

## THE HIGH COURT

[2012 No. 4056 S]

BETWEEN

COMMISSION FOR AVIATION REGULATION

PLAINTIFF

AND

ALLIED IRISH BANKS PLC

DEFENDANT

**JUDGMENT of Mr. Justice Noonan delivered the 3rd day of October, 2016.**

1. This claim arises out of the collapse of Portlaoise Travel Limited ("P.T.") on the 29th of July, 2009. As required by the legislation to which I will refer further, at the date of its collapse P.T. had in place a guarantee or bond with the defendant ("the Bank") guaranteeing its liability to customers on foot of contracts in respect of overseas travel. The plaintiff ("the Commission") is the licensing authority for travel agents. It licenses travel agents on an annual basis and a new bond is provided by the travel agent each year to coincide with the period of the licence, the amount of such bond being calculated by reference to the travel agent's projected licensable turnover for the relevant period.

2. P.T. received a licence to trade from the Commission for the period from the 1st of May, 2008, to the 30th of April, 2009. It furnished a bond ("Bond 1") to the Commission in the amount of €440,000 to cover that period incorporating a guarantee provided by the Bank. Because of a significant decline in its business, the bonding requirement for the following year from the 1st of May, 2009, to the 30th of April, 2010, was reduced to €196,000 by the Commission. The furnishing of a bond is a precondition to the grant of a licence and in respect of the 2009-2010 year, the bond ("Bond 2") was not furnished by P.T. to the Commission until the 11th of May, 2009. Consequently, the Commission issued a licence to P.T. which commenced on the 11th of May, 2009, to the 30th of April, 2010. This left a ten day gap between the two licences during which no overseas travel business could lawfully be conducted by P.T. In the normal way, where bonds and licences are renewed seamlessly without a gap, the liability under the earlier bond is subsumed into the later bond so that at any one time, there is only one bond, the latest one, available to the Commission. In the present case, the Commission argues that the legislation provides that where a gap occurs between licences, as here, the effect is that both the earlier and later bonds are available to the Commission.

3. Bond 2 has been paid in full by the bank and no issue arises in that regard. The Commission's claim in these proceedings is for the sum of €199,654 being the amount of its loss incurred in compensating clients of P.T. in respect of the period covered by Bond 1. The bank resists the claim on the basis that its liability under Bond 1 was extinguished when it issued Bond 2 which on its face took effect on the 1st of May, 2009, not the 11th of May, 2009, as the Commission says. The sum claimed by the Commission includes the figure of €23,040 in respect of administrative expenses and a separate issue arises as to whether that is in any event recoverable.

**Legislative Framework.**

4. In the early 1980s, a number of prominent travel agency businesses failed with consequent losses to a significant number of customers, many of whom found themselves stranded abroad. In the wake of these events, new legislation was introduced to provide for the bonding of tour operators and travel agents alike in the form of the Transport (Tour Operators and Travel Agents) Act 1982 ("the 1982 Act") and the regulations made thereunder, the Tour Operators and Travel Agents (Bonding) Regulations 1983 S.I. 102/193 ("the Bonding Regulations"). The legislation applies to travel agents, a "travel agent" being defined as:

"...a person other than a carrier who, as agent, sells or offers to sell to, or purchases or offers to purchase on behalf of, the public accommodation on air, sea or land transport to destinations outside Ireland..." (s. 2 of the 1982 Act).

In order to trade in overseas travel business, a travel agent must be licensed by the Commission, now the licensing authority. A prerequisite to the granting of such licence is the furnishing of a bond as set out in s. 13 of the 1982 Act:

**" PART III****The Bond**

13.—(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 functions of the Minister under this section are now vested in the Commission.

6. The Bonding Regulations set the level of bond to be provided by a travel agent at 4% of its projected licensable turnover. For the purposes of these proceedings, the relevant regulations are regulations 6-8:

"[6.] The Bond shall be maintained for the period of validity of a licence or, if such licence is revoked by the Minister for any reason prior to its date of expiry, up to the date of such revocation, and the date of expiry or revocation shall be without prejudice to any liability which may be incurred under the Bond in respect of any obligations to customers arising under overseas travel contracts to which these regulations apply, entered into during the period of validity of the licence, or a previous licence which expired immediately prior to the commencement of the licence period to which the current Bond relates.

[7.] Any demand under the Bond by the Minister or his nominee shall be made in writing not later than six months after the date after which the Bond ceases to have effect, but on being satisfied that the licensee has discharged his obligations to his customers under overseas travel contracts to which the Bond relates, the Minister at his discretion, may release the provider of the Bond and any Guarantor thereof, from their obligations under the Bond and any guarantee relating thereto at any earlier date within the period of six months.

