Neutral Citation Number: [2008] IEHC 231

THE HIGH COURT
COMMERCIAL

2008 No. 49 J.R.

BETWEEN

RYANAIR HOLDINGS PLC

APPLICANT

AND
IRISH FINANCIAL SERVICES REGULATORY AUTHORITY

RESPONDENT

AND
BY ORDER OF THE COURT
AER LINGUS PLC

NOTICE PARTY

Judgment of Mr. Justice Kelly delivered the 10th day of July, 2008

Introduction

1. The applicant (Ryanair) is seeking an order of *mandamus* to compel the respondent to investigate a complaint made to it by Ryanair on the 21st August, 2007. It also seeks to compel the making public of the findings of that investigation. Alternatively, *mandamus* is sought to compel the respondent to decide whether it is going to investigate the matter or not and to give reasons for its decision.

2. This is my judgment on certain preliminary issues of law which Ryanair accepts, if answered in a manner adverse to it, must result in these proceedings being dismissed in *limine*.

Background

3. Ryanair is the largest shareholder in the notice party (Aer Lingus). It holds approximately 29% of the issued share capital of Aer Lingus. The Minister for Transport on behalf of the Irish Government holds 25% of the issued share capital in Aer Lingus. The Minister is the second largest shareholder.

4. On the 7th August, 2007 Aer Lingus announced that it was setting up a new base at Belfast International Airport and that it would begin services between that airport and London Heathrow. In order to operate that new route, Aer Lingus announced its decision to transfer its Heathrow slots from Shannon to Belfast, thereby closing the Shannon-Heathrow route.

5. That decision gave rise to a good deal of controversy. One of the issues in that controversy concerned the date when the government first became aware that the slots were going to be transferred from Shannon.

6. Ryanair contends that in an interview which was given by the Chief Executive of Aer Lingus to RTE on the 12th August, 2007 he said that the Minister had been informed of the Aer Lingus decision to close its Shannon Heathrow route on the 3rd August, 2007.

7. Ryanair takes the view that if Aer Lingus informed one large shareholder of such a matter ahead of other shareholders and indeed the public, it did so in breach of the Market Abuse (Directive 2003/6/EC) Regulations 2005 (the Regulations) and the Market Abuse Rules (the Rules).

8. On the 21st August, 2007 Ryanair (through its solicitors) wrote to the respondent calling on it to conduct an investigation into the matter.

9. After that initial letter was written Ryanair says that it became aware that Aer Lingus had in fact informed the Minister of its decision as far back as the 13th June, 2007. Thus, it wrote again to the respondent on the 19th October, 2007 calling upon it to investigate the matter.

10. On the 22nd October, 2007 the respondent replied in the following terms:-

> "The Financial Regulator investigates possible breaches of Market Abuse law uncovered by us or brought to our attention, subject only to the efficient and effective use of our resources. In the event that a company investigated is found by an Administrative Sanctions Inquiry to have committed a breach of a regulatory requirement a public statement is made of the outcome of the process. You should note, however, that it is not our policy to brief those who bring matters to our attention of the outcome of investigations directly. Notwithstanding that, I would like to thank you for drawing these matters to our attention and for the supporting documentation, which you have forwarded to us."

11. On the 30th October, 2007, Ryanair's solicitors replied to the respondent's letter and asked for confirmation that it was conducting an investigation into the complaint.

12. Ryanair's solicitors wrote a further letter on the 8th November, 2007 which again asked the respondent to make a decision as to whether it was going to investigate Ryanair's complaint.

13. This was responded to on the 9th November, 2007 when the respondent indicated that its position was as stated in its letter of the 22nd October, 2007.

14. On the 13th November, 2007 the respondent again wrote to Ryanair's solicitors. That letter reiterated the contents of the two previous letters of the 22nd October and 9th November, 2007 respectively. The letter went on:-

> "For the avoidance of doubt and as previously indicated to you, the Financial Regulator is statutorily prohibited from disclosing confidential information to you or your client pursuant to Section 33AK of the Central Bank Act 1942 (other than provided for in part 5 of the Market Abuse Regulations 2005). Breach of the Financial Regulator's obligations in this regard would constitute a criminal offence.
>
> Should your client choose to initiate legal proceedings against the Financial Regulator, the Financial Regulator shall draw the courts attention to this correspondence and to previous correspondence in relation to the issue of costs."

