# THE HIGH COURT

**[2001 No. 707 J.R.]**

**BETWEEN**

**AER RIANTA CPT**

**APPLICANT**

**AND**

**THE COMMISSIONER FOR AVIATION REGULATION**

**RESPONDENT**

**AND**

**BY ORDER OF THE HIGH COURT**

**AER LINGUS LIMITED AND RYANAIR LIMITED**

**NOTICE PARTIES**

**JUDGMENT of O'Sullivan J. delivered the 3rd of April, 2003.**

## INTRODUCTION

The applicant ("Aer Rianta") is the operator of three international airports at Dublin, Cork and Shannon, and the respondent ("the Commissioner") is the sole member of the Commission for Aviation Regulation established by s.5 of the Aviation Regulation Act, 2001, with the function, *inter alia*, of specifying maximum levels of airport charges that may be levied at the above airports by the applicant.

Such charges were ultimately determined by the respondent in a *"varied determination"* dated the 9th February, 2002, and took the form, where relevant to these proceedings, of setting a maximum charge or cap per passenger chargeable by the applicant to the users of the airports which include the notice parties.

This varied determination is subject to a wide ranging judicial review challenge in these proceedings. I will refer to the specific challenges being dealt with in this judgment at a later point.

Following an initial application I delivered judgment on 16th January, 2003, in which I excluded a number of the challenges sought to be made by the applicant based on error allegedly made by the respondent in his calculation of the maximum charge.

Subsequently, having held a formal case conference, I made a further ruling directing certain issues to be tried at this stage of the proceedings and postponing other issues, designated *"process"* issues, relating to alleged want of fair procedures, to a later stage.

In this judgment, accordingly, I now deal with a number of substantial issues which are largely, but not exclusively, directed to questions of statutory interpretation and application.

## THE STATUTORY CONTEXT

Because of the nature of the issues now being dealt with it is necessary to set out in some detail the relevant statutory provisions.

### The Air Navigation and Transport (Amendment) Act, 1998

The applicant was established in 1937 as a holding company for the first notice party and to promote aviation generally. For the first three years flights were from Baldonnell Co. Dublin until Collinstown Airport, as it was then called, commenced operations in 1940. In 1950 the applicant was given statutory responsibility to manage this airport as agent for the relevant government minister and 19 years later took over the same responsibility in relation to Shannon and Cork airports. Ownership of these

airports was vested in the relevant minister until 1998. Accordingly in the years prior to that date the airports were owned by the relevant minister and managed for him as his agent by the applicant.

The purpose of the Act of 1998 was to bring about a fundamental change by vesting ownership of the airports in the applicant and reorganising its powers and duties. Under the Act of 1998 the Minster for Finance is the holder of the share capital of the applicant.

Section 2 of the Act of 1998 provides the following definitions:

> "The word "aerodrome" means any definite and limited area (including water) intended to be used, either wholly or in part, for or in connection with the landing or departure of aircraft;
>
> (imported from s.2 of the Air Navigation and Transport Act, 1936).
>
> …
>
> "airport" means the aggregate of the lands comprised within an aerodrome and all land owned or occupied by an airport authority, including aircraft hangars, roads and car parks, used or intended to be used in whole or in part for the purposes of or in connection with the operation of aerodrome;
>
> "airport authority" means the person owning, whether in whole or in part, or managing, either alone or jointly with another person, an airport;
>
> "airport charges" means –
>
> *(a)* charges levied in respect of the landing, parking or taking off of aircraft at an aerodrome including charges for air-bridge usage but excluding charges in respect of air navigation and aeronautical communications services levied under section 43 of the Act of 1993,

*(b)* charges levied in respect of the arrival at or departure from an airport by air of passengers, or

*(c)* charges levied in respect of the transportation by air of cargo, to or from an airport,

as may be appropriate;

…

"the Authority" means the Irish Aviation Authority;…

"the company" means Aer Rianta, cuideachta phoiblí theoranta;…

"the Minister" means the Minister for Public Enterprise."

The following sections of the Act of 1998 provide:

"10. – (1) The Minister shall by order appoint a day to be the vesting day for the purposes of this Act as soon as practicable following the commencement of this Act.

…

14. – (1) On the vesting day, all lands, which immediately before that day were–

*(a)* vested in the Minister or used or intended to be used in connection with-

(i) a function of the Minister corresponding to a function conferred on the company by *section 16*, or

(ii) the provision of terminal services at an airport,

or

*(b)* held by the company in trust for the Minster,

(which lands comprised the airports known as Dublin Airport, Cork and Shannon Airport) and all rights, powers and privileges relating to or connected with such lands shall, without any conveyance or assignment and, subject to *subsection (2),* stand vested in the company for all the estate or interest therein which immediately before the vesting day was vested in the Minister but subject to all trusts and equities affecting the lands subsisting and capable of being preformed.

…

(5) On the vesting day the company shall, in respect of the lands and other property vested in the company under this section, pay to the Minister for Finance such amount as the Minister for Finance, with the consent of the Minister, may determine.

…

16. – (1) The company shall manage and develop the airports vested in it by *section 14* and any other airport that may from time to time be established or owned by the company pursuant to *subsection (3).*

(2) The company shall ensure the provision of such services and facilities as are, in the opinion of the company, necessary for the operation, maintenance and development of a State airport, including roads, bridges, tunnels, approaches, water supply works and water mains, gas works and gas pipelines, sewers and sewage disposal works, electric lines, telecommunications facilities, lights and signs, apparatus, equipment, building and accommodation of whatever kind.

(3) The company may, with the consent of the Minister given an after consultation with the Minister for Finance and subject to such

conditions as the Minister may determine, establish a new airport or become the owner in whole or in part or manager of an existing airport.

…

17. – (1) The company may acquire by agreement or, in accordance with the *Second Schedule*, compulsorily, any land, easement, interest in or other right over land, or any water right, for any one or more of the purposes described in *section 18.*

...

18. – (1) The purposes for which land may be acquired under *section 17* are as follows:

*(a)* to extend or develop an airport belonging to the company or establish and airport;

…

*(d)* to develop civil aviation at a State airport;

*(e)* to carry out the principal objects of the company.

…

22. – (1) The company and its subsidiaries shall take such steps as may be necessary under the Companies Acts to alter their memoranda and articles of association for the purpose of making them consistent with this Act.

…

23. – (1) The principal objects of the company shall be, and shall be stated in its memorandum of association to be –

*(a)* to own, either in whole or in part, or manage, alone or jointly with another person, airports whether within the State or not,

*(b)* to take all proper measures for the safety, security, management, control, regulation, operation, marketing and development of its airports,

*(c)* to provide such facilities, services, accommodation and lands at airports owned or managed by the company for aircraft, passengers, cargo and mail as it considers necessary,

*(d)* to promote investment at its airports,

*(e)* to engage in any business activity, either alone or in conjunction with other persons and either within or outside the State, that it considers to be advantageous to the development of the company, and

*(f)* to utilise, manage and develop the human and material resources available to it in a manner consistent with the objects aforesaid.

…

24. – (1) It shall be the general duty of the company –

*(a)* to conduct its affairs so as to ensure that the revenues of the company are not less than sufficient taking one year with another to –

(i) meet all charges which are properly chargeable to its revenue account,

(ii) generate a reasonable proportion of the capital it requires, and

(iii) remunerate its capital and pay interest on and repay its borrowings,

*(b)* to take such steps either alone or in conjunction with other persons as are necessary for the efficient operation, safety, management and development of its airports,

*(c)* to conduct its business at all times in a cost-effective manner, and

*(d)* to regulate operations within its airports.

(2) Nothing in *section 23*, this section or the memorandum of association of the company shall be construed as imposing on the company, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court to which it would not otherwise be subject.

(3) In carrying out its functions, the company shall have regard to –

*(a)* the development of air transport,

*(b)* any policy, financial or other guidelines given by the Minister to the company, in relation to the functions conferred on the company by or under this Act, and

*(c)* the safety standards in relation to the operation of aircraft and air navigation applied and in force by the Authority.

…

38. – (1) The Minister may give a direction in writing to the company requiring it -

*(a)* to comply with policy decisions of a general kind made by the Minister in relation to the functions assigned to the company by or under this Act, or

*(b)* to do or refrain from doing anything to which a function of the company relates, the doing, or refraining from doing of which is, in the opinion of the Minister, necessary or expedient in the national interest.

(2) If the company considers that compliance by it with a direction under *subsection (1)* would adversely affect the safety of aircraft it shall so inform the Minister and the Authority

(3) The Minister shall, in amending or revoking a direction under this section, have regard to any information received by him or her under *subsection (2)*.

(4) The company shall comply with a direction under this section.

