

**THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW**

2005 No. 427 JR

BETWEEN**CITYJET LIMITED****APPLICANT**

**AND
IRISH AVIATION AUTHORITY**

RESPONDENT**Judgment of Mr. Justice Kelly delivered the 30th day of June, 2005****The Complaint**

1. The applicant (Cityjet) complains that the respondent (the Authority) has wrongfully failed to issue to it a certificate of airworthiness in respect of an aircraft leased and operated by it.
2. As a result of this alleged wrongful failure on the part of the Authority, Cityjet seeks the declaration claimed at para.7 of its statement grounding this application for judicial review. It has eschewed all other reliefs save a claim for damages which has been stood over to abide the result of its claim for declaratory relief.
3. The declaration sought is as follows:-

"A declaration by way of application for judicial review that aircraft BAe 146-200, serial number E 2047, registration mark G-OZRH currently on the U.K register is entitled to a certificate of airworthiness issued by the respondent in reliance on the certificate of airworthiness issued by the U.K. Civil Aviation Authority for the above aircraft in 1996 with renewals in 1999, 2002 and 2005, together with an export certificate of airworthiness in 2004."

Background

4. Cityjet is an Irish registered company. It is owned by Air France – KLM plc. It carries on the business of the carriage of passengers by air. It began operations in January 1994.
5. It operates 90 flights a day and employs over 500 people.
6. All of the aircraft operated by Cityjet are British Aerospace aircraft type BAe 146 s. It does not operate any other type of aircraft.
7. These aircraft are particularly suitable for the routes serviced by Cityjet. The planes can take off and land on extremely short runways and do not need reverse thrust at landing. They are very quiet in operation and so are widely used at small city based airports such as London City Airport.
8. This model of plane is no longer produced and there are therefore a finite number of them available and suitable for operation.
9. Cityjet holds a valid air operators certificate (an AOC). This authorises Cityjet to fly specific types of aircraft. The BAe 146 is authorised to be flown on foot of this certificate.

The Aircraft in Suit

10. The aircraft the subject of this application is the one identified by both serial number and registration mark in the declaration sought. I will refer to it throughout this judgment as "the jet".
11. It was manufactured in the United Kingdom in 1985.
12. In December of that year the jet was given an export certificate of airworthiness by the U.K. Civil Aviation Authority. Later in that month the Federal Aviation Administration, which is the U.S. aviation authority, granted a certificate of airworthiness in respect of it.
13. The jet was registered to Pacific South West Airlines at that time and was named "The Smile of San Diego".
14. Between 1985 and 1991 the jet was re-registered and transferred to US Air.
15. In April, 1991 the jet ceased to be used and was stored in the Mojave Desert, California, in the United States. That storage apparently arose as a result of an industrial dispute between pilots and US Air.
16. The jet remained in the desert until 1995. In that year it was taken to Calgary, Alberta, Canada. A complete maintenance check was carried out.
17. Subsequent to this check the jet was flown back to the United Kingdom.
18. In February, 1996 the U.S. Aviation Authority issued an export certificate of airworthiness in respect of the jet. That certificate indicated that it was to be exported to the United Kingdom and that there it would be modified in accordance with the appropriate airworthiness requirements of the U.K. Civil Aviation Authority.
19. The jet underwent such modification and the U.K. Civil Aviation Authority issued a certificate of airworthiness in February, 1996. Subsequently, on foot of directions given by the U.K. Civil Aviation Authority, a further review, maintenance checks and modifications were carried out.
20. In 1998 the jet commenced operations for a company called Flightline Limited. By 2003 the jet was owned by a Guernsey based company called Calder Limited. It is from that company that Cityjet leased the jet for a term of three years.
21. Cityjet has tried unsuccessfully to have the jet registered in this State by the Authority and to have a certificate of airworthiness

issued by the Authority in respect of it.