15. On the 21st November, 2007, Ryanair's solicitors wrote to the respondent pointing out that it had not asked it to disclose confidential information. Rather, it had asked the respondent to make a decision on whether or not to investigate the complaint and to communicate the basis for such decision to Ryanair. This letter threatened judicial review proceedings without further notice.

16. The following day the respondent replied reiterating its position as set out in its letters of the 13th November, 2007 and its two previous letters of the 9th November, 2007 and 22nd October, 2007.

17. A further letter was sent by the respondent reiterating its earlier stance but indicating that if there was a desire to discuss the matter, personnel of the respondent would be happy to do so. In the event no such meeting took place.

18. On the 21st January, 2008, Peart J. granted leave ex parte to Ryanair to judicially review the respondent.

The Reliefs Claimed
19. The following are the reliefs in respect of which Peart J. gave leave to apply:-

> "1. An order of *mandamus* requiring the respondent to investigate the complaint made by Ryanair initially on the 21st August, 2007.
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> 2. An order of *mandamus* requiring the respondent to make public the findings of its investigation.
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> 3. Further and in the alternative an order of *mandamus* requiring the respondent to make a decision as to whether it is going to investigate the complaint made by Ryanair on 21 August, 2007.
>
> 4. Further and in the alternative an order of *mandamus* requiring the respondent to give reasons for its decision not to investigate the complaint made by Ryanair on 21 August, 2007.
>
> 5. A declaration that the respondent is in breach of its obligations under section 10(1) of the Market Abuse (Directive 2003/06/EC) Regulations.
>
> 6. Further or other reliefs"

Procedural History
20. On the 18th February, 2008 on the application of the respondent, I made an order transferring the case to the Commercial List. On that occasion Aer Lingus applied to be joined as a notice party to the proceedings. That application was opposed by Ryanair but not by the respondent. Aer Lingus was joined to the proceedings as a notice party on that date. I also gave leave to the respondent to make an application for an order directing the trial of preliminary issues of law.

21. I heard that application on the 3rd March, 2008 and made an order for the trial of the issues sought by the respondent.

The Issues
22. The following are the issues which call for consideration in this judgment. They are:-

> "1. As to whether the respondent is under a legal duty pursuant to the Regulations and/or the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (the 2005 Act) or otherwise:-
>
> (a) to advise Ryanair as to whether it has carried out or intends to carry out an investigation on foot of a complaint made by Ryanair initially on 21 August, 2007 into an alleged breach by Aer Lingus of the 2005 Regulations; or
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> (b) to make public any findings of any such investigations; or
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> (c) to give reasons for any decision not to investigate such a complaint.
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> 2. If the answer to any of the questions posed at 1(a) to (c) inclusive is 'yes', as to whether such a duty is enforceable by way of *mandamus* in the circumstances (and on the basis) pleaded in the statement of grounds as supported by the grounding affidavit of Michael O'Leary sworn on the 17 January, 2008.
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> 3. As to whether the statement of grounds and the grounding affidavit of Michael O'Leary sworn on 17 January, 2008 discloses a breach by the respondent of:
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> (a) any of the aforesaid duties held by the court to be applicable to the respondent and enforceable by way of *mandamus* and
>
> (b) the 2005 Regulations."

23. The factual basis for the determination of these issues was identified in the second schedule to the order of the 3rd March, 2008. Four facts were identified but all of them are encompassed in the recitation of facts which I have already made earlier in this judgment so they need not be repeated here. I have recited a more extensive factual background. It is extracted from the grounding affidavit of Michael O'Leary sworn in support of the *ex parte* application dealt with by Peart J. on the 21st January, 2008. As I have been asked to strike out these proceedings in *limine*, I think it more appropriate to set forth the facts in that greater detail. For the purposes of this application I assume that Ryanair will be in a position to prove all of these facts.

24. It is now necessary to sketch out the statutory regime which the respondent is called upon to administer and in respect of which it is said to be in breach.