39. – (1) The company may require the payment to it of airport charges, in respect of the use of a State airport, at such rates as it may, from time to time, with the approval of the Minister, determine.

(2) Liability for the payment of any charge payable by virtue of *subsection (1)*, together with interest on such charges in respect of any period during which the charges were due but not paid, may be imposed upon the operator or registered owner of an aircraft, whether such aircraft is registered in the State or is not so registered, or upon both those persons.

…

42. - (1) The company may make bye-laws in relation to a State airport.

…

(3) Bye-laws under this section may be made for any one or more of the following purposes, that is to say –

…

*(f)* the proper management, operation, safety, security and supervision of an airport or part thereof.

…

47. – (1) It shall not be lawful for a person to interfere in any way with anything provided for the purposes of the operation, management or safety of an airport.

(2) A person who contravenes *subsection (1)* shall be guilty of an offence."

**Aviation Regulation Act, 2001**

This act became law on 21st February, 2001 and on the 27th February, 2001, the respondent was appointed the sole member of the Commission established by section 5.

*"Airport", "airport authority"* and *"airport charges"* all have the meanings assigned to them by the Act of 1998.

*"Minister"* means Minster for Public Enterprise.

"5. – (1) There shall stand established on the establishment day a body to be known as the Commission for Aviation Regulation or, in the Irish language, An Coimisiún um Rialáil Eitlíochta to perform the functions assigned to it under this Act.

…

(4) In carrying out its functions, the Commission shall ensure that all determinations, conditions attaching thereto, amendments thereof and requests shall be objectively justified and shall be non-discriminatory, proportionate and transparent.

6. – Subject to this Act, the Commission shall be independent in the exercise of its functions.

7. – The principal function of the Commission shall be to regulate airport charges and aviation terminal services charges.

…

10. – (1) The Minister may give such general policy directions (including directions in respect of the contribution of airports to the regions in which they are located) to the Commission as he or she considers appropriate to be followed by the Commission in the exercise of its functions.

(2) The Commission shall comply with any direction given under *subsection (1)*.

…

32. – (1) In this section and *section 33,* "determination" means a determination under *subsection (2).*

(2) Not more then 6 months after the establishment day and at the end of each succeeding period of 5 years, the Commission shall make a determination specifying the maximum levels of airport charges that may be levied by an airport authority.

(3) In a determination the Commission may provide for a different maximum level of airport charges at different airports.

(4) Where it appears to the Commission that two or more airports are either–

*(a)* managed by the same airport authority, or

*(b)* that they are owned by the same person and operate as a group of airports whose activities are coordinated by that person, any determination in relation to any one of those airports may be made by reference to the

aggregate of amounts levied by way of airports charges at that airport and amounts so levied at the other airports.

(5) A determination shall –

*(a)* be in force for a period of 5 years, and

*(b)* come into operation not later than 30 days after the making of such determination.

(6) A determination may –

*(a)* provide –

(i) for an overall limit on the level of airport charges,

(ii) for limits to apply particular categories of such charges, or

(iii) for a combination of any such limits,

*(b)* operate or restrict increases in any such charges, or to require reductions in them, whether by reference to any formula or otherwise, or

*(c)* provide for different limits to apply in relation to different periods of time falling within the period to which the determination relates.

(7) Prior to making a determination the Commission shall –

*(a)* give notice to any person concerned stating that it proposes to make a determination,

*(b)* publish such notice in a daily newspaper published and circulating in the State, and

*(c)* specify the period (being not less then one month from the publication of the notice) within which representations with respect to the proposed determination may be made by interested parties or the public.

(8) The Commission –

*(a)* shall consider any representations which are made under *subsection (7)* and not withdrawn, and

*(b)* may either accept or reject any representations made under *subsection (7)*.

(9) On making a determination the Commission shall make a report on the determination giving an account of its reasons for making that determination together with its reasons for accepting or rejecting any representations made under *subsection (7)*.

(10) A report under *subsection (9)* shall be sent by the Commission to the Minister and to the airport authority concerned.

(11) The Commission shall as soon as may be –

*(a)* give notice that it has made a report under *subsection (9)*

and

*(b)* make the report available on request to interested parties or to the public.

(12) A notice under *subsection (11)* shall be given by publishing the notice in a daily newspaper published and circulating in the State and by such other means as the Commission may determine.

(13) For the purposes of this section, the Commission may request an airport authority in writing to provide information (including accounts, estimates, returns, projections or any other records) to it which is in the possession of or which can be obtained by the airport authority.

(14) *(a)* The Commission may on or after the expiration of a period of 2 years after the making of a determination –

(i) at its own initiative, or

(ii) at the request of an airport authority or user concerned in respect of the determination,

if it considers that there are substantial grounds for so doing, review the determination and, if it sees fit, amend the determination.

*(b)* An amendment made under *paragraph (a)* shall be in force for the remainder of the period of the determination referred to in *subsection (5) (a)*.

*(c) Subsection 5 (b)* and *subsections (7)* to *(13)* shall apply to an amendment made under *paragraph (a)*.

(15) Any airport charges imposed by an airport authority, which are in force immediately before the establishment day, shall continue in force until any determination has been made.

33. – In making a determination the Commission shall aim to facilitate the development and operation of cost-effective airports which meet the requirements of users and shall have due regard to –

*(a)* the level of investment in airport facilities at an airport to which the determination relates, in line with safety requirements and commercial operations in order to meet current and prospective needs of those on whom the airport charges may be levied

*(b)* a reasonable rate of return on capital employed in that investment, in the context of the sustainable and profitable operation of the airport,

*(c)* the efficient and effective use of all resources by the airport authority,

*(d)* the contribution of the airport to the region in which it is located,

*(e)* the level of income of the airport authority from airport charges at the airport and other revenue earned by the authority at the regulated airports or elsewhere,

*(f)* operating and other costs incurred by the airport authority at the airport,

*(g)* the level and quality of services offered at the airport by the airport authority and the reasonable interests of the users of these services,

*(h)* the costs competitiveness and operational efficiency of airport services at the airport within respect to international practice,

*(i)* imposing the minimum restrictions on the airport authority consistent with the functions of the Commission, and

*(j)* such national and international obligations as are relevant to its functions.

34. – Section 39 (1) of the Act of 1998 is amended by the substitution of "subject to *section 32* of the *Aviation Regulation Act, 2001"* for "with the approval of the Minister".

…

38. – (1) A person shall not question the validity of a determination, a review of a determination or a request of the Commission under this Part otherwise than by way of an application for leave to apply for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as "the Order")."

This section goes on to specify that the judicial review shall be made within a period of two months from the date of the determination, shall beyond notice to specify parties,

not be granted unless the High Court is satisfied that there are substantial grounds and restrict the right of appeal from the High Court decision  cases involving points of law of exceptional public importance or the Constitutionality of any law.

“40.—(1) This section applies to—

(*a*) an airport authority to whom a determination under *section 32(2)* applies,

(*b*) the Irish Aviation Authority in respect of a determination under *section 35(2)*, and

(*c*) an airport user, being any person responsible for the carriage of passengers, mail or freight by air to or from an airport, in respect of a determination under *section 32(2)* or *35(2)*.

(2) The Minister shall, upon a request in writing from a person to whom this section applies who is aggrieved by a determination under *section 32(2)* or *35(2)*, establish a panel ("appeal panel") to consider an appeal by that person against the determination.

(3) An appeal panel shall consist of at least 3 but not more than 5 persons appointed by the Minister, one of whom shall be designated by the Minister to be the chairperson of the appeal panel.

(4) An appeal panel shall determine its own procedure.

(5) An appeal panel shall consider the determination and, not later than 2 months from the date of its establishment, may confirm the determination or, if it considers that in relation to the provisions of *section 33* or *36*, there are

sufficient grounds for doing so, refer the decision in relation to the determination back to the Commission for review.

(6) An appeal panel shall notify the person who made the request under *subsection (2)* of its decision under *subsection (5)*.

(7) An appeal panel, having considered a determination under *section 32(2)* or *35(2)* and made a decision in respect of it under *subsection (5)* and having notified under *subsection (6)* the person who made the request under *subsection (2)* of its decision, shall stand dissolved.

(8) The Commission, where it has received a referral under *subsection (5)* from an appeal panel, shall, within one month of receipt of the referral, either affirm or vary its original determination and notify the person who made the request under *subsection (2)* of the reasons for its decision.

(9) A notice of a decision made under *subsection (8)* shall be given by publishing the notice in a daily newspaper published and circulating in the State and by such other means as the Commission may determine.