22. The fact that such registration and certificate has not been forthcoming has not meant that Cityjet has been unable to use the jet. That has been possible because of arrangements which have been made under annex 6 to the Convention on International Civil Aviation (the Chicago Convention). Under those arrangements operational and maintenance oversight has been transferred to the Authority by the U.K. Civil Aviation Authority whilst the jet has remained on the U.K. register. A number of these annex 6 arrangements have been made, the most recent in April of this year. It is due to expire on 30th June, 2005. Unless a further arrangement of this type is entered into it will create substantial problems for Cityjet in the use of the jet. The Authority indicated through counsel that it was not willing to participate in a further annex 6 arrangement.

Aircraft Records

23. Records in relation to an aircraft and its main components are important and have to be retained throughout the life of the aircraft and its parts. Maintenance on an aircraft is recorded in detail. Records of such maintenance are retained throughout its life.

24. These records provide information in respect of what, where, when, how and by whom each maintenance action was carried out on the aircraft. This information is important to ensure the continuing airworthiness of the aircraft and in the investigation of the causes of failure, incidents and accidents. The importance of these records is well established within the aircraft industry. Indeed concrete expression of the importance of the documents is to be found in the lease under which Cityjet hold the jet. There the definition of "aircraft" includes its "documents" which are set forth in part 2 to schedule 1 of the lease. There no fewer than 24 species of documents are set forth and described.

25. Despite the contractual entitlements of Cityjet to have had all of these documents supplied to it there is no dispute but that they were not. Indeed it is that lacuna in the documentary history of the jet that is the cause of the problems.

26. The affidavits in the case go into enormous detail concerning these records. It is not necessary for me to deal with this in any detail since this is an application for judicial review and not an appeal from a decision of the Authority on the merits. It is sufficient to record that it is accepted by Cityjet that the records are incomplete. Even with the discovery of further records since the commencement of these judicial review proceedings that position still obtains.

Cityjet's Concessions

27. Not merely does Cityjet accept that there is a lacuna in the jet's documents but it also accepts that if the question of the registration of the jet and the issue of a certificate of airworthiness is governed exclusively by national legislation and rules, the Authority is justified in the stance which it has taken.

28. It is important therefore to record that neither the procedures followed by the Authority nor indeed the decision made by it, if such decision falls to be made under domestic legislation, is sought to be impugned in these proceedings. Rather what is contended is that the Authority had no entitlement to make its decision pursuant to domestic legislation but rather had to give effect to European Regulations dealing with the matter. By failing to do so it is said that the Authority acted *ultra vires*.

The Authority

29. Up to 1993 the registration of aircraft in this State was carried out by the Department of Transport. The Authority took over responsibility for this in 1994 pursuant to the provisions of the Irish Aviation Authority Act, 1993, (the Act). The Authority is the entity responsible for safety regulation of civil aviation. Its functions include the registration of aircraft and the issue of certificates of airworthiness.

30. Registration of an aircraft determines its nationality. The law of the State of registration is the law which applies on board the aircraft. Once registered, the State of registry is also responsible for safety regulatory oversight of the craft.

Registration Procedures

31. When it is sought to register an aircraft the Authority requires the presentation by an applicant of certain facts and documents concerning the craft. This is required so that the Authority may establish that the relevant legislation and orders made under it can be satisfied. Given the important consequences which flow from registration it is hardly surprising that the Authority refuses to register or certify an aircraft which does not meet the statutory requirements.

32. Information is furnished to the aviation industry by the Authority from time to time so that it may be apprised of the requirements which have to be met.

33. The Authority will not register an aircraft unless it is prepared to grant a certificate of airworthiness. It appears to be the practice of the Authority to encourage applications for certificates of airworthiness to be made prior to the registration of an aircraft on the Irish Register. It is the failure to secure such a certificate of airworthiness in respect of the jet which is at the heart of this application.

The Application in the Present Case

34. On 22nd August, 2003 Cityjet first applied for registration of the jet.

35. In September, 2003 it applied for a certificate of airworthiness for it.

36. In October, 2003 an inspector from the Authority carried out an inspection of the jet and concluded that the historical records were not in order.