[8.] Notwithstanding the generality of Articles 6 and 10 of these Regulations, where a new bond which comes into effect before or from the date after which the current bond ceases to have effect, is provided, or procured, by a licensee, the existing bond shall cease to be effective from the date of commencement of such new bond, and any losses or liabilities incurred by customers of the licensee as a result of the inability or failure of such licensee to meet his financial or contractual obligations to customers in relation to an overseas travel contract, shall fall to be discharged from monies payable under the new bond...."

7. The second schedule to the Bonding Regulations provides the template for the terms of the Bond to be provided.

#### **Relevant Facts.**

8. P.T. was, in 2009, a long established travel agency in business for some 26 years with some eight branches throughout the Midlands. In common with many other travel agents, its licence year ran from the 1st of May, to the 30th of April. Its 2008/2009 licence was issued by the Commission on the 30th of April, 2008. This licence was covered by Bond 1 which is dated the 20th of March, 2008, and was apparently received by the Commission on the 30th of April, 2008. Bond 1 is in the amount of €440,000 implying that PT's projected annual licensed turnover for the period was €11m. Part II of the Bond comprises the bank guarantee and states:

"This Bond shall come into effect on the 1st day of May, 2008, and shall cease to have effect on the 30th day of April, 2009, or, if the licence granted to the tour operator/travel agent is revoked at an earlier date, after such earlier date on which the licence is so revoked, but without prejudice to any liability in respect of any obligations of the licensee to the Commission or its nominee under Part I above arising out of overseas travel contracts which are entered into during the period of validity of the licence, or a previous licence which expired immediately prior to the commencement of the licence period to which this guarantee relates PROVIDED THAT any demand on us hereunder by the Commission or its nominee shall be made in writing not later than six months after the date after which this guarantee ceases to have effect.

Notwithstanding the foregoing, where a new Bond which comes into effect before or from the date after which this guarantee ceases to have effect, is provided, or procured, by the licensee, under this guarantee shall cease from the date of commencement of such new Bond."

9. It will be seen that the wording of the Bond mirrors exactly the terms of the Bonding Regulations. It appears from the evidence of Mr. Alan Richardson, head of the Commission's Travel Trade Team section, that the grant of a licence in each year is preceded by a "Decision in Principle" letter which sets the amount of the Bond required and encloses a copy template Bond to be utilised by the travel agent.

10. On the 19th of December, 2008, P.T. applied for a new licence for the forthcoming year through the agency of its accountants who enclosed financial statements for the year ending 31st of August, 2008, and completed the relevant application form for a new licence. Travel agents were encouraged to apply in good time for the following year's licence so that the regulatory authority, the Commission, could carry out whatever due diligence was required prior to the grant of a new licence. There followed correspondence from the Commission essentially seeking more detailed and audited financial information from P.T. regarding its business. The figures furnished by the accountants on the 19th of December, 2008, stated that the total turnover of the business projected for the next twelve months was €11m of which €10m was licensable.

11. In response to the Commission's requirements, the accountants again wrote on the 17th of February, 2009, stating that PT's licensable turnover for the six months to the 31st of October, 2008, was approximately €4.2m. The audited licensable turnover figure for the twelve months ending on the 31st August, 2008, was almost €10.9m. The accountants went on to say that P.T.'s directors had advised that the expected total turnover for the year to end August 2009 was now projected at €5.5m, €4.9m of which would be licensable. These were approximately half the figures that had been projected in the earlier correspondence of the 19th of December, 2008. Furthermore, the accountants indicated that turnover of the business for the month of January 2009 had fallen by 60% over the previous year and that the directors were in the process of closing several branches with a loss of turnover of €3m from this alone. The letter further indicated that P.T. was no longer a member of IATA and thus no longer able to issue airline tickets.

12. This information understandably gave rise to concern on the part of the Commission to scrutinise more closely the likely viability of P.T.'s business going forward. There followed a series of correspondence from the Commission again seeking more detailed financial information including details of planned cost reductions in the business having regard to the closures and the "huge" reduction in turnover projected. P.T. was slow to respond to this correspondence until mid April 2009, now some six weeks before the renewal date. On the 15th of April, 2009, the accountants sent in month by month projections, but not all the information required by the Commission. Again on the 22nd of April, 2009, the accountants sent a spreadsheet with the figures broken down for each branch. Risk assessments were carried out by the Commission in relation to the information that had been supplied by P.T. and it would appear that ultimately, on Monday the 27th of April, 2009, Mr. Richardson took the decision that a "Decision in Principle" could be issued to P.T. Mr. Richardson signed a letter of that date headed "DECISION IN PRINCIPLE" and stating that the amount of the Bond required before a licence could be granted was in the amount of €196,000. This figure represented 4% of projected licensed annual turnover of €4.9m, being the figure furnished to the Commission on the 17th of February, 2009. The letter went on to say:

"It is noted that it is proposed to secure a Bond with a bank. The Bond should be in the form prescribed in the second schedule to the Tour Operators (Bonding) Regulations, 1983. A copy of the instrument is enclosed and you should arrange for this to be completed and lodge it with the Commission as soon as possible. The Commission's document must be used for this purpose."