The Respondent
25. The respondent is a constituent part of the Central Bank and Financial Services Authority of Ireland. It is the financial regulator

for much of the financial services industry in this State.

26. The respondent is also the competent authority in the State for the purposes of the banking, insurance and certain other financial services supervisory directives of the European Union. Its functions and powers are contained in s. 33C of the Central Bank Act 1942 (the Act).

27. The respondent's task is to perform the functions of the Central Bank and Financial Services Authority of Ireland pursuant to a range of enactments and statutory instruments.

28. Section 33C(3) of the Act provides that in performing its functions and exercising its powers, the respondent is required to promote the best interest of users of financial services in a way that is consistent with the orderly and proper functioning of financial markets and the orderly and prudent supervision of providers of those services.

Market Abuse
29. Directive 2003/2006/EC of the 28th January, 2003 (the Directive) deals with insider dealing and market manipulation which is referred to as 'Market Abuse'. That Directive was given effect in Irish law by the Regulations. They cover not merely insider dealing but a range of other abuses and unlawful practices in the investment markets.

30. The respondent is given wide power under the Regulations and it is obliged to perform its functions and exercise it powers in accordance with the terms of the Act.

The Regulations
31. Regulation 3 designates the Central Bank and Financial Services Authority of Ireland as the single administrative competent authority for the purposes of the Directive.

32. Regulation 10 deals with the disclosure of inside information. It requires an issuer of securities to publicly disclose without delay inside information which has a number of meanings which are set forth in the definition section of the Regulations. In brief, such information can be described as price sensitive information. It is to be disclosed without delay in a manner that enables fast access and complete, correct and timely assessment of such information by the public.

33. Part 4 of the Regulations deals with the powers of the respondent. They include a power to appoint authorised officers (Regulation 28). Such authorised officers are, under Regulation 29, given a range of investigatory powers. They include power to enter upon and search premises, to secure documents and other records and to require a person to give information and explanation. Regulation 30 permits an authorised officer to apply to a District Court judge for a warrant authorising entry into a premises including a private dwelling.

34. Regulation 31 permits the respondent to give directions in order to ensure the integrity of financial markets in Member States or to enhance investor confidence in those markets or to prevent any person from contravening or continuing to contravene a provision of the Regulations.

35. Part 5 of the Regulations provides for a discrete system for enforcing breaches of Market Abuse law. If the respondent has reason to suspect that there has been contravention of such law it is entitled to appoint an assessor to conduct an assessment as to whether a breach of the law has been committed. If the assessor finds such, he is entitled to make an assessment of the sanction or sanctions if any which are appropriate to be imposed (See Regulation 35(1)). Under Regulation 35(10) the assessment constitutes the decision of the respondent.

36. In order to arrive at his assessment the assessor is given a variety of powers such as requiring a person to appear before him to give evidence and to produce documents. He is entitled to administer oaths and a witness before him has the same liabilities, privileges and immunities as a witness before this court.

37. The Regulations provide for an appeal against an adverse assessment. The appeal is to this court and Regulation 40(2) provides that such an appeal may be heard otherwise than in public.

38. Amongst the sanctions that the respondent is entitled to impose on foot of an adverse assessment is a private caution or reprimand. That is provided for in Regulation 41(a). Under Regulation 41(b) it can give a public caution or reprimand. Regulation 41(c) allows for the imposition of a monetary penalty not exceeding €2,500,000.00 in any case. A direction disqualifying the assessee from the management of a financial service provider may be given under Regulation 41(d). A cessation of activities may be ordered pursuant to Regulation 41(e). Costs may be awarded pursuant to Regulation 41(f).

39. The powers of this court on an appeal from an adverse assessment permit it to confirm, vary or set aside the adverse assessment but it may not provide for the imposition of a sanction beyond the powers of the respondent. The appeal to this court is final except that a party to the appeal may apply to the Supreme Court to review this court's decision on a question of law.

40. It is clear from these provisions that one of the sanctions which may be applied by the respondent and by this court on appeal is a private caution or reprimand to the assessee. Furthermore, the hearing of the appeal by this court may be conducted otherwise than in public.