37. Thereafter there was much correspondence exchanged between the parties which it is not necessary for me to review in the course of this judgment. The reason for that is because it is accepted by Cityjet that there is a lacuna in the records of the jet. These records cover an 11 year period of the jet's life. The Authority is not content to accept proof that those records existed at some time in the past (which they undoubtedly did) but rather wishes to know their contents.

38. No question has been raised as to the entitlement under the relevant domestic law to require production of these records or to refuse a certificate of airworthiness in their absence.

39. It is not necessary for me to set out in *extenso* the relevant domestic legislation which is applicable since it is accepted that the Authority is justified in the stance which it takes on foot of that legislation. For the sake of completeness however I should record that the relevant statutory entitlement is to be found in the Act and various orders made thereunder including the Irish Aviation

Authority (Airworthiness of Aircraft) Order, 1996.

40. The history of the application and the approach of the Authority is best summarised in a letter from the Authority to Cityjet dated 17th February, 2005, which insofar as it is relevant states as follows:-

"I am surprised that Cityjet finds the position of the Authority unclear on the matter of the above aircraft. Cityjet applied in March 2004 to place the aircraft on the Irish register. The Authority made the usual enquiries in relation to the aircraft and its records. It became apparent that approximately 11 years of maintenance records for the aircraft could not be produced. All aircraft owners are, or should be, aware of the importance of aircraft maintenance records and of the record keeping requirements.

The aircraft did not therefore meet registration or airworthiness requirements in this country. By letter to Cityjet of 12th March, 2004, the difficulties with the aircraft records were clearly spelt out. The Authority facilitated your airline be permitting the aircraft, which remained on the U.K. register, to be used on your Irish Air Operators Certificate for three months while you tried to track down the missing maintenance records. Cityjet accepted by letter of 16th March the condition that the aircraft would be removed from the AOC at the end of three months if the aircraft records could not be found.

Cityjet then removed the aircraft from its AOC for commercial reasons in June, 2004.

Although the records had not been located during the March/June 2004 period, Cityjet approached the Authority again in September and sought to put the aircraft on its AOC temporarily on the basis of delegation to the I.A.A. from the U.K. Following extensive discussions this was done on foot of the Cityjet programme to locate or reconstruct the records. The legal difficulties regarding registration of this aircraft were again explained to Cityjet representatives at a meeting on 28/09/2004.

The Authority also indicated that if it were not possible to locate the original records that it would be prepared to consider a reconstruction of the records if Cityjet were able to source enough supporting documentation to rebuild the record. The Authority has made every effort to assist Cityjet by explaining the difficulties, both legal and technical and in seeking solutions where possible. Although responsibility for retaining and producing the records rest with the aircraft owner, Authority personnel visited British Aerospace in Scotland, contacted a previous operator in the U.S. and contacted the F.A.A. in Oklahoma in an attempt to locate records for this aircraft.

The Cityjet programme to research and reconstruct the records was provided to the Authority in a letter of 12th October, 2004, the concluding date of the programme being February, 2005. The Authority agreed the dry lease arrangement to 15th January, 2005, providing that sufficient progress on record reconstruction was made.

The Authority visited Cityjet on 20th December, 2004, to review the work done and was surprised to learn that the records for the C check carried out by Canadian Regional in 1996, which Cityjet had previously indicated were available, were actually missing. It became apparent to the Authority that insufficient progress was being made. Further to your companies request of 10th January to extend the delegation, the Authority gave a further extension on 14th January to allow Cityjet to conclude the work programme as originally proposed. It is a matter for Cityjet to produce the records or suitable documents to replace them and in spite of allowing you time to do this in accordance with the programme proposed by Cityjet, appropriate records have not been made available to the Authority in connection with the registration application.

During 2004 the Authority held several meetings with Cityjet representatives at which it specified its requirements and the basis for them. These requirements were also reiterated by telephone and in correspondence and some of these communications have been referred to above. It was made clear to Cityjet that if it failed to produce the missing documents or to reconstruct them in a manner acceptable to the Authority, the aircraft could not be accepted onto the Irish register. It was apparent to this Authority that the requirements were understood by Cityjet. The Authority has furthermore facilitated Cityjet by permitting the aircraft to be used on its Irish AOC while the search was taking place."