**Air Navigation and Transport Act 1936**

2. – (1) The expression "the Minister" means the Minister for Industry and Commerce;

…

**37.**—The Minister may and any local authority may, with the consent of the Minister given after consultation with the Minister for Local Government and Public Health and subject to such conditions as he may impose, establish and

> maintain aerodromes and provide and maintain in connection therewith roads, bridges, approaches, apparatus, equipment, and buildings and other accommodation.
>
> …
>
> **68.**—As soon as may be after the passing of this Act the Minister for Finance shall, after consultation with the Minister, take all such steps as appear to him to be necessary or desirable to procure that a limited company (in this Act referred to as the Company) conforming to the conditions laid down in the Second Schedule to this Act shall be formed and registered in Saorstát Eireann under the Companies Acts, 1908 to 1924.

The second schedule made it clear that one of the principal objects of the company was the holding of shares in Aer Lingus Teoranta.

## THE ISSUES TO BE DEALT WITH

By order of 10th December, 2001, Kelly J. granted the applicant leave to bring judicial review proceedings challenging the determination of the respondent (as it then was) on several grounds which included; (a) challenging for error, which I have already ruled cannot be done, (b) challenging the respondent's interpretation and application of the relevant Acts, which I am dealing with now, and (c) challenging on the grounds of alleged want of fair procedures which issues have been postponed.

By a subsequent order McKechnie J. on 4th February, 2002, the notice parties were joined and by order of Murphy J. on 22nd April, 2002, the applicant was given leave to challenge the varied determination of 9th February, 2002, on substantially the same grounds as before.

As already indicated following my judgment of 16th January, 2003, a formal case management conference was held at which the principal parties expressed differing views as to what issues should next be dealt with. I determined that in the main the proposals identified by the applicant in relation to these issues together with the relevant materials should be adhered to with the exception of the challenges relating to alleged want of fair procedures, which should be deferred.

In this judgment, accordingly, I am dealing with twelve issues. The first two of these relate to the applicant's allegation that the respondent has no power to review its capital expenditure programme proposed for the future including the five years affected by the respondent's award (issue 1) or in relation to its capital expenditure programme which was completed, contracted for, or commenced prior to coming into force of the Act or the appointment of the respondent (issue 2). Between them these two issues took up most of the time devoted to this section of the case and before identifying the specific questions which were formulated in a number of different versions and in a number if different ways it would be useful if I gave a short background introduction as follows.

The method by which the respondent arrived at a maximum revenue per passenger chargeable by the applicant, the cap was, broadly speaking, to calculate the asset base of the applicant at the date of the determination, to adjust that figure for depreciation, to deduct items not allowable in the Commissioner's view from that asset base and to add a figure for allowable capital expenditure for the period of the determination (the "CAPEX"). The figure thus produced was the regulated asset base (the "RAB") of the applicant. The next step was to determine a percentage return (called the weighted average cost of capital, or "WACC") on the RAB so as to produce a figure for an annual return. To this was added a further depreciation figure to

represent a return to investors and an addition for regular operation expenditure, with a further addition for regulatory fees and estimated taxation expense so as to arrive at an assessed total annual expenditure which would have to be paid for out of revenue resources available to the applicant including the cap.

This total figure was reduced by the respondent's estimate of the applicant's revenue from its commercial operations and once that overall maximum allowable revenue figure was established it was divided by the number of passengers (also estimated) to produce the cap chargeable by the applicant in the first year to which determination applied being a maximum average revenue per passenger for that year. Projections forward were made for the balance of the five year period of the determination which included a deduction calculated by reference to the consumer price index and by reference to an established formula for airport regulation known as "the X factor", which calculation included a reduction in the cap which would otherwise be chargeable in view of the respondent's judgment that the applicant could attain greater efficiencies in Dublin and Shannon airports over the period. Multiple calculations and assumptions were involved in producing each and every one of the estimated figures referred to and in several of them there were many sub calculations and computations before the end figure was computed. This process involved, furthermore, contributions from several parties each with their own agenda and several contending for different outcomes. In fact two such caps were fixed by the determination: a single overall CAP for all passengers passing through the three imports and a separate "sub-cap" for passengers passing through Dublin alone. The figure for the Dublin sub-cap was appreciably lower than the overall cap for the three airports. These caps were €6.34 and €5.38 respectively.

As stated, part of the exercise carried out by the respondent was to calculate the asset base of the applicant at the date of the determination and also to calculate a figure for allowable capital expenditure for the period going forward. As will be seen hereafter the respondent received information from the applicant in relation to both of the categories of capital expenditure comprising, *inter alia*, a list of projects some of which had been completed (such as Pier C in Dublin airport) some of which had been contracted for and others of which were simply planned either for the immediate or the medium or long term. Some of these projects had already been approved by the Minister for Public Enterprise either prior to the coming into force of the Act of 2001 or prior to the appointment of the respondent. Apart from itemising and describing these projects the applicant also submitted its estimates of costs and it is the total of these costs which is referred to as the CAPEX (namely capital expenditure).

As part of the process engaged in by the respondent prior to determining the cap, submissions were also received from other parties including airlines such as the two notice parties and many others in the wider community such as tourist interests.

Clearly the interests of airlines, for example, could in many cases be opposed to those of the applicant. The respondent did not automatically accept either the items or the costings in whole or in part presented to him by the applicant as its CAPEX but rather reviewed it and in many cases, as will be seen in more detail later, either rejected it or reduced the amount available or excluded it from his calculations as being premature. In many instances he expressed the view that the applicant had not justified the inclusion of a particular project in its programme or the costs claimed for it in others. He disallowed some of these projects referring to the fact that the airport users and, in particular, airlines were strongly opposed to them and claimed that they had not been properly consulted. The respondent employed his own independent consultants,

Infrastructure Management Group Inc. (IMG), to prepare a CAPEX for the applicant which, in their opinion would be allowable. This he adopted for his calculation of the cap.

At this point I am merely concerned with giving an introduction to the first two questions. In general the first question involves a challenge by the applicant to the effect that the Commissioner had no jurisdiction to interfere with the applicant's CAPEX at all and was obliged to accept it both as to the projects included and the costs claimed for the purpose of calculating the cap. The second issue concerns the applicant's challenge that even if the Commissioner does have such a power in relation to the applicant's CAPEX going forward into the future, he does not have a power to disallow any element of the applicant's capital expenditure which has already been spent, is the subject of a contractual commitment or has been approved by the relevant Minister, either before the introduction of the Act of 2001 or his appointment. A third issue relates to the applicant's assertion that if the respondent has such powers he is not at large but stands in the position of a court reviewing decisions for irrationality in respect of the applicant's decisions in relation to their own CAPEX. Alternatively, he must allow a margin of appreciation and show *"due regard"* for these decisions which he has, allegedly, failed to do. The remaining issues being dealt with in the judgment are set out in their turn below and need no further introduction at this point.

## FORMULATION OF THESE ISSUES

As already indicated the specific grounds of challenge now being dealt with have been differently formulated by the applicant and are expressed differently depending on whether one consults the order giving leave to bring the judicial review

proceedings, the applicant's revised list of core issues (following my judgment of 16th January, 2003) dated 20th January, 2003, the outline written submissions prepared by the applicant for this section of the case or the written submissions in reply dated 5th March, 2003. This comment is not intended as a criticism: rather the reverse because the issues became to some extent simplified and clarified as the proceedings progressed and it is possible, I think, to identify a dozen questions which, if answered, will respond to all aspects of the applicant's challenge. I propose now to set out these questions as follows:

1. & 2. Does the respondent have power to review the applicant's CAPEX being both
   (a) The current and future CAPEX and
   (b) The "past" CAPEX?
3. If so, is such power of review subject to restrictions such that the CAPEX can only be reviewed for irrationality? Alternatively, must the respondent allow a margin of appreciation to the applicant's CAPEX, or must he have "due regard" for it in some other way and if any of these restrictions apply, did the respondent operate the appropriate standard in carrying out his review?
4. Did the respondent in fact and in practice "disallow" elements of the applicant's CAPEX either in whole or in part by discounting these from his calculations thereby, in effect, subverting the applicant management's decision-making jurisdiction?
5. Even if the respondent has a general power to conduct such a review, does he have power to analyse and eliminate, item by item, the elements in the

applicant's CAPEX: in other words to "micro-manage" this aspect of the applicant's business?

6. Does the respondent have power to take into consideration matters other than those specifically identified in s. 33 of the Act of 2001?
7. Specifically, does the respondent have power to insist that the applicant justifies each element and the costs of each element of its CAPEX so that, if they fail to do this in the respondent's judgment, that element will be excluded for calculation purposes?
8. Does the respondent have power to exclude elements from the applicant's CAPEX for alleged lack of consultation with airport users and in particular airlines including the two notice parties who expressed strong opposition to such excluded elements?
9. Does the respondent have power to substitute a CAPEX of his own devised in place of the applicant's CAPEX and in particular one prepared for him by independent consultants IMG?
10. Was the respondent obliged to include some facility by way of formula or otherwise in his calculation to reimburse the applicant for what are described as exogenous unforeseen costs which will in all probability arise during the period covered by the determination although not, obviously, identifiable at the time?
11. Did the respondent comply with a ministerial directive requiring him to reflect government policy in relation to regional development in his determination?

