has ample jurisdiction within its appellate function to allow the appeal to be conducted on that basis."

At p. 79 of the report McLoughlin J. said:

> "… but where an appeal brings an order of the High Court before this Court to determine whether such order should stand or be reversed (in whole or in part), or be amended, or to direct a new trial, this Court would clearly have jurisdiction to receive such evidence as it considers necessary for such determination.""

38. Finnegan P. continued by noting:

> "The jurisdiction is most frequently exercised in favour of a party to an appeal where circumstances have changed since the original hearing or where basic assumptions common to both sides had been falsified by subsequent events, particularly if this had happened by the act of the defendant: see also *Fitzgerald v. Kenny* [1994] 2 I.R. 383."

39. Finnegan P. then considered a number of other cases, including *Balkan Tours* and *Dunne v. Minister for Fisheries* [1984] IR 230. Finnegan P. then stated at page 407:

> "I am satisfied that this decision is an illustration that on an appeal additional evidence should in general be admitted only where it is necessary or desirable in the interests of justice, rather than authority for the proposition that on an appeal of this nature such evidence should be admissible without the party wishing to adduce the same satisfying the court of the necessity or desirability of it being admitted."

40. The 1982 Act provides that if an appeal is allowed a licence is automatically restored. It seems to me to be obvious that there is a minimum requirement before a decision of the respondent can be overturned; the High Court must be satisfied that it is not allowing a financially unviable tour operator to carry on business to the risk of holiday makers. Further, as I have held, the Court has its own power to impose conditions in addition to those already imposed, or in substitution or on a consideration of the current situation. That, it seems to me, puts the High Court in a position where it has to assume at least some responsibility for doing all that is necessary to protect the public. It could be argued that this renders post-revocation evidence relevant, but nothing I have heard in this case alters my opinion as to the correct procedure under the 1982 Act. The prescribed system involves the constant monitoring of accounts; the making of a warning where a serious situation has arisen, to the effect that the company may not have its licence renewed; and the right of the company to make representations.

41. It seems to me that post-revocation developments will only be relevant in assessing what, if any, conditions may need to be imposed in order to correct a decision which is wrong in the first place. I have determined that the correct date on which to analyse the present case is the date of the decision itself, the 24th of October. I also note that the respondent is not a court, and it is therefore not *functus officio* once it has made its decision. Rather, as an administrative body it can reconsider a decision in appropriate cases where the licence has just expired or when it is just about to expire. It may be right for the respondent to refuse to engage in such reconsideration if no new information of substance is submitted. Where such a refusal occurs, there is no appeal against that decision under the statutory scheme. Instead, the decision to refuse to again consider a licence application may be procedurally correct or it may be deficient by reason of flying in the face of fundamental reason and common sense or by virtue of an error of fact of a fundamental kind which vitiates jurisdiction. In such cases, the only available remedy is judicial review.

42. I am also influenced by the fact that on refusal of a licence under the 1982 Act, in the event of a company making real efforts to recapitalise or otherwise markedly improve its position, it can in exceptional circumstances immediately apply for a new licence and make reference to the existing bond. In *International Fishing Vessels v. Minister for Marine* [1989] IR 149, Blayney J. emphasised the importance of allowing unsuccessful applicants for licences to improve their application and re-apply. He stated at page 155:

> "I think there is no doubt… that the Minister in deciding whether to grant or refuse the licences was obliged to act fairly and judicially in accordance with the principles of constitutional justice. What I have to decide is whether this obligation involved a duty to give reasons for his decision. In my opinion it did. I consider that unless the Minister gave his reasons it could not be said that the procedure he adopted in giving his decision was fair. It seems to me that there are two facts in particular which lead to this conclusion:
>
> > (1) It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very much more difficult to succeed. A procedure which places an applicant at such a disadvantage could not in my opinion be termed a fair procedure, particularly where the decision which the applicant wishes to challenge is of such crucial importance to the applicant in its business…
> > (2) The giving of reasons by the Minister could in one case be of particular importance as it would enable an applicant to meet the grounds on which the licence had been refused and, having done so, re-apply. Sub-section 6 (a) of s. 222B provides that the Minister may refuse an application where it "relates to a sea-fishing boat which is owned by a body corporate and the Minister is not satisfied that the body corporate is under the control of, beneficially owned by or under the control of and beneficially owned by a person or persons who, or, as may be appropriate, each of whom, is either a qualified individual or a qualified body."If an application were being refused under this provision, it seems to me that it would be manifestly unfair for the Minister not to make it known because the ground for the refusal could be overcome by making changes in the control or ownership of the corporation, and the party applying should not be deprived of the opportunity of doing this. It seems to me, accordingly, that in any case in which the applicant is a corporation the Minister should be required to give reasons for his decision as otherwise the party applying would not know if

the application was being refused under sub-s. 6 (a) or for some other reason.