41. The letter then goes on to point out the legal basis upon which the Authority relied in support of its requirement that the records be produced and its refusal to issue the certificate of airworthiness in the absence of such records.

The Challenge

42. Cityjet argues by reference to a number of European Regulations that the Authority has no entitlement to rely upon the national legislation as a basis for refusing the certificate of airworthiness. In circumstances where the jet possesses a certificate of airworthiness issued by the U.K. Civil Aviation Authority it is said that by virtue of these Regulations the Authority must without further ado issue a certificate of airworthiness in respect of the jet. By failing to do so it is contended it has not accorded supremacy to the European Regulations over national legislation.

43. I turn now to a consideration of the Regulations relied upon in support of this proposition.

Council Regulation 3922/91

44. This is a Regulation of 16th December, 1991, on the harmonisation of technical requirements and administrative procedures in the field of civil aviation.

45. Counsel on behalf of Cityjet calls attention to the 8th recital of this Regulation which states that:-

"Member States should accept the certificate of products and of bodies and persons concerned with the design, manufacture, maintenance and operation of products without further technical work or evaluation, when the product, organisation or person has been certified in accordance with the common technical requirements and administrative procedures."

46. He then directs my attention to the provisions of Article 2(1)(a) of the Regulation which define a "product" to mean a civil aircraft, engine, propeller or appliance.

47. The argument then turns to Article 7 of the Regulation which provides:-

"Member States shall recognise the certification granted pursuant to this Regulation by another Member State or by a body acting on its behalf, to bodies or persons placed under its jurisdiction or under its authority, who are concerned with the design, manufacture and maintenance of products and the operation of aircraft."

48. It is argued that because of this Regulation the certificate of airworthiness issued by the United Kingdom Aviation Authority must be accepted without further technical work or evaluation on the part of the Authority.

49. I am satisfied that this argument has no substance. This is because Article 1 of the Regulation defines its area of application. It reads:-

"1. This Regulation shall apply to the harmonisation of technical requirements and administrative procedures in the field of civil aviation safety as listed in Annex (II), and in particular with respect to:

- the design, manufacture, operation and maintenance of aircraft,*
- the persons and organisations involved in these tasks."*

50. This provision makes it clear that the application of the Regulation is limited to the harmonisation of technical requirements and administrative procedures in the field of civil aviation safety only insofar as they are listed in Annex (II) thereof.

51. When one turns to Annex (II) one finds the following:-

"Lists of codes in force containing the common technical requirements and administrative procedures referred to in Article 3

1. General and procedures

JAR 1. Definitions and abbreviations.

2. Type certification of products and parts."

52. This definition throws one back to Article 3 which reads as follows:-

"Without prejudice to Article 11, the common technical requirements and administrative procedures applicable in the Community with regard to the fields listed in Annex (II) shall be the relevant codes referred to in that Annex and in force on 1st January, 1992."

53. I am satisfied that this Regulation has no application whatsoever to certificates of airworthiness issued in respect of an individual plane. Rather the Regulation is concerned with what is described as type certification. That is the form of certification which has been granted by the Authority in respect of the type of aircraft to which the jet belongs. Such a certificate has been issued to Cityjet enabling it to fly aircraft of that type. The Regulation has nothing to say in respect of the matters which are in issue here and which involve a refusal on the part of the Authority to issue an individual certificate of airworthiness.

54. Consequently insofar as any part of Cityjet's case is made by way of reliance on Regulation 3922/91 I am satisfied that it is misconceived.

Regulation 1592/2002

55. This Regulation of 15th July, 2002, established a European aviation safety agency and also provided for common rules in the field of civil aviation.