41. Regulation 45 provides that the respondent shall, subject to certain exceptions, publicly disclose the specified sanctions which are contained at Regulation 41 paras. (c) - (f). The Regulation does not impose a duty to publicly disclose a private caution or reprimand. Even in respect of those sanctions which the respondent is obliged under this Regulation to publicly disclose, it retains a discretion to decide not to do so where it considers that such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

42. Part 6 of the Regulations deals with offences and reports.

43. A person who contravenes *inter alia* Regulation 10 is guilty of an offence. On summary conviction he is liable to a fine not exceeding €5,000.00 or imprisonment for a term not exceeding 12 months or both.

Some Preliminary Observations
44. Before turning to the precise questions in suit it is, I think, appropriate to make some observations concerning the obligations of the respondent on foot of the Regulations.

45. It is clear that under Regulation 35, if the respondent "has reason to suspect that a prescribed contravention is being committed or has been committed" it *may* appoint an assessor to conduct an assessment. This is at the discretion of the respondent. The first task of such an assessor is to decide whether such a contravention occurred or not.

46. This court will be extremely slow to interfere with an investigatory authority's discretion on whether or not to investigate a particular matter. Such an approach is well supported by authority in this jurisdiction and elsewhere. Only in exceptional circumstances will the court intervene by judicial review to override such a discretion.

47. In *Fowley v. Conroy* [2005] 3 I.R. 480 Clarke J. had to consider this topic. In the course of so doing he reviewed all of the relevant authorities both in this jurisdiction and in England.

48. The applicant in *Fowley's* case was a member of the Garda. Her house was the subject of a burglary. Some of her property was stolen amongst which were tapes which she said were of relevance to the Morris Tribunal. She reported the matter to the gardaí. An investigation of the burglary was undertaken. Her solicitor wrote a letter to the Commissioner of the Garda which stated that she was witness before the Morris Tribunal and had given evidence to it regarding alleged misconduct on the part of certain senior members of the Garda. The letter called upon the Commissioner to have the investigation of the robbery carried out by gardaí outside the Donegal division. This was because of an alleged clear conflict of interest between the applicant and senior gardaí. In reply, it was stated on behalf of the Commissioner that he had full confidence in the ability of the investigating gardaí to carry out a thorough investigation. The applicant sought *mandamus* with a view to having the investigation carried out by gardaí in respect of whom there would not be a conflict of interest. The application was dismissed.

49. In considering the relevant case law, Clarke J. said this:-

"4.1 In *R v. Commissioner of the Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, the entitlement, at the level of principle, of the courts to intervene in relation to the exercise of police powers came for consideration by the United Kingdom Court of Appeal. The case was concerned with a policy decision made by the relevant commissioner of police not to attempt to enforce certain provisions of the United Kingdom gaming legislation in relation to gaming clubs in London. A private citizen sought an order of *mandamus* directing the respondent to reverse the policy decision. In dealing with the issue of principle Lord Denning M.R. held the following at p. 136:-

> 'I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected person are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from *Fisher v. Oldham Corporation* [1930] 2 K.B. 364 and *Attorney General Rule for New South Wales v. Perpetual Trustee Co. Ltd.* [1955] A.C. 457.
>
> Although the chief officers of police are answerable to the law there are many fields in which they have a discretion with which the law will not interfere. For instance it is for the Commissioner of Police of the Metropolis, or the Chief Constable, as the case may be, to decide in any particular case whether enquires should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing to do his duty to enforce the law'.

To like effect Salmon L J. said the following at p. 138:-

> 'The chief function of the police is to enforce the law. The Divisional Court left open the point as to whether an order of *mandamus* could issue against a chief police officer should he refuse to carry out that function. Constitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue any order to the police in respect of law enforcement. In this court it has been argued on behalf of the Commissioner that the police are under no legal duty to anyone in regard to law enforcement. If this argument were correct it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control by the court. I reject that argument. In my judgment the police owe the public a clear legal duty to enforce the law – a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene.'"