12. And, finally, was the respondent correct to exclude an up to date passenger forecast from his varied determination of 9th February, 2002, on the basis that he had no statutory power to include it?

I propose to take the first two and last three of these questions *seriatim* and outline the arguments made by the parties in relation to each one and then to reach my conclusion before proceeding to the next group of questions. I will deal with questions four to nine inclusive as a unit.

## 1. DOES THE RESPONDENT HAVE POWER TO REVIEW THE APPLICANT'S CAPEX?

This question identifies the issue in principle and leaves aside specifically the sub-issue relating to "past CAPEX" and also leaves aside (at least as a matter of primary emphasis) the related questions as to whether the respondent has power to micro-manage (or I think the respondent would say micro-analyse) the applicant's CAPEX.

### Applicant's Submissions

The lynchpin of the applicant's argument is grounded in s. 16 of the Act of 1998. This has been quoted *in extenso* at the beginning of this judgment but I will repeat the material portions as follows:

> "**16.—**(1) The company shall manage and develop the airports vested in it by *section 14* and any other airport that may …be established or owned by the company …

(2) The company shall ensure the provision of such services and facilities as are, in the opinion of the company, necessary for the operation, maintenance and development of a State airport, including roads, bridges, tunnels, approaches …apparatus, equipment, buildings and accommodation of whatever kind.

(3) The company may, with the consent of the …establish a new airport …"

The applicant submits that once it has formed the opinion under *subsection (2)* that any service or facility is necessary, it has a positive, unqualified, absolute duty to ensure the provision of same. This duty is subject to no outside control and in particular is not subject to any control by the respondent. Section 16 has not been amended explicitly or by implication by the Act of 2001 and indeed in performing his duties thereunder the respondent must (under s. 33) aim to facilitate the development and operation of cost effective airports which meet the requirements of users - effectively the same objective which has been imposed upon the company under s. 24 of the Act of 1998 which provides, where relevant, that it must take such steps as are necessary for the efficient operation, safety, management and development of its airports and conduct its business at all times in a cost effective manner.

The applicant submits that it and it alone has this positive duty and that the Act of 2001 has not attempted to amend or in any way interfere with s. 16 or with s. 24 and that it is clear that, under s. 33, the respondent must facilitate the discharge by the applicant of this duty and the only way he can do this is to accept, without any reduction, the CAPEX and costing presented to him by the applicant.

Clearly the applicant will not be able to discharge that duty unless it has the appropriate funds. In determining the cap the regulator opted for what was called the

"single till" approach. This is to be distinguished from the dual till approach. The single till approach means that in calculating the cap the respondent included all the revenue available to the applicant (in a "single till") including revenue from its commercial operations as being revenue which is available to provide funding generally for the on-going cost of the applicant's allowable CAPEX. This latter was calculated only after such commercial revenue had been taken into account so that the resulting cap was much less than if this revenue had not been so calculated. In other words, there was only one till into which all of the revenue was calculated and, by reference to which, only the shortfall after counting in the available commercial revenue was required to be made up by the cap. The alternative approach - the dual till approach – would have excluded the commercial revenue with the result that the amount required to be funded by the cap would have been significantly greater and as a result the cap itself would have been much greater. The applicant makes the point that by opting for the single till approach with the consequent reduction in the cap, the respondent's determination has put the applicant in the position that it has no funds out of which to fund its CAPEX other than the cap. Therefore, by removing elements from the applicant's CAPEX and thereby declining to provide for the funding thereof, the respondent has in effect and in reality put the applicant in a position where it is incapable of carrying out its clear, unqualified, strict statutory duty to ensure the provision of those very items which it considers necessary under s. 16 of the Act of 1998. This is something he has done without any statutory warrant and he cannot – as he has tried to do in argument – avoid the inevitable logic of his determination by simply suggesting that the applicant has other revenue streams out of which "disallowed" elements of the applicant's CAPEX can be funded.

The result of this is that there is a lacuna in the way the respondent has operated the Act of 2001. The applicant has a clear statutory objective to manage and develop airports and to ensure the provisions of services and facilities under s. 16 of the Act of 1998: the respondent in no way accepts that he is obliged to ensure their provisions and yet he effectively deprives the applicant of the wherewithal to carry out its statutory duty. This means that the intention of the legislature that these services and facilities be provided is, thereby, frustrated. This cannot be a true application of the Act of 2001 and need not be the case if the acts are correctly construed. Clearly the respondent, in making his calculation, must make provision for the applicant's CAPEX and its funding, and there is nothing in the Act of 2001 which precludes this and indeed everything in that act to support this interpretation.

The board of directors of the applicant are obliged to ensure that its capital is remunerated. There is no way that they could, as the respondent suggests, decide to invest in capital projects which have been excluded by the respondent even if they could persuade some investor to provide the funding, because there is no way that they could guarantee that the investment would be remunerated by inclusion in a subsequent determination or that the respondent would change his mind at a later date. Effectively, by depriving the applicant of the money to carry out its statutory duty, the respondent has frustrated the applicant's discharge of same and this cannot have been the intention of the Act of 2001.

When one looks at s. 33 of the Act of 2001 in greater detail, there is nothing there which runs counter to this submission. It is clear that the respondent must "aim to facilitate the development and operation of cost effective airports" (a duty which it shares with the applicant) and, in doing this, must have regard to the level of investment in airport facilities at the relevant airport in line, not only with safety requirements, but

also, with commercial operations albeit in order to meet the current and prospective needs of the airlines (upon whom the charges may be levied). He must also have regard to a reasonable rate of return on the capital employed in that investment; to the efficient and effective use of all resources; the operating costs of the airport authority and also he must have due regard to imposing minimum restrictions on the airport authority and to such national and international obligation as are relevant to its functions. In the latter context it is clear that the national obligation imposed on the applicant under s. 16 of the Act of 1998 is a clear unqualified absolute obligation on it to ensure the delivery of the services and facilities contained in its CAPEX.

Whilst there is, of course, material in s. 33 which obliges the respondent to have regard also to cost competitiveness and the needs of the users, these cannot – in the absence of clear explicit statutory language which does not exist – override the stark unqualified statutory obligation imposed on the applicant under s. 16 of the Act of 1998. To achieve such an amendment of this clear statutory duty would require explicit and specific language which is simply not present in the Act of 2001.

The suggestion made by the respondent that the cap relates only to a fraction of the applicant's income (some 24%) is misleading: the rest of the income is not available for funding any excluded elements of the CAPEX precisely because the respondent has opted for the single till approach which means that the cap itself is calculated only to make up the difference for funding those elements of the CAPEX which the respondent allowed after these other revenue streams have been taken into account. They are, therefore, not available to fund disallowed elements of the CAPEX because they are already, according to his single till calculation, deployed in funding the permitted CAPEX.

In this connection also, the suggestion that more funds will be available to the applicant if passenger numbers increase or it achieves even greater efficiencies than those targeted in the respondent's calculations or through other commercial activities, are greatly exaggerated because the passenger numbers are already calculated on a realistic basis; the built in efficiencies are challenging and the other commercial streams are quite optimistic. The reality is – and this cannot be avoided – that in all probability the money will not be available to the applicant over the five year period to fund excluded elements of its CAPEX. Furthermore, the suggestion by the respondent that this will reduce him to a rubber stamp is exaggerated: there are many elements of regulation still available to him if the applicant's CAPEX is effectively "off limits".

For example, with reference to the formula referred to in the earlier part of this judgment the respondent has power to assess and review every element going into this formula with the exception of the applicant's CAPEX (and in principle also the applicant's operating costs (its OPEX). The regulator still has functions in relation to assessing passenger numbers, the amount of return on capital, the method of calculating the depreciation of the asset base of the applicant and other relevant elements such as likely taxation and efficiency. He will require all the statutory aids such as staff and independent consultants to assist him in carrying out this work even if he must accept the applicant's CAPEX. The applicant is not making the same point in relation to its OPEX in these proceedings simply because the respondent accepted the applicant's OPEX for the purpose of his first determination. Nonetheless in principle the OPEX is just as much off limits to the respondent as is the applicant's CAPEX because both are subject to its positive statutory duty under s. 16 of the Act of 1998.