56. Article 5 of this Regulation deals with airworthiness.

57. It is clear that Article 5(2)(a) and (c) recognise the distinction between a type certificate and individual certificates of airworthiness. As I hope I have already made clear, type certification means a particular type of aircraft shall be recognised as suitable for the issue of an airworthiness certificate but it does not in any way dilute the necessity for an individual certificate of airworthiness for a particular plane. Such a certificate is the one envisaged at Article 5(2)(c).

58. Article 5(2)(c) reads:-

"Each aircraft shall be issued with an individual certificate of airworthiness when it is shown that it conforms with the type design approved in its type certificate and that relevant documentation, inspections and tests demonstrate that the aircraft is in condition for safe operation. This certificate of airworthiness shall remain valid as long as it is not suspended, revoked or terminated and as long as the aircraft is maintained in accordance with the essential requirements related to continuing airworthiness set out in point 1.d of Annex 1 and the implementing rules referred to in para. 4."

59. Paragraph 4 of Article 5 provides that the Commission shall adopt, in accordance with the procedure laid down in Article 54(3), the rules for the implementation of Article 5.

60. Much reliance is placed by Cityjet upon the provisions of Article 8 of this Regulation. That deals with the recognition of certificates.

61. Article 8(1) reads:-

"Member States shall, without further technical requirements or evaluation, recognise the certificates issued in accordance with this Regulation. When the original recognition is for a particular purpose, or purposes, any subsequent recognition shall cover only the same purpose(s)."

62. Paragraph 2 of Article 8 reads as follows:-

"Pending adoption of the implementing rules referred to in Article 5(4), and without prejudice to Article 57(2),

certificates which cannot be issued in accordance with this Regulation may be issued on the basis of the applicable national regulations."

63. This second paragraph of Article 8 is of importance. It focuses attention on the provisions of Article 57(2).

64. Article 57(2) reads:-

"The provisions of Article 8 shall apply to products, parts, and appliances, organisations and persons that have been certified in accordance with the provisions referred to in para.1 of this Article."

65. Paragraph 1 of Article 57 reads:-

"Directive 80/51/EEC and Annex (II) to Regulation (EEC) No.3922/91 shall be repealed as from 28th September, 2003."

66. I have already found that Regulation 3922/91 deals with type certification of aircraft and not individual certificates of airworthiness. It follows therefore that Article 8 insofar as it provides for recognition of certificates deals with the recognition of type certification rather than individual certificates of airworthiness.

67. The effect of the repeal provision insofar as Regulation 3922/91 is concerned is that Annex (II) to it was repealed as of 28th September, 2003, but not the text of the Regulation.

68. I now turn to the provisions of Article 58 of Regulation 1592/2002 which deals with the entry into force of the provisions of the Regulation.

69. The relevant part of this Article is its second paragraph which reads:-

"Articles 5 and 6 shall apply as from the dates specified in the implementing rules."

70. Regulation 1592/02 became effective on 28th September, 2003.

71. The implementing rules were provided for in Commission Regulation (EC) 1702/2003 of 24th September, 2003 and 2042/2003 of 20th November, 2003.

Commission Regulation 1702/2003

72. This Regulation lays down the implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances.

73. Regulation 1592/2002 is defined as the "basic regulation". However, as is clear from Article 1 of this Regulation it lays down in accordance with Article 5(4) and 6(3) of the basic regulation common technical requirements and administrative procedures for the airworthiness and environmental certification of products, parts and appliances.

74. Article 5 of this Regulation deals with its entry into force.

75. It provides that the Regulation is to enter into force on 28th September, 2003, except for (insofar as it is relevant) sub-parts (H) of part 21 which shall enter into force on 28th September, 2004.

76. Sub-part (H) deals with airworthiness certificates.

77. The effect of all of this is that up to the 28th September, 2004, airworthiness certificates continued to be dealt with by national legislation and were not the subject of these European Regulations.

78. Accordingly if the decision in the present case to refuse a certificate of airworthiness in respect of the jet was made prior to 28th September, 2004, it appears to me quite clear that there could be no question of these European Regulations having any application. They were not in force.

When Was the Decision Made?