13. Mr. Richardson in his evidence said that P.T. had been very anxious to get this letter as soon as possible since obviously any delay in issuing a licence could have serious implications for its business. Mr. Richardson initially thought that this letter had been sent by fax to P.T. However, he agreed that in the normal way, a fax transmission sheet would have been kept to prove transmission and in this case there was none. I am satisfied from the evidence that the probability is that the Decision in Principle letter was not in fact sent by fax to P.T. but simply by post in the ordinary way. The email correspondence from P.T. put before the court suggests that it did not in fact receive the document until Friday the 1st of May. It seems to be common case that this was the first time that P.T. had been advised in writing of what the bonding requirement would be for the issue of a licence for the coming year. The evidence suggests that it is possible that P.T.'s principal, Mr. Brennan, telephoned the Commission in advance of receiving the document because he appears to have gone to the Bank on the previous day, the 30th of April, 2009, to apply for the bond and presumably must then have known the amount required.

14. As I have noted, the 1st of May, 2009, was a Friday followed by the May bank holiday weekend so that businesses did not reopen until Tuesday the 5th of May, 2009. On that date, the Commission sent an email to P.T. timed at 13.35 stating that the documentation required by the Commission to ensure a timely issuance of the new licence to trade from the 1st of May had not been received. Consequently, it said, the offering for sale of overseas travel must have ceased as of the 30th of April last and any booking facilities on the website of the business should be disabled as failure to do so could leave P.T. open to prosecution for unlicensed trading, a serious offence. However, the email indicated that the premises may remain open subject to no reservations or payments being accepted for overseas travel.

15. Of considerable importance, an email in identical terms was sent to approximately ten other travel agents whose licences also commenced on the 1st of May but who had failed to submit the appropriate bond by the 5th of May.

16. Mr. Brennan replied to this email at 14.17 on the same afternoon and said that the delay in getting the bond in was as a result of P.T. not having received "our application", presumably meaning the Decision in Principle, until the previous Friday, May 1st. Mr. Brennan went on to say that the application for the bond was in train as a matter of urgency and should be available "in the next few days". On the next day, the 6th of May, 2009, Bond 2 was executed by Mr. Brennan on behalf of P.T. and by the bank which stamped it with the same date. As before, the Commission's template was used as per the regulations and the bank guarantee provided:

"This guarantee shall come into effect on the 1st day of May, 2009, and shall cease to have effect after the 30th day of April, 2010, ...."

The wording thereafter is identical to that found in Bond 1. Accordingly, Bond 2 was available to P.T., it would appear, from Wednesday the 6th of May, 2009. A telephone conversation log maintained by the Commission in respect of a telephone call with Mr. Brennan on Friday the 8th of May, 2009, at 1.20 pm suggests that Mr. Brennan had not in fact picked up the bond at that stage but said he was going into the bank that afternoon, presumably to pick it up. That in fact appears to have been what happened because the original bond was received by the Commission on Monday the 11th of May, 2009.

17. In the course of his evidence, Mr. Richardson explained that the P.T. Bond 2 was the last bond to be received out of the ten or so that were late. It seems from Mr. Richardson's evidence that this gave rise to something of a dilemma in the Commission. He expressed this in the following way during Day 1 of the trial:

"78Q. Mr. McDonald: When that was received on the 11th of May, 2009, Mr. Richardson, was any consideration given to whether or not it would be possible to back date the licence and to issue the licence as from the 1st of May, 2009?"

A. Certainly, the matter was considered, but the discussion amongst ourselves would be that we would be in serious difficulty dating the licence the 1st of May when the document was signed by both the applicant and the bank and the bank stamped on the 6th of May, and that it would really mean that we were breaching the regulations by doing such an issue, and that's why we decided that we would stick with the date when we received the actual bond back in the original document, the 11th of May, and we dated the licence that date."

18. This issue was revisited on Day 2 when I had the following exchange with Mr. Richardson:

"196Q. Mr. Justice Noonan: I'm still struggling a bit with this, Mr. Richardson, maybe you can help me with it. You regarded the critical thing as being the fact that you received the bond on the 11th, despite the fact that it was effective from the 1st. Am I understanding that correct?"