The respondent has attempted to justify his approach to calculating the cap by reference to his expert evidence that this is a normal way to carry out a regulatory

function. It may well be that certain theories or practices of regulation, and in particular incentive based regulation, do include a power in the regulator to review and exclude portions of the regulatee's CAPEX. But this is no argument for the true interpretation of the statute. One cannot simply argue that because this particular theory of regulation requires a particular power, it must be in the act. This is to put the cart before the horse. Clearly it is not in the act, as a perusal of s. 16 of the Act of 1998 which has been left untouched and unamended, demonstrates. To read such a power into the Act of 2001 simply because it is desirable by reference to one particular theory of regulation is entirely inappropriate.

Equally wide of the mark is the submission that the ambit of s. 16 (2) is narrow and does not include runways, terminals and major development projects such as are included in the applicant's CAPEX. This argument is based on the inclusion of in s. 16 (2) of the words *"…including roads, bridges, tunnels, approaches…sewers and sewage disposal works… buildings and accommodation of whatever kind."*

If this argument were correct it would produce the absurdity that there was statutory power and indeed a duty cast by the Act on the applicant to provide these ancillary services but no duty to provide runways, terminals and other central aerodrome facilities. Quite apart from this, this argument ignores the earlier words in the subsection which impose on the company an obligation to provide *"…such services and facilities as are, in the opinion of the company, necessary for the operation, maintenance and development of a State airport."* These words are clearly wide enough to capture runways and terminals and the list of other relatively minor items are included to ensure that there could be no argument that they were excluded.

The respondent has argued, further, that s. 37 of the Act of 1936 is the antecedent of s. 16 (2). Section 37 of the earlier Act is clearly concerned only with

minor matters and indeed with matters which may involve cooperation with a local authority and therefore which are not completely within the jurisdiction of the applicant.

The applicant argues that in fact the true successors of s. 37 are subs. (1) which deals with management and development of an airport authority and subs. (3) which deals with the establishment of a new airport. Certainly it is not overwhelmingly apparent that the only successor of s. 37 is subsection (2).

The respondent has argued that the applicant's duty under s. 16 was never absolute because its power to determine airport charges was itself always subject to the approval of the minister. It follows, the respondent has argued, that the duty cast upon the applicant under s. 16 must always have been read as contingent upon the availability of ministerially approved charges being available to pay for the provision of these services and facilities. The duty was always qualified and under the Act of 2001 the respondent has argued that the determination of these charges is now subject to the imposition by the regulator of the cap under s. 32 of the Act of 2001 which itself must be calculated by reference to the list of matters to which the respondent has to have due regard set out in s. 33.

The applicant in response to this argument (which I will elaborate in more detail when I come to set out the respondent's submissions) submits that it is based on a fundamentally flawed understanding of the relationship between the two statutes. It is true that under the Act of 1998 the Minister had power to approve (or otherwise) the charges determined by the applicant. He also had power under s. 38 to give directions of a general kind in relation to the applicant's functions and of a specific kind in relation to matters necessary or expedient in the national interest. The Minister, under the Act of 1998 therefore, had two quite distinct species of function namely a function in

relation to charges which has been now assigned to the respondent under the Act of 2001 and a function in relation to general regulation of the applicant's other duties which remains with the Minister and has not been assigned to the respondent.

The respondent therefore has a jurisdiction in relation to charges and charges only which he has inherited from the Minister but he has not inherited the Minister's other regulatory functions under s. 38 of the Act of 1998 and he cannot enlarge his charging responsibilities to encroach upon the latter. It is therefore false for the respondent to argue that just because he has a power in relation to the applicant's charges he can by reference to the matters to be considered as set out in s. 33 operate this power in a way which effectively carries out regulation, not of charges, but of the airport itself (which is a function which the minister retains insofar as it is vested in any body other than the applicant itself). Comparisons with other Irish regulators offer the respondent no comfort because these regulators have much wider powers than are given to the present regulator whose power relates to charges and charges only.

The regulator has argued that ten words in the Act of 2001 actually show the intention of the Oireachtas that the regulator should have the last word in the matter of charges. The first of these words is "regulate" in s.7 which specifies the regulating of airport charges as his principal function. The word is not defined further and therefore includes what is covered by the ordinary meaning of the word. The second word is the word "reject" in s. 32 (8) of the Act of 2001 which gives the respondent power, having considered any representation made by the applicant in the context of his determination process, to "accept or *reject* any representation" (emphasis added). It is argued that this means that if the applicant makes a representation specifying its CAPEX and the costings, by the inclusion of this word the legislature intended to confer upon the respondent a power to reject that CAPEX. The final words are contained in s. 34 of the

Act of 2001 which provides that the words *"subject to section 32 of the Aviation Regulations Act, 2001"* be substituted for the words *"with the approval of the minister"* in s. 39 (1) of the Act of 1998 so that the latter now reads

> "The company may require the payment to it of airport charges, in respect of the use of a State airport, at such rates as it may, from time to time, subject to section 32 of the Aviation Regulation Act, 2001, determine."

The respondent has sought to argue that the effect of the words is to clearly establish that the respondent has full unqualified jurisdiction to review and disallow any or all of the applicant's CAPEX.

In response the applicant submits that this construction would involve the amendment *sub silentio* of s. 16 (1), s. 16 (2), s. 23 and s. 24 of the 1998 Act, none of which provisions have in fact been amended by the Act of 2001.

Secondly it is submitted that one would expect a very explicit and clear section in the Act of 2001 if a radical shift of power such as is now being contended for on behalf of the respondent was, in fact, intended.

The argument that the respondent's power derives from his ability to reject any submission from the applicant founders on the basic principle that a statutory power cannot be dependent upon whether or not the applicant makes a submission. Nor does reliance on the word "regulate" assist the respondent in importing into the Act something which is not there and which runs counter to an explicit provision (s. 16 of the Act of 1998) which is. The subjection of the applicant's power to determine charges to the respondent's functions under s. 32 means just that, namely that the respondent can regulate the charges but this cannot be expanded to confer upon him an ability to regulate the airport which remains with the Minister. Section 33 is clearly ancillary to s. 32 in that it provides guidance to the respondent as to how he is to carry

out his function under that section. It cannot therefore be used as itself an origin and source of further jurisdiction to regulate airports as distinct from charges. This is true not just as a matter of form but as a matter of substance. What the regulator has done has been, as a matter of substance, to deprive the applicant of the capacity to exercise its clear statutory duty as set out in s. 16 of the Act of 1998. This cannot have been the intention of the legislature. So far, incidentally, from having paid due regard to the level of investment in airport facilities as required by s. 33 (a), by depriving the applicant of the only possible source of funding for its CAPEX, it has paid no regard to this matter.

**Respondent's Submissions**

The respondent began by identifying the foregoing submission as an *absolutist* position, to be distinguished from a secondary or alternative submission of the applicant, to the effect that even if the respondent had jurisdiction to review the applicant's CAPEX this could only be done in a broad brush way and not by way of analysing item by item the elements in the CAPEX in a way described by the applicant as "micro-management". By reference to this latter argument the respondent has no jurisdiction to exclude any element of the CAPEX which must be treated with due regard to the applicant's statutory duties and expertise and can only be reviewed therefore either generally or on an itemised basis by reference to *Wednesbury* principles of unreasonableness.

I should make it clear that, in the foregoing, I have attempted to summarise the applicant's submission only in relation to what the respondent has described as the absolutist submission and in what immediately follows I will be dealing only with the respondent's reply thereto.

The respondent accepts that his regulation of airport charges will impact on the applicant's plans and makes the point that the applicant's case, that it has thereby taken over the management by the applicant of the airports, clearly means that this has been done *de facto* rather then *de jure. De Jure* the respondent has clearly done no more then he is required to do under the Act of 2001.

The respondent relies on the applicant's own description of the function of a regulator set out as part of the statutory process leading up to the determination of the cap. The applicant submitted

> "Aer Rianta sees the dominant role of economic regulation as maximising the welfare of customers and business by balancing overall needs and objectives. In maximising welfare, regulators act as market surrogate where there is no effective competition. As market surrogate, the regulator attempts to drive the economic efficiency that would be delivered if effective competition were possible. Aer Rianta believes that the best approach to adopt in fulfilling these aims is incentive based regulation."

The respondent points out that the latter is something clearly more than simple price capping. It contemplates a regime which incentifies the regulatee to adopt certain courses of action and to eschew others. The expert evidence shows that reviewing CAPEX is normal practice for a regulator, including the reassessment of the value of previous investments and this includes the placing of reliance by a regulator on an alternative set of investment calculations to those presented by the regulatee.