79. The evidence satisfies me that the decision of the Authority to refuse the individual certificate of airworthiness for the jet was made in March, 2004. I have come to that conclusion by reference to the diary entry of Mr. Shaw of the Authority and the correspondence thereafter. In particular I conclude that the decision was not merely made but was communicated to and was understood by Cityjet in March, 2004. On 19th March, 2004, Cityjet's chief executive wrote to the chief executive of the Authority in terms which speak for themselves. He wrote (insofar as it is relevant to these proceedings):-

"I wish to raise some important issues in relation to the failure of Cityjet to obtain an Irish certificate of airworthiness for the (jet). Cityjet have been forced down the road of operating this aircraft on a short term dry lease basis relying instead on the U.K. CAA continued airworthiness certification.

I have to say that as a 'technical person' and Accountable Manager for this airline I am unable to follow the rationale and logic of the position that has been adopted by the airworthiness standards department. (The letter from Mr. Brian Skehan to M. Maher of 12th March, refers). There is no safety issue involved here. The I.A.A. seems to be seeking an indemnity from the U.K. CAA with a view to avoiding all potential risk.

I understand that it is in the nature of airworthiness authorities to be risk averse however the position adopted in this case is at total variance with policy and practice in other E.U. States and E.U. Regulations. As a consequence Cityjet is now placed at a serious competitive disadvantage vis-à-vis other European regional airlines in general and in particular with our rival carriers (Regional and Britair) within the Air France group.

The position adopted by Airworthiness as well as confounding the E.U core principle of free movement of products, ignores the certification standards of a sister authority and also undermines the quality systems on personal competence of designated officers in this organisation.

Accordingly, I wish to formally appeal the decision of the airworthiness department in this matter and attach for your

consideration an outline by our legal advisor of the basis of our appeal.”(My emphasis).

80. That letter makes it quite clear that the decision which is sought to be impugned in these proceedings was taken as far back as March, 2004. The decision was taken at a time when, having regard to what I have pointed out by reference to the relevant Regulations, the question of airworthiness certificates for an individual aircraft fell to be dealt with not pursuant to European Regulation but by national law.

81. Lest however that I am wrong in the conclusion which I have come to as to the date of the decision in suit I will carry out a brief examination on what the position in law would have been had the decision been made subsequent to 28th September, 2004. This unfortunately calls for consideration of yet another European Regulation which is no less fuliginous in its draftsmanship than those which I have already had to consider. It is Regulation 2040/2003 which I have already mentioned briefly.

The Post 28th September, 2004 Regime

82. Regulation 1702/2003 provides at sub-part (H) 21A.183(2) that the competent authority of the State of registry shall issue a certificate of airworthiness for used aircraft in the following circumstances:-

“(i) Upon presentation of the documentation required by 21A.174(b)(3) demonstrating that;

- the aircraft conforms to a type design approved under a type certificate and any supplemental type certificate, change or repair approved in accordance with this part, and to applicable airworthiness directives, and

- the aircraft has been inspected in accordance with the applicable provisions of part M; and

“(ii) When the aircraft conforms to an approved design and is in condition for safe operation. This may include inspections by the competent authority of the Member State of registry.”

83. Sub-part (H) 21A.174(b)(3) provides that an application for a certificate of airworthiness shall include with regard to used aircraft originating from a Member State an airworthiness review certificate issued in accordance with part M.

84. However Article 1.2(d) of the Regulation which deals with the scope and definitions provides that:-

“Part M means the applicable continuing airworthiness requirements adopted in pursuance to the basic Regulation.”

86. Commission Regulation 2042/2003 of 20th November, 2003, deals with the continuing airworthiness of aircraft and aeronautical products, parts and appliances and on the approval of organisations and personnel involved in these tasks. It provides in Article 7(2) as follows:-

“By way of derogation from para. 1 the provisions of Annex (I) except for M.A. 201(h)(2) and M.A. 708(c) shall apply as from 28th September, 2005.”

87. Annex (I) to this Regulation is in fact part M. Consequently sub-parts (H) of part 21 of Regulation 1702/2003 cannot apply because part M is not yet in force and will not apply until 28th September, 2005.