A. Well because it was dated by the bank, in other words to me it looked as though the people in the bank signed it on the 6th of May.

Mr. Justice Noonan: Yes.

A. They'd stamped it on that date.

Mr. Justice Noonan: Yes.

A. That put it out of kilter with anybody else dating the bond for the 1st of

May and stamping it that date, because all of the other bonds referred to in this email, all of them bar the one with.

Mr. Justice Noonan: with ACE.

A. All of those were signed and dated prior to the 30th of April or on the 30th of April.

Mr. Justice Noonan: Yes.

A. So here we have one that is completely out of kilter and it looked as though the bank didn't recognise that by dating it the 6th of May, they were creating this particular problem."

19. It seems to me therefore that the feature which distinguished P.T.'s bond from all the others that were late, with one other exception, was that it was dated subsequent to the 1st of May although expressed to take effect from that date.

20. The evidence establishes that there were ten or so travel agents apart from P.T. who, as of the 5th of May, 2009, had not been issued with a licence to trade by the Commission because they had failed to lodge the requisite bond. It follows that the licences to those travel agents which were subsequently issued by the Commission were issued on or after the 5th of May, but backdated to the 1st of May, on the basis that the bonds were operative on that date, although not yet received by the Commission. Clearly therefore, the Commission felt entitled to backdate licences in certain circumstances. However, it did not do so in this case because of its belief, confirmed by Mr. Richardson, that because the bond was dated the 6th of May, it could not in fact be considered to have taken effect on the 1st of May, 2009, despite what it said on its face.

21. Another significant feature of Mr. Richardson's evidence was that he said that the Commission realised when they received the bond from P.T. on the 11th of May, 2009, and decided to issue the new licence from that date that a gap would arise, the effect of which would be that the bank would remain liable on foot of both Bonds 1 and 2. Thus, Mr. Richardson's evidence on Day 2 was:

"137Q. Mr. Allen: Ok. Well, can I suggest this to you, Mr. Richardson, if you're right, the only licence that was available to Portlaoise as of the 5th of May was a licence secured by two bonds amounting in total to €636,000?

A. That is correct.

138Q. And that's a great deal different than the letter in principle which you had issued to allow your applicant to go to the bank?

Mr. Justice Noonan: That figure is the two previous ones added together.

Mr. Allen: It is the 440 and the 196.

Mr. Justice Noonan: What was it again?

Mr. Allen: 636

Mr. Justice Noonan: Thanks.

The Witness: That has occurred because no bond has been put in place effective from the 1st of May, prior to the 1st of May."

## **Discussion.**

22. The essential issue in this case is one of interpretation. Mr. McDonald S.C., for the Commission, contends that the bond falls to be construed by reference to the Bonding Regulations. He points to the fact that the bond exists to protect customers who enter into contracts with a travel agent for overseas travel during the period of the licence. That is what the bond covers, not unlicensed and unlawful transactions. Therefore the bond can only have effect during the currency of the validity of the licence and in the present case, thus can have had no effect prior to the 11th May, 2009. Despite what the bond actually says therefore, Mr. McDonald submits that it did not actually come into effect until the 11th May meaning there was a 10 day gap between the expiry of one licence and the commencement of another. The effect of this gap means that the Bank cannot avail of the exemption in Regulation 8 which provides that the earlier bond ceases to be effective from the date of commencement of the new bond where the new bond comes into effect before or from the date after which the current bond ceases to have effect.

23. Mr. Allen S.C., for the bank, on the other hand argues that the bond on its face came into effect on the 1st May, 2009, and thus the condition posited in Regulation 8 is satisfied. The fact that the licence did not commence until subsequently is neither here nor there as it is the terms of the bond, and not the licence, to which the Court is being asked to give effect. He says that the bond is a private law document between private parties and must be construed as such.

24. In *Analogue Devices B.V. & Ors. v. Zurich Insurance Company* [2005] 1 I.R. 274, the Supreme Court held that in construing such documents, in that case an insurance policy, the court has to give effect to the intention of the parties to be ascertained objectively from the words used in the document and taking into consideration the surrounding circumstances or factual matrix. Undoubtedly the legislation is one such element to be taken into account in the present case in construing the bond. At the end of the day, the words used in the document must be given their plain and ordinary meaning. The factual background is relevant to ascertaining that meaning.