The applicant's contention therefore involves the removal of one familiar tool from the regulator under the Act of 2001. This is not only surprising but wrong in that it ignores the existence and rationale of the Act of 2001, the structure and content of that Act, the precise terms of the Act and in particular s. 33 and finally the explicit amending

provisions of section 34. The applicant's submission also implies that the Act of 1998 overrides the provisions of the Act of 2001. This ignores the history of the Act of 1998, imposes an unjustifiable interpretation on s. 16 (2) and wholly ignores the ministerial veto in s.39 of the Act of 1998 which has now been replaced by the regulator's function under s. 32 of the Act of 2001. Moreover, the applicant has exaggerated the impact of the respondent's determination on its management capacities as it has also exaggerated its own duties under s. 16 (2) of the earlier Act.

It is accepted that the regulator's determination was intended to and does have an impact on the applicant's business: nevertheless, all the respondent does is to fix a maximum charge. He cannot require (by court injunction for example) that the applicant carry out any particular project in its CAPEX or refrain from carrying out another. The regulator's cap applies only to about a quarter of the applicant's income. Moreover, if the applicant becomes more efficient or improves its profits or if passenger numbers increase above those predicted, it will retain these revenues.

The applicant never enjoyed an untrammelled right even to decide its own CAPEX. Prior to the Act of 2001, the applicant's charges were subject to ministerial approval. The Minister's function in this regard was not qualified or restricted in any respect. This has now been replaced with a sophisticated and carefully engineered method of reviewing the applicant's charges. But these were never at the absolute say so of the applicant. Prior to 1998, the applicant had no power to fix charges: between 1998 and the coming into force of the Act of 2001 it had power to fix charges with the approval of the Minister. In fact, despite an extensive CAPEX programme in these years, those charges were not increased so that in practice the applicant's CAPEX for those years was not funded from an increase in charges.

The Act of 2001 does not take away or cut down an existing function of the applicant for the simple reason that the applicant never had that function. Its ability to determine charges was always subject to ministerial approval and is now subject to the respondent. Nothing has been taken away: simply the identity of the approving person has been replaced and, indeed, by way of a carefully constructed mechanism rather than a crude and somewhat unpredictable system so far as the earlier statute went.

The elaborate machinery set out in the Act of 2001 would not be necessary if the respondent's power was as limited as the applicant now contends. If it was intended to exclude the CAPEX from the respondent's control all that was needed was the deletion of CAPEX from s. 39 (1) of the Act of 1998 but this was not done. The Act of 2001 sets up a sophisticated machinery, equips the respondent with staff and independent advisors, and provides for an elaborate process involving appeal, judicial review, submissions from interested parties including the applicant and the possibility of an amended determination.

Crucially s. 32 (8) confers upon the respondent the power to reject representations with respect to a proposed determination including representations from the applicant. This power does not depend on the making of these representations: it is merely reflective of what is entailed in the power to regulate charges and in particular to do so with reference to the requirements of section 33. If the applicant's contentions were correct there could not possibly be a power to reject the applicant's representations with regard to a proposed determination insofar as they included a list of proposed projects in the applicant's CAPEX and intended costs. This is, in fact, what the applicant did in this particular instance and the power of the respondent to deal with it as he has done is clearly conferred in the statutory provision entitling him to accept or reject these determinations.

Furthermore, s. 33 clearly means that in carrying out his function under s. 32 the respondent must critically evaluate the investment plans of the applicant. It is difficult to see what the words *"shall aim to facilitate the development and operation of cost effective airports which meet the requirements of users"* and the words *"shall have regard to –*

(a) *the level of investment in airport facilities at an airport to which the determination relates…"*

mean unless they mean that he must have regard to the investment plans of the applicant so that he can aim to facilitate a cost effective airport and have regard to that level of investment. He cannot have regard to that level of investment without considering the elements of the CAPEX.

If the only function that the respondent could carry out in relation to CAPEX was to fix prices then the Act achieved this in s. 32 and there was no need for section 33. The introduction of the latter section means, however, that the regulator must have regard, *inter alia*, to the investment plans of the applicant because if he does not do this he cannot have regard to the matters referred to in s. 33 and in particular subs. (a).

The effect of s. 34 is crucial in the context of the present submission. It makes the company's capacity to determine charges *"subject to section 32 of the Aviation Regulation Act, 2001"* - that is subject to a section which explicitly entitles the respondent to reject anything which the applicant might submit to the respondent in relation to its CAPEX. This clearly establishes the hierarchy between the respondent and the applicant: the last word rests with the respondent because he can reject anything the applicant submits to him in relation to CAPEX.

The applicant's submission on this point simply ignores this plain amendment of the Act of 1998. Not only did the applicant never have an untrammelled power to

determine its own charges but now that power is subject to an explicit unqualified power vested in the respondent to reject the applicant's proposals in this regard.

The history of investment between 1998 and 2001, during which time the applicant spent some £139 million of capital expenditure without having any increase in its charges, runs contrary to its submission. These were not funded out of increased airport charges yet in the applicant's submission it had a statutory duty not only to ensure the provision of these facilities but also to ensure that they were funded.

The applicant places heavy reliance on s. 16 (2) of the Act of 1998. It is misplaced. There is no such absolute duty as is contended for which would in any event be unique. This Act is similar to other roughly contemporaneous Acts involving the privatisation of commercial activities hitherto carried on by departments of State.

Sections 23 and 24 which impose general duties are remarkable for the fact that it is explicitly provided in s. 24 (2) that nothing in s. 23 or s. 24 is to be construed as imposing on the company either directly or indirectly any form of duty or liability enforceable by proceedings before any court to which it would not otherwise be subject. The sections are aspirational only and clearly not intended to impose the type of unqualified duty now contended for by the applicant as being contained in section 16. This section is not even located beside the other two.

Section 39 of the Act of 1998 which gave the Minister a power of veto over the applicant's charges is fatal to its present submission: it never had the absolute power or duty now contended for. Moreover, this veto is expressed in absolute terms: no reasons need be given, there are no guidelines, no time scale and it is not subject to an appeal or review. Even if s. 16 (2) is given the strong interpretation now contended for by the applicant it must be qualified by reference to s. 39 and indeed by reference to s. 38 which confers on the Minister a power of direction.

With regard to s. 16 itself, it is noteworthy that it is not located in the part of the Act dealing primarily with the statutory duties of the applicant. Section 16 (1) imposes a general duty to manage and develop airports and s. 16 (3) a permissive power to establish a new one. This is the context in which s. 16 (2) must be read. When one turns to subs. (2) it is noteworthy that there is no reference to runways or terminal buildings. The reference to buildings and accommodation at the end of the subsection is clearly to be interpreted *ejusdem generis* with what has gone before, namely the list of relatively incidental and ancillary infrastructure facilities such as roads, bridges, tunnels, approaches and sewers referred to in the subsection. Furthermore the predecessor of this section is s. 37 of the Air Navigation and Transport (Amendment) Act, 1936, which is the first Act dealing with the organisation of airports. This section (which has already been cited above in this judgment) is clearly concerned with ancillary facilities which require particular treatment in that they may involve cooperation with a local authority and this in turn explains why the phrase *"shall ensure the provision of..."* appears in this subsection and not in subsection (1). The business of managing and developing airports is clearly within the control of the company whereas the provision of these ancillary services may require cooperation with a third party. The difference in phraseology is instructive in this context. The introduction of the phrase *"in the opinion of the company"* is intended to confer a broad discretion on the company in relation to these matters rather than to create an absolute strict statutory duty as now contended for by the applicant. Its obligation under subs. (2) is no greater or more mandatory than its duty under subsection (1).

In regard to the latter, however, it is not contended that the applicant has an untrammelled power or that its management or development of airports cannot be restricted by economic reality, availability of funds or the amount of finance lenders are

willing to pay in advance. The burden of interpretation sought to be imposed by the applicant on s. 16 (2) is exaggerated and excessive.

The applicant has sought to suggest that the Minister is and continues to be a regulator of the airport whereas his erstwhile function as regulator of charges is the only function which has been devolved to the respondent. This is wide of the mark because the Minister is not a regulator of the airport; he has been given no specific management function but only a power to make policy decisions of a general kind and specific decisions only in relation to what is necessary or expedient in the national interest. He is not a general regulator.

It is clear that the respondent has power to do more than simply impose a simple cap on the applicant's charges. Section 33 provides a list of matters to which he must pay due regard and which clearly mean that the regulator himself must have regard to the manner in which the airport charges may be spent. He must aim to facilitate the development and operation of cost effective airports which meet the requirement of users but he must also have due regard to the level of investment in order to meet the current and prospective needs of (effectively) the airlines. It is clear that he has power to incentivise the applicant to achieve these objectives by his determination and clearly if he is to do this he must have regard to the applicant's CAPEX and its cost with power to review it if appropriate.