88. Lest there be any doubt in that regard Article 2(12) of Regulation 1702/2003 provides that:-

“Where reference is made in part 21 to apply and/or to comply with provisions of part M and part M is not in force, the relevant national rules shall apply instead.”

89. The effect of this is therefore that until 28th September of this year, national law continues to apply in relation to the issue of individual certificates of airworthiness.

The U.K. Certificates

90. At the time that the Authority made its decision not to issue a certificate of airworthiness and therefore not to register the jet in this State there was in existence a certificate of airworthiness issued by the United Kingdom Civil Aviation Authority. That certificate was granted on 2nd February, 2002, with an expiry date of 1st February, 2005. The certificate on its face makes it clear that it is issued pursuant to the Chicago convention and the relevant United Kingdom legislation being the Civil Aviation Act, 1982 and the orders and regulations made thereunder.

91. The current certificate of airworthiness granted by the U.K. authorities is dated 2nd February, 2005, with an expiry date of 1st February, 2008. The format of this certificate differs from its immediate predecessor. On its face it states that it is issued pursuant to the Chicago convention and Regulation (EC) No. 1592/2002 Article 5(2)(c).

92. The argument which is made on behalf of Cityjet is that because this latter certificate has been issued pursuant to Regulation 1592/2002 it must be given effect to in this jurisdiction and supersedes the national legislation. I will consider this argument in a moment but before doing so it is necessary to point out that this argument can have no application in respect of the U.K. certificate which was in force at the time when the decision in suit was made. The U.K. certificate as of that date was not issued pursuant to the Regulation but rather pursuant to the Chicago convention and the U.K. domestic legislation.

93. I am of the view that no legitimate complaint can be made in respect of the way in which the Authority dealt with the certificate which was in force at the time of the decision in suit, namely March, 2004. There is in my opinion no force in the argument made by Cityjet to the effect that the Authority wrongfully failed to recognise that certificate. The Authority did in fact recognise that certificate because had it not done so the annex 6 arrangements made pursuant to the Chicago convention would not have been agreed to. As a result of that arrangement the jet has been operating in Irish air space and has been entered on Cityjet's AOC. No legitimate criticism can be made of the Authority in that regard.

94. The existence of the 2002 U.K. certificate of airworthiness does not in my view mean that the jet had to be automatically registered by the Authority. The European Regulations which I have mentioned were not then in force and indeed do not come into force insofar as individual plane certification is concerned until September, 2005. Furthermore the U.K. certificate was issued pursuant to U.K. domestic law. I am therefore satisfied that there was no breach of its obligations in European law on the part of the Authority in the decision which it made in March, 2004.

95. Lest however that I am wrong in the conclusion which I reached as to the date of the decision I will consider the position which obtains subsequent to the issue of the U.K. certificate of airworthiness of 2nd February, 2005. The argument which is made by Cityjet in regard to it is that because it is issued pursuant to Article 5(2)(c) of Regulation 1592/2002 it must be recognised and given effect to in this jurisdiction for the purposes of the issue of a certificate of airworthiness by the Authority and the registration of the jet on the Irish register.

96. The basis for this proposition is to quote the written submissions made by Cityjet:-

"That the cumulative effect of the above harmonising legislative provisions is to confer great efficacy on the certificates of airworthiness granted by the competent authority of the United Kingdom, the Civil Aviation Authority. The language of the relevant regulations, including Regulation no. 1592/2002 emphatically state that Member States shall without further technical requirements or evaluation recognise the certificates issued in accordance with this Regulation."

97. The submissions go on to point out that this language finds reflection throughout the EC legislation but nowhere more explicitly than in Regulation 1592/2002 itself.

98. The submissions then go on to quote what is now well known jurisprudence on the supremacy of European law over national law where appropriate.

99. A tour of this jurisprudence together with quotations from relevant text books was undertaken. Among the decisions visited was *Simmenthal* 2 [1978] E.C.R. 629; the *Amsterdam Bulb* Case [1977] E.C.R. 137; *Marleasing* [1990] E.C.R. I 4315; *Factortame* 2 [1990] E.C.R. I 2466.