25. There is little doubt but that the general intent of the legislation is that there should be one bond in effect at any one time to answer the liability of the travel agent. The Commission's own Guidelines, subsequently issued, accept that fact as did Mr. Richardson in evidence. It would appear that the parties to these arrangements generally operate on that basis. As I understand it from the evidence, what has arisen in this case is unprecedented. It is also true to say that while the legislation requires that the bond must cover the period of the licence, it does not necessarily have to coincide with that period provided it includes it. The legislation itself expressly recognises that a bond may come into effect before, as well as from, the date when a current bond ceases to have effect.

26. The Commission's understanding as embodied in the subsequent Guidelines and confirmed by Mr. Richardson is illustrated by the statement in the Guidelines that the fact that an undertaking enters into an arrangement with a financial institution to backdate the commencement date of the bond to cover the period during which they had no licence is no bar to a prosecution for illegal trading. Of course that is so but it appears to at least tacitly accept that a bond may be backdated. As I have pointed out already, the Commission also clearly took the view that a licence may be backdated, albeit only in circumstances where the bond was executed on or before the commencement date of the licence. The Commission's view appears to have been that because the date of execution of the bond was subsequent to the date upon which it states that it takes effect, the licence cannot be backdated to the earlier date. This appears to me to have been an erroneous view. There is no reason in principle why a document, subsequently executed, cannot have legal effect from an earlier date. This is of course an everyday occurrence.

27. As the case evolved however, it would appear that the Commission's argument developed somewhat into a submission that the bond could not take effect before the 11th May as there was nothing in respect of which it could have been effective for the relevant 10 day period as any trading in that period would have been unlicensed and thus not covered by it.

28. I do not think this argument is well founded. While it is certainly true to say that the bond does not cover unlicensed activities, it is nonetheless available to cover licensed activities up to the date of expiry of the previous license. Because the scheme of the legislation envisages that there will be only one bond in place at any one time, of course this means that the bond must be available for all prior claims whenever they may have arisen and not just during the period of the latest bond. This means that in the present case, because of the anomalous situation that the Commission argues has arisen, it was necessary to distribute claims as between Bond 1 and Bond 2, clearly something never envisaged by the legislation.

29. It seems to me that in reality, the essential issue in this case arose from the fact that the Commission declined to backdate the licence to the 1st May, 2009, which I believe they were entitled to do and had in fact done in many other cases.

30. The effect of the Commission's decision not to backdate the licence would, were its argument correct, be striking. It would mean that the Commission could, of its own motion and without any notice to the Bank, effectively more than triple the Bank's liability by unilaterally deciding not to backdate the licence. This would be, to say the least, a surprising state of affairs, particularly as it runs counter to the Commission's own views, as subsequently expressed in their Guidelines.

31. It seems to me highly probable to the point of being a near certainty, that when the Bank issued Bond 2 and backdated its effective commencement date to the 1st May, it believed that in so doing, it extinguished its liability on the old bond. The Commission must undoubtedly have realised that this was the case while at the same time considering that it had the benefit of two bonds, such benefit apparently conferred by its own decision not to backdate the P.T. licence. It chose not to disabuse the Bank in this respect.

32. I cannot accept that the true intention of the parties in entering into this bond was ever other than to extinguish the previous bond and in my view, the words of the Bond itself are entirely consistent with that conclusion. The Bond on its face says that it shall come into effect on the 1st May, 2009. I believe that it did. In that event, the Bank's liability under Bond 1 ceased on the execution of Bond 2.

33. In the event therefore, the Commission's claim must fail. The subsidiary issue as to the recoverability of administrative expenses does not therefore arise. Were it to become relevant that I express a view on this point however, I should note that s. 13(4)(d) of the 1982 Act has been amended by s.30 of the Package Holidays and Travel Trade Act, 1995 so that it now reads:

"(d) to defray any reasonable expenses incurred by the Minister or, as the case may be, the person nominated or approved of by the Minister as trustee, or provide for any payments **to** the Minister or trustee 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."

It is common case that the highlighted word "to" is plainly an error and should read "by" as in the original subsection.

34. Bond 1 itself mirrors this language and provides:

"to defray any reasonable expenses incurred by the Commission, or provide for any payments by the Commission, on behalf of a customer of the licensee in respect of any overseas travel contract which could not be completed by reason of the inability or failure of the licensee to meet his financial or contractual obligations in relation to such overseas travel contract."

35. The Commission incurred expenses in administering the payments to customers following the collapse of P.T. It made payments to those customers in respect of the loss of holidays for which they had paid. I accept the Commission's submission that there are no other expenses to which the section could apply and it must accordingly be taken to include the expenses of administering the payments, such administration being for the benefit of the customers and on their behalf.

36. For the reasons given, I will dismiss this claim.