For the reasons I have given, it seems to me in principle that the failure of the Minister to give reasons for his decision rendered the procedure unfair and not in accordance with the principles of constitutional justice."

43. Therefore, the procedure under the 1982 Act, which involves the right of the applicant to receive reasons and the right to make submissions thereupon, seems to imply that the applicant must put forward his best case before the making of the decision to revoke and not afterwards. The notification of concern of proposed revocation should be sufficient to spur a licence-holder into action, without the respondent needing to follow through on that proposal. The duty on the applicant is to respond with sufficient information to make its case. In light of this, I am of the opinion that I should assess the decision of the respondent in light of the situation which prevailed on the date of the decision.

The Test on Appeal

44. The second preliminary issue before the Court is that of the test to be applied on appeal. In that regard, there are a number of possibilities. The first is that this appeal under the 1982 Act is a complete re-hearing in the sense of a *de novo* appeal from the Circuit Court to the High Court. In such cases the judge knows nothing, for instance, of what the Circuit Court has decided, what the level of damages was etc. The file is sealed and the Court never sees it. The application of that approach to the appeals process under section 9 of the 1982 Act cannot be correct. This court has no expertise in finance or accountancy, nor does it have expertise in policy. This court has never had the opportunity to see or hear from the human persons who control the applicant. This court has never had the opportunity to assess whether they are serious-minded people or not, it simply assumes that they are. The respondent, by way of contrast, has such expertise and has had such opportunities. I should say that this is not simply a question of curial deference, with which I have potential problems. Rather, the legislature has quite deliberately established a body with expertise in accountancy matters, which the courts never adjudicate upon unless they are raised in plenary proceedings and a conflict of evidence arises, which also has the capacity to hold face to face interviews in making its assessment. I therefore dismiss as incorrect any suggestion that these proceedings should be classed as a complete re-hearing.

45. I also dismiss as incorrect, following the decision of *Orange Communications v. Director of Telecommunications* [2000] IESC 22, any notion that this process is a regular judicial review and that I am exercising jurisdiction solely in relation to procedure and the very high standard of unreasonableness that must be reached before the High Court can overturn and administrative decision. In *Orange*, Keane C.J. reviewed a number of decisions and stated as follows at pages 117-119:

"In the common law world, judicial review of administrative decisions, such as that of the Director in the present case, has travelled far from the narrow, jurisdictional constraints which were associated with the prerogative writs and State Side orders. It affords a machinery for striking down such decisions, not merely where they are vitiated by a misconception in law of the tribunal as to its legal powers, but also on grounds relevant to these proceedings, e.g. bias, manifest unreasonableness or failure to give reasons as required by the relevant statute or by other legal principles. In this case, however, the parties were agreed that it was not necessary for Orange to establish that the decision to refuse to grant the licence to Orange was so manifestly unreasonable as to be contrary to common sense and that, to that extent at least, the principles laid down in cases such as *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642 and *O'Keeffe v. An Bord Pleanála* were not necessarily applicable. Accordingly, while I would approach the case on that basis, it is also clear that the High Court in hearing the appeal must bear in mind that the Oireachtas has entrusted to the Director a decision of a nature which requires the deployment of knowledge and expertise available to her, her staff and consultants retained by her, but not available to the court. As it was put by the Canadian Supreme Court in *Southan .v. Director of Investigation and Research* (1997) 1 SCR 748:-

> *"…(an) appeal from a decision of an expert tribunal is not exactly like an appeal from a decision of a trial court. Presumably if parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage the judges do not. For that reason alone, review of the decision of a tribunal should often be of a standard more deferential than correctness …I conclude that the … standard should be whether the decision of the tribunal is unreasonable. This is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it …"*

To the same effect is the decision of Kearns J. in *M. and J. Gleeson & Co. .v. Competition Authority* [1991] 1 ILRM 401 where he was considering the nature of an appeal under s. 9 of the Competition Act, 1991 and said:-

> *"It seems to me clear that the concept of curial deference of necessity takes the court to this further position, namely that the greater the level of expertise and specialised knowledge which a particular tribunal has, the greater the reluctance there should be on the part of the court to substitute its own view for that of the authority. That again is the weighting which was indicated by the Canadian Court in the Southan case… That means in practical terms that the applicants in order to succeed must establish a significant erroneous inference which was critical to the grant of the licence and which went to the root of that decision rather than an erroneous inference relating to some detail, even if that detail is relevant."*

In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the Director. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the Director was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the Director."