**Aer Lingus' Submissions**

Insofar as directed to this issue Aer Lingus points out that it pays some 45% of the charges levied by the applicant comprising an average of £27 million per year in the period 1997 to 2001. It emphasises the role of users as being central to the statutory scheme set out in ss. 32 and 33 of the Act of 2001. It is submitted that the respondent in

having due regard to the matters set out in s. 33 must do this through the lens of the introductory paragraph because he must aim to facilitate the development and operation of cost effective airports which meet the requirements of users. It is submitted that possibly users mean only the airlines and certainly includes them. Airlines as users have a privileged place in the Act of 2001 as being persons whose needs must be considered in this context but also specifically it is the current and prospective needs of airlines that shall be the object of consideration under subss.(a) and (g) of s. 33 and it is noteworthy that airport users appear to be defined as airlines (see section 40 (1) (C)). If the applicant's CAPEX is off limits it is difficult to see how the respondent can consider the interest of users as identified in the Act of 2001 in a way which satisfies his statutory duty. This notice party also made further submissions which are in line with those of the respondent.

**Ryanair's Submissions**

The second notice party, Ryanair Limited, made submissions which were directed primarily to other arguments which will be dealt with later in this judgment. It emphasised, however, that there was no restriction on the consideration of the requirements of users to which the respondent is obliged to have regard under s. 33 in determining the cap and also that the purposive interpretation of the Act of 2001 means that the respondent should have a completely independent control of the applicant's charges. It was submitted that the applicant is not a user and therefore the respondent, when considering the needs of the users, is not considering the needs of the applicant. The airlines are users and arguably the only users by reference to section 40 (1) (C). Even if they are not the only users under the Act, they are clearly in a central position in the context of the respondent's functions and it is their needs and not the needs of Aer

Rianta (which is not a user) which must be considered and which have, therefore, been elevated to a position of paramount importance so far as the considerations of the respondent are concerned when making a determination.

The two Acts can be read harmoniously together: the duty which the applicant asserts is cast upon it by s. 16 (2) of the Act of 1998 is a duty which was never absolute and must be read as modified initially by reference to the ministerial power to approve its charges and subsequently to the respondent's jurisdiction to set a maximum cap on these charges having considered the matters set out in section 33. Any reading of s. 31 (2) as is now contended for by the applicant results, therefore, in a distorted reading of s. 32 (8) and s. 33 of the Act of 2001.

**Conclusion**

If the respondent has the power to review the applicant's CAPEX one would expect to find this in the Act of 2001. Therefore my first port of call in deciding this issue is to examine that Act. Having done this I will consider the Act of 1998 to see whether my primary conclusion should be altered in anyway.

As has been made clear the principal function of the respondent is to regulate airport charges including those of the applicant. The word "regulate" is not defined and therefore should carry its ordinary meaning. According to the Concise Oxford Dictionary the word means "control by rule" or "subject to restriction". There seems to be nothing in the Act of 2001 to suggest that the word carries a special meaning and in particular it is not defined. Accordingly the principal function of the respondent is to control airport charges by rule or subject them to restrictions.

The respondent carries out this function under the provisions of s. 32 of the Act of 2001. By subs.(2) it is provided that he shall make a determination "specifying the maximum levels of airport charges that may be levied by an airport authority".

Accordingly the regulation for control or restriction is done by way of specifying maximum levels of airport charges.

Section 33 of the Act of 2001 provides that, in making a determination, the respondent "shall aim to facilitate the development and operation of cost effective airports which meet the requirements of users." This is the overall objective imposed on the respondent. So far as it goes, it seems to me to authorise a consideration and review by the respondent of the proposed and existing CAPEX of a subject airport operator because the respondent has to aim to facilitate the development of a cost effective airport as specified. It is clearly within the contemplation of this provision that the respondent would consider the capital expenditure both past, present and future in order to see whether it does in fact facilitate that objective. In principle this overriding objective imposes upon the respondent, in my opinion, a clear duty to aim to facilitate the development and operation of cost effective airports and this duty is sufficiently wide to authorise him to discharge it by a consideration of the CAPEX of the subject airport both past, present and future.

This initial impression is fortified, in my view, by the provisions of s. 33 (a) which require him in carrying out the foregoing function to have due regard to the level of investment in airport facilities at the subject airport. The general impression derived from the introductory overriding duty is given more specific focus by these words. In my view they make it quite clear that it is the duty of the respondent in making a determination to have regard to the level of investment in airport facilities (being investment in the past, present or future) and once again an obvious way in which he can do this in my view is to review the relevant CAPEX.

This conclusion is not altered, I think, by the particular phraseology of the subsection or by the standard or criterion by reference to which the respondent is to

have due regard being a level of investment "in line with safety requirements and commercial operations in order to meet current and prospective needs of those on whom the airport charges may be levied". It is conceivable that there are methods by which a respondent could aim to facilitate the development of cost effective airports and have due regard to the level of investment therein other than by reference to the relevant operator's CAPEX, but a simple and obvious way of achieving this is the way actually selected by the respondent in the present case, namely, by subjecting the applicant's CAPEX to review. In my opinion the cited provisions of s. 33 clearly authorise him to do this.

This conclusion is fortified by the provisions of s. 32 (8) which specifically give the respondent power to "accept or reject" any representation made by any party in response to his statutory notice indicating his proposal to make a determination and inviting such representation. If, as in the present case, the subject airport operator makes a representation indicating its CAPEX and costings, then clearly under these provisions the respondent had jurisdiction to reject it. This includes, clearly, a jurisdiction to review the CAPEX, make an assessment and reject it either in whole or in part which is in fact what the respondent did in the present case.

Equally clearly the respondent's jurisdiction to review the applicant's CAPEX does not depend on the applicant making any particular representation. Rather his jurisdiction to reject a CAPEX representation is consistent with, and fortifies, his jurisdiction which originates in s. 7 and which is qualified and articulated in section 33. In the event, for example, that no CAPEX representation is made by the subject airport operator this does not, in my opinion, either deprive the respondent of jurisdiction to review the relevant CAPEX or exonerate him from his obligation to do so. That obligation is to be found generally in s. 7 but specifically in s. 32 and in s. 33 (a) as I

have indicated. Accordingly, in the unlikely event that a determination is made without a submission from the subject airport operator, the respondent has, nonetheless, a specific duty to aim to facilitate the development and operation of a cost effective airport and in doing so he must have due regard to the level of investment in facilities at the airport as specified in subparagraph (a). It may be that he can do this otherwise than by reference to a particular programme of capital expenditure but in any event these provisions make it quite clear that in carrying out his positive duty he has power to review the relevant CAPEX.

I must next consider, however, whether, in having "due regard" to the level of investment, he is obliged to accept that level of investment at the indication of the applicant both with reference to the past, present and future because of the applicant's specific duties under s. 16 of the Act of 1998.

It has been suggested that the clear provisions of s.16 (if such they be) are somehow diminished because this section is separated from ss. 23 and 24 which deal with the general duties of the applicant company. Furthermore, it is suggested that the duties imposed in s. 24 are themselves diminished by reason of subs. (2) which specifies that nothing in the section shall be construed as imposing any additional duty or liability on the company which would be enforceable by proceedings in court. I am not greatly impressed by this submission. Sections 23 and 24 are to be found in Part IV of the Act of 1998 dealing with administration of the company whereas s.16 is to be found in Part III which is dealing with the transfer of property and carrying out of works by the company. Moreover it has been submitted on behalf of the applicant that s.16 is unique in the sense that there is no section similar to it in other Acts which could be compared with the Act of 1998 and which do contain provisions similar to ss. 23 and 24.

In any event if the words in s.16 are clear then by the primary rule of construction the intended meaning of the section is to be interpreted in accordance with such clear meaning.

The clear meaning of subs. (1) in my opinion is that there is a positive duty cast upon the applicant, albeit in general terms, to manage and develop airports vested in it. This would clearly in a general sense include a duty to propose and articulate a capital expenditure programme under the general heading of developing the airport.

Subsection (2) again clearly, in my opinion, imposes a positive duty (as distinct from a power) upon the applicant to ensure the provision of services and facilities specified in this subsection. An issue has arisen between the parties as to whether these services and facilities are the relatively subsidiary items such as roads bridges tunnels and so forth or whether they are the major elements of development in an airport such as runways and terminals. The applicant submits that the section imposes a duty upon the applicant to ensure the provision of such services and facilities as are necessary for the operation, maintenance and development of a State airport including some specified items. It is clearly necessary, the applicant submits, for the operation, maintenance and development of a State airport that there be runways and terminals and the reference to the subsidiary items is merely to ensure that they would not be excluded by being overlooked. The contrary argument by the respondent is that the list of ancillary and subsidiary matters is clearly what is intended as the scope of subs. (2) and that the specific power to provide buildings and accommodation of whatever kind must be read *ejusdem generis* with the subsidiary list which proceeds these words. Furthermore, the antecedent of this section (s. 37 of the Act of 1936) is clearly concerned with matters which require co-operation between an airport authority and a local authority and this indicates the scope of the intended subsection as dealing with relatively minor matters.