50. Clarke J. also considered the decision of the House of Lords in *R v. Chief Constable ex parte ITF Limited* [1999] 2 A.C. 418. He quoted with approval the following passage from the speech of Lord Slynn who in turn was quoting from the judgment of Balcombe L.J. in *Harris v. Sheffield United Football Club Ltd*. [1988] Q.B. 77 at 95 to the following effect:-

> "The true rule, in my judgment, is as follows. In deciding how to exercise its public duty of enforcing the law, and of keeping the peace, a chief constable has a discretion, which he must exercise even handedly. Provided he acts within his discretion, the courts will not interfere… In exercising that discretion a chief constable must clearly have regard to the resources available to him."

51. Clarke J. took the view that the extent of the discretion of the Commissioner of the Garda in Ireland was similar to that of a chief constable in the United Kingdom.

52. He went on in his judgment to consider the rights of a victim to invoke the aid of the court concerning a failure to properly investigate a crime. He concluded as follows:-

> "I am satisfied that a victim may have an entitlement to ensure that an inquiry into the crime concerned is not dealt with in a capricious manner. For example, a refusal to investigate the crime for no good reason may be reviewable even though

> it must be clear that the courts would afford a very wide margin of appreciation to the gardaí as to any legitimate basis for not embarking upon an investigation of a crime. It would, therefore, only be in the most exceptional cases indeed that a jurisdiction to intervene could arise."

53. The view of Clarke J. is entirely consistent not merely with the English judgments which he quotes but also with two earlier decisions of the Supreme Court which had to deal with prosecutorial policy on the part of the Director of Public Prosecutions. In *the State McCormack v. Curran* [1987] I.L.R.M. 225 Finlay C.J. noted that if the Director of Public Prosecutions were to reach a decision to prosecute or not to prosecute "*mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court". Short of that the court ought not to intervene.

54. Likewise in *H. v. DPP* [1994] 2 I.R. 589 the Supreme Court held that the DPP was generally not obliged to give reasons for a decision not to prosecute.

55. From these decisions the following conclusions can be reached concerning the availability of *mandamus* directed to a body such as the respondent.

> 1. It is only in exceptional cases that the court will intervene by way of judicial review into a discretionary investigatory process whether carried on by the police or a body such as the respondent.
>
> 2. A refusal to investigate may be reviewable but even in such circumstances the court gives a very wide margin of appreciation to an investigatory authority as to its basis for not embarking upon an investigation. Only in the most exceptional cases will the jurisdiction to intervene arise.

56. These decisions of course deal with the obligation to investigate. The questions I have to deal with on this preliminary issue are whether inter alia the respondent can be ordered to inform Ryanair whether it has commenced an investigation into the matters the subject of its complaint or not. The considerations set out above are not without relevance in dealing with these questions.

The Questions

57. Ryanair's application raises issues as to what the respondent's obligations are if it receives a complaint concerning an alleged breach of the Regulations. If the respondent decides not to investigate the complaint or to investigate it to a limited extent is it obliged to make such fact public or to inform the complainant and also to provide its reasons for so doing? If the respondent decides to investigate, is it obliged to make public the findings of its investigation or at least to disclose them to the complainant and if so when?

58. Ryanair is seeking a *mandamus* requiring the respondent to make a decision as to whether it is going to investigate its complaint. A decision to investigate is clearly a matter which is within the discretion of the respondent. The concept of there being an absolute duty on the respondent to investigate every complaint or to do so in the manner or on the terms upon which a complainant may propose and then to give reasons why it has decided not to do so is not supported by any case law and in fact the contrary is so. That is clear from the cases which I have cited.

59. It has also to be borne in mind that the respondent is involved in an extremely sensitive area of economic life. The respondent has to bear in mind what is contained in recital 12 of the Directive which is to the effect that the objective of legislation against Market Abuse is to ensure the integrity of community financial markets and to enhance investor confidence in those markets.

60. The question of publicity in the enforcement process undertaken by the respondent is also of great importance and sensitivity in the context of the market. Publicity undoubtedly may play a role but neither the Regulations nor the 2005 Act require publication of a decision to investigate or not to investigate.

61. The Regulations provide an entitlement to publish certain enforcement sanctions but they are subject to exceptions and ultimately to the discretion of the respondent. In any event, publication is only envisaged after an adverse assessment if the case results in the imposition of certain sanctions.