100. Cityjet rely on the statement from this latter case which summarises the legal position as follows:-

"The court has also held that any provision of a national legal system or any legislative, administrative or judicial practice which might impair the effectiveness of community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, community rules having full force and effect are incompatible with those requirements, which are the very essence of community law."

101. If this case concerned a refusal on the part of the Authority to recognise the U.K. certificate of airworthiness issued pursuant to Article 5(2)(c) of Regulation 1592/2002 subsequent to 28th September of this year all of these authorities would have relevance. It appears to me that after that date there may very well not be any entitlement on the part of the Authority to rely upon national legislation in respect of an individual certificate of airworthiness. However until then I can see no basis upon which the Authority cannot rely upon national legislation. When the European legislative instruments which are relied upon provide that they do not come into force until a specific date I cannot see how in advance of that date it can be said that there is a breach of obligation on a party failing to implement them. I find no support for such a proposition in the case law.

102. The fact that the civil aviation authority in the United Kingdom appears to have given effect to Regulation 1592/2002 with the issue of the certificate of airworthiness of 2nd February, 2005, in advance of the date upon which it is obliged to do so it does not create in my view a corresponding obligation on the part of other Member States to recognise that certificate in advance of the date upon which the Regulation on foot of which it is issued becomes binding upon them. That is in essence what is contended for by Cityjet. If correct that would be a formula for enormous confusion since the date of applicability of a Regulation would be determined not by that fixed by the Regulation itself but rather by reference to whether an individual Member State decided to give effect to it in advance of that date. Whilst an individual Member State may decide to do so that surely cannot result in other Member States having to do likewise.

103. In these circumstances I am of the view that even if it can be said that the Authority in this case refused to issue a certificate of airworthiness for the jet subsequent to the issue of the U.K. certificate of airworthiness of 2nd February, 2005, in reliance upon national legislation it did not do so unlawfully.

104. In my opinion on the substantive issue Cityjet fails.

Delay

105. In addition to defending the substantive matters in issue the Authority contends that this application by Cityjet ought to fail because of delay.

106. I have held that the decision of the Authority was made in March, 2004. This application for judicial review commenced by an application to Peart J. on 25th April, 2005, seeking leave to apply. Leave was granted and on 12th May, 2005, I made an order transferring the case into the commercial list.

107. There is no gainsaying but that the application for leave was made 13 months after the decision of the Authority. There was therefore non-compliance with the relevant provisions of order 84, rule 21.1 of the Rules of the Superior Courts. That provides that an application for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose or six months where the relief sought is certiorari unless the court considers that there is good reason for extending the period.

108. It is not necessary for me to deal with this aspect of the case in extenso since I thought it preferable to and have addressed the substantive issue. I should say for the sake of completeness however that I am satisfied that the application was made out of time as is self evident and I am not satisfied that there are good reasons for extending the time. There is of course a discretion in the court to do so but it is one which must be exercised judicially.

109. In *De Roiste v. The Minister for Defence* [2001] 1 I.R. 190, Denham J. held that in analysing the facts of a case to determine whether there are good reasons to extend time the following non-exhaustive list of factors should be taken into account:-

- (a) The nature of the order or actions, the subject of the application,
- (b) The conduct of the applicant,
- (c) The conduct of the respondents,

(d) The effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed,

(e) Any effect which may have taken place on third parties by the order to be reviewed, and

(f) Public policy that proceedings relating to the public law domain take place promptly except for a good reason as furnished.

110. Bearing those considerations in mind I am not satisfied that good reason has been furnished. Furthermore it was in my view all the more incumbent upon Cityjet to move with expedition given the ever changing legal backdrop created by the relevant European legislative instruments against which the question of certificates of airworthiness in the European context have to be considered.

Conclusion

111. For the above reasons I am satisfied that Cityjet is not entitled to succeed and this application is refused. The claim for declaratory relief and damages is dismissed.