46. However, it seems to me that there cannot be a uniform mechanism set down in isolation to be applied in all statutory appeals. The scope of the court's function will depend upon the particular legislation at issue. In *Glancré* at page 405, Finnegan P. said the

following:

> "Accordingly, where the court is given an appellate jurisdiction it must construe the words used by the legislature to see whether the court has power to substitute its own opinion for that of the decision maker if it considers that the impugned act was wrong on the merits and not merely wrong in law. In *Dunne v. Minister for Fisheries* [1984] I.R. 230 Costello J. started from the premise that the Oireachtas, in conferring the appellate jurisdiction, must have intended that the jurisdiction on appeal should be wider than the court's powers when exercising its inherent jurisdiction at common law of review. He had regard to the fact that the section under consideration there did not expressly limit the appeal to one on a point of law."

47. It seems to me, therefore, that before a decision can be overturned on appeal, the relevant statutory provision must be considered in the context of the Act as a whole, following which a number of considerations must be addressed:

> (1) The court must examine the nature of the jurisdiction; is the court exercising power in relation to an issue with which it has experience, for example the concept of planning permission and exempted development, or is it dealing with an arcane discipline which is devolved solely to an administrative tribunal which has expertise in that regard?
> (2) If the court is empowered to impose conditions, for example because a successful appeal will automatically cause a licence to issue, it will be necessary for the court to consider what conditions, if any, ought to be imposed.
> (3) If the body whose decision is being appealed is a specialist body, with expertise in policy or a discipline such as accountancy, this must be taken into account.
> (4) The court must establish the intention of the legislature in creating the appeals mechanism, in particular the intended relevance of the original decision to the appeal proceedings; should the original decision be considered in detail or should the process operate akin to a *de novo* appeal from the Circuit Court to the High Court.
> (5) The court must consider any powers which it has to gather information or, just as important, the absence of any power to gather information as this indicates that the original decision making body is what is being reviewed, not that the High Court is entering the process itself.
> (6) The effect of the original decision must be addressed. In this instance, I note that once the decision of the respondent was posted on its website, the applicant complained that a detrimental effect on its business was noticeable.
> (7) The court ought to have regard to whether the statutory scheme allows the decision making body to actually meet with the applicant and therefore make a judgment as to credibility or reliability.

Conclusions

48. Having considered all of those points in the context of the case law, I feel that I am bound to follow the decision of Keane C.J. in *Orange*. The test of serious and significant error, as identified by the Supreme Court in that case, requires an assessment of whether the decision in question was unreasonable, in other words, whether there is a mistake of fact which goes to the foundation or root of the decision. In respect of the decision of the 24th of October, a number of complaints have been made by the applicant. Firstly, it is alleged that the decision assumes that the Revenue Commissioners will not pay the VAT refunds to which the applicant is entitled. Secondly, it is suggested that the decision does not specify that the directors' loans need to be converted to capital. Thirdly, a failure to have regard to the injection of one million euro into the company is alleged. Fourthly, it is claimed that the decision is based on an incorrect asset to liability ratio. Fifthly, it has been submitted that the decision of the respondent ought to have specified the steps which the applicant could have taken in order to secure a renewal of the licence.

49. Three months in the lifespan of a tour operator or a travel agent is quite a long time. I am satisfied that the respondent was entitled to make the decision that it made in relation to VAT because that is the expected waiting period before a decision is made on a refund. I think the respondent did have regard to the fact that there was a conversion of the directors' loan, which after all is fresh capital, but I also think it reasonably viewed it as having, in effect, been used up in the previous financial year. This is a view which I think the respondent was entitled to take. I do not think it incumbent on the respondent to establish the precise asset to liability ratio, rather it is the duty of the respondent to take a reasonable view of what that should be and then submit appropriate accounts that will show a healthy and secure company to the respondent.

50. Furthermore, it is not for the respondent to indicate what steps need to be taken before a licence will be renewed. Instead, the onus is on an applicant to propose measures in order to satisfy the respondent that its operation remains financially sound, to such an extent that the respondent should permit it to trade in a volatile commercial sphere. Finally, on the question of the adequacy of the consultation which took place, I note the multiple letters which were exchanged and the numerous meetings between the parties, as well as the memorandum of the 22nd of October and the decision of the 24th of the same month.

Decision

51. It may of course be argued that what has happened subsequent to the respondent's decision has in some way altered the applicant's suitability for a licence. As I have said, the respondent is entitled to reconsider its determination because it is not *functus officio*. However, for the purposes of this appeal, the respondent did not act unreasonably in the sense in which I have defined that term in remaining concerned as to the applicant's financial stability and in holding the view that the applicant does not meet the criteria set down in the 1982 Act. In those circumstances there is nothing that I can do but affirm the respondent's decision of the 24th of October 2008.