62. The contention of Ryanair that there is a public duty to investigate and make public the findings of an investigation is not in conformity with the provisions of the Regulations or the 2005 Act. A mere announcement of the fact of an investigation could prove highly damaging and undermine confidence in financial markets. The prime function of the Market Abuse regime is to protect those markets. Complaints may or may not be well founded. A person against who a complaint is made has an entitlement to his good name and reputation which potentially could be destroyed by publicity attaching to an investigation.

63. In these circumstances it appears to me to be vital that the respondent be afforded the wide margin of discretion which is provided for under the Regulations and that interference by this court should arise only in truly exceptional circumstances.

64. I now turn to the questions.

Question 1

65. I find no obligation either express or implied in either the Regulations or the 2005 Act which imposes any duty on the respondent to advise Ryanair whether it carried out or intends to carry out an investigation on foot of Ryanair's complaint. There is no duty to make public the findings of any investigation save in the circumstances set out in the Regulations. Neither is there to be found any obligation to publish reasons for a decision not to investigate a complaint.

66. The decision to investigate a complaint under the Regulations involves the exercise of discretion on the part of the respondent. It is not bound by any statutory duty to inform a complainant when or if it decides not to investigate a complaint. Neither is it required to make its findings public or give any reasons for its decision. There is no mention either in the Regulations or in the Act of 2005 of any duty to advise a complainant of the outcome of any complaint.

67. The case law supports the respondent's contention that the manner in which alleged regulatory breaches are to be investigated involves the exercise of a discretion and that whilst the courts do have power to review the exercise of such discretion it is only in exceptional cases that it will do so. This is not such a case.

68. It is remarkable that Ryanair's statement of grounds does not specify any breach of the Regulations or the Act or indeed any other duty on the part of the respondent. Rather the statement of grounds invites the court to assume that the respondent has acted in breach of duty.

69. The terms of the Regulations and the Directive demonstrate that duties of disclosure of the type contended for are not provided for in them and they ought not to be implied into the Market Abuse regime.

70. Apart from the fact that there is no provision in the Regulations which requires the respondent to make known its decisions on foot of complaints made to it, the option to privately caution an assessee for Market Abuse strongly suggests that the procedure up to a decision being taken must be kept private if that possibility is to remain viable. It is difficult to see how a private caution could have any real meaning if the respondent was under a duty to tell the complainant what was happening in the investigation. The point of the respondent having the option of using a private caution is to keep the matter away from the public gaze. It would make nonsense of that jurisdiction if there had to be disclosure of the fact of an investigation having taken place.

71. In these circumstances I answer the question as follows:

(a) No

(b) No

(c) No

Question 2
72. This question only arises in the event of any part of question (1) being answered in the affirmative. I have answered all of them in negative.

73. Lest however I am wrong in so doing I propose to consider this question. Even if there is any one or more of the duties contended for by Ryanair in Question 1 (a), (b) and (c) such duty is not in my view enforceable by way of *mandamus* in the circumstances and on the basis pleaded in the statement of grounds as supported by the affidavit of Michael O'Leary sworn on the 17th January, 2008. The affidavit and statement of grounds demonstrate only:

(a) that Ryanair is a substantial shareholder in Aer Lingus,

(b) that Ryanair considers it had information to suggest that Aer Lingus was in breach of Regulation 10 of the 2005 Regulations,

(c) that it made a complaint to the respondent in this regard on the 21st August, 2007, and

(d) that the respondent has declined to indicate to Ryanair whether it has commenced an investigation or not.

74. None of these facts disclose a breach of the Regulations or of the 2005 Act. The evidence adduced goes nowhere near the very high threshold of proof which has to be achieved in order to permit of judicial review. Indeed *mandamus* in such circumstances would not only be inappropriate but inimical to the effective regulation of the market as required under the Regulations and the Directive which preceded it.

75. Accordingly I answer Question 2 in the negative.

Question 3
76. From the answers to the earlier questions it is clear that I take the view that the statement of grounds and supporting affidavit disclose no breach of duty on the part of the respondent whether under the Regulations or otherwise. This question is answered in the negative.

Disposal
77. As all of the questions have been answered in a manner adverse to Ryanair, it follows that the application for judicial review fails in *limine* and is dismissed.