The applicant, in response, points to other portions of s. 37 which deals with major matters.

In my view by imposing on the applicant in subs. (2) a duty to ensure the provision of such services and facilities as are (in its opinion) necessary for the operation, maintenance and development of a State airport, the Oireachtas intended to impose upon it a duty to provide all such necessary services and facilities, including runways and terminals, but also including the list of relatively minor matters which were specified. Subsection (2) seems to me to put flesh, so to speak, on the general obligation contained in subs. (1) in the context of the provision of services and facilities which are necessary in pursing the overall objective of managing and developing the airport identified in subsection (1). The arguments in relation to s. 37 of the Act of 1936 seem to me to be evenly balanced and do not really advance the matter.

I agree, therefore, with the applicant's contention that s. 16 (2) imposes on the applicant a duty to ensure the provision of a wide range of services and facilities including runways and terminals which are, in its opinion, necessary for the operation, maintenance and development of a State airport.

Clearly the funding for these services and facilities will, or at least may, come, in whole or in part, from the payment to the applicant of airport charges which it has power to determine by s. 39 (1) of the Act of 1998. This is not an absolute power: it is a power to determine these charges "with the approval of the Minister". The role of the Minister in approving these charges is not qualified or limited in any way. Clearly if the Minister did not approve of the proposed charges but reduced them this would impact on the ability of the applicant to deliver the services and facilities. Is it to be said that the Minister's unqualified power of approval is somehow to be curtailed or subjected to the opinion of the applicant which it must form under section 16 (2)? Such an

interpretation would be an impermissible attenuation of the Minister's power of approval which clearly includes a power of disapproval in my opinion. Insofar as the discharge of the applicant's duties under s. 16 (2) depends upon its determination of charges then such duty (and its discharge) is in turn contingent upon the approval of the Minister. This seems to me to be the sensible way to read the two provisions of the Act of 1998 so as to produce a harmonious result. There is no sense in giving the Minister a power of approval of charges if all he can be in respect of all or some of them is a rubber stamp.

The function of controlling the applicant's airport charges has now been transferred to the respondent by the Act of 2001. His principal function is to regulate those charges. It is, in principle, inimical to the concept of regulation that the CAPEX which is an element going to make up the charges should be beyond the control of a regulator in a way analogous the repugnancy of the notion that a Minister with power of approving charges should somehow end up only as a rubber stamp. It is not surprising, therefore, to find in the Act of 2001 an explicit amendment of the Act of 1998 which provides that the power of the applicant to determine charges is to be subject to s. 32 of the Act of 2001. The role of the Minister who had power to approve (and therefore disapprove) the charges is now replaced by s. 32 of the Act of 2001. Section 32 sets out the entire mechanism and jurisdiction to be exercised by the respondent in performing his principal function of regulation. It includes power to specifically reject (or accept) any representation made by an interested party pursuant to a statutory consultation process and thereby in explicit terms subjects any determination of charges by the applicant for the purpose of enabling it to discharge its duty under s. 16 (2) to the possibility of outright rejection by the respondent.

The effect of the relevant statutory provisions, therefore, appears to be that the respondent, in carrying out his duty of regulating airport charges, has a positive duty to aim to facilitate the development of cost effective airports and while so doing must have due regard to the level of investment in the subject airport and is specifically equipped with a power to reject any proposals in relation, *inter alia*, to CAPEX that may be submitted to him by the operators of that airport. Moreover there is nothing in the provisions of the Act of 1998 which would upset or overturn this conclusion: rather the contrary, because the statutory duties to ensure the provision of services cast upon the applicant in s. 16 (2) and its power under s. 39 to determine charges is specifically made subject to those general and specific powers of the respondent which include the power to reject their proposals on CAPEX.

My conclusion on the first question which deals only with the principle as to whether the respondent has jurisdiction to review the applicant's CAPEX, therefore is that he has such a power.

In my opinion the relevant statutory provisions can be read together harmoniously without straining the language or deviating from the primary rule of interpretation that the intention of the legislature is to be divined from the words used in the relevant sections when given their ordinary meaning. There is no need therefore to refer, or pray in aid, any of the special rules or principles of interpretation which have been referred to in argument and which are intended to deal with situations where such a construction may not be immediately apparent.

**2. DOES THE RESPONDENT HAVE POWER TO APPLY THE 2001 ACT RETROSPECTIVELY AND IF HE DOES, DID HE?**

Prior to the coming into effect of the Act of 2001 (on the 1st of February, 2002) the applicant had completed or committed itself to a number of projects in its CAPEX. These can be briefly described as the Shannon Terminal, Pier C, some associated aircraft stands and a large amount of the CAPEX incurred during the first nine months of 2001. These have been referred to as "stranded assets" in the submissions.

Some of them were commenced before the vesting day, that is, at a time when the ownership thereof was vested in the Minister. It will be recalled that after the vesting day the Minister retained some control (and still does) in that he can give broad directions as to policy and specific directions in a limited area relating to national security. These functions were not transferred to the respondent.

Decisions to go ahead with and fund the stranded assets were, accordingly, taken by the Minister and prior to the coming into existence of the regime operated by the respondent.

**Applicant's Submissions**

The applicant submits that even if (contrary to its primary submissions) the respondent has a power in general to review its CAPEX and, even if (again contrary to its further submission) the respondent can do more than simply review the applicant's CAPEX decisions for unreasonableness, he has no power to disallow the stranded assets which have been approved, contractually committed to, commenced or completed prior to the commencement of the Act of 2001.

This Act is clearly intended to be prospective only and applies to subsequent airport charges but it is also future looking in that the respondent must aim to facilitate the development of cost effective airports rather than impugn or disallow it. The rule against retrospection is a rule of construction comprising a presumption that a statute is intended to operate prospectively unless otherwise clearly stated. The retrospective

operation of an Act has been defined in the words of Craies in *Craies on Statute Law* (7th ed., p.387) and adopted by Chief Justice O'Higgins in *Hamilton v. Hamilton* [1982] I.R. 466 at 474 when it

> "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past."

The applicant submits that to construe the Act of 2001 as permitting the respondent effectively to disregard the stranded assets (for the purpose of calculating airport charges) is plainly to give that Act retrospective effect. (Pier C and Shannon Terminal were contracted for and commenced at a time when the applicant was merely an agent for the Minister who was therefore the undertaker in relation to them). The applicant continues to have a duty to ensure that its revenue is sufficient to remunerate this capital outlay. They thus have a reasonable expectation that they will continue to obtain remuneration for these completed projects which they cannot do if the respondent disallows them as he has done. By so doing he has clearly impaired a vested right of the applicant and accordingly the Act of 2001 has been made to operate retrospectively.

The Minister had exercised a function authorising the stranded assets and now under the Act of 2001 the respondent purports to take a different view to that of the Minister, thereby depriving the applicant of its vested right to remuneration. This clearly imposes a new duty or attaches a new disability in respect of these past transactions. This could only be done if the jurisdiction so to do was expressed in the clearest language. In the absence of this language the presumption (which is a strong one) is that it should not be done and accordingly the disallowance of the stranded

assets is *ultra vires*. It is the clearest example of the application of the provisions of the Act of 2001, with operative effect, to past transactions.

The Oireachtas cannot have contemplated, in the Act of 2001, giving the respondent a power retrospectively to disallow capital projects which have been, as contemplated by them, specifically allowed by the Minister under the Act of 1998 (and indeed prior thereto in his further capacity as owner thereof). It is of course the case that the charges determined by the respondent are prospective: the key point is that the methodology by which those charges were set by him involved the respondent in claiming an exercise of power to disallow for the purpose of calculating them past expenditure which had been occurred under an earlier regime. By doing so he retrospectively attached to those capital expenditures a disability by stranding the relevant assets and thereby excluding the possibility of their generating a return on capital (contrary to a specific duty imposed on the applicant in the Act of 1998). The new law of 2001 was therefore clearly applied to past events and this means the Act has been applied retrospectively as identified in the following observation of Barron J. in *O'H v. O'H* [1991] I.L.R.M. 108

> "In considering whether a statute should be construed retrospectively a distinction is drawn between applying the new law to past events and taking past events into account. To do the latter is not to apply the Act retrospectively."

To disallow past CAPEX is to apply the new law to past investments: to recognise the relevant quantum for calculation purposes would be to take them into account. To do the former is to apply the Act retrospectively and is *ultra vires* in the absence of clear statutory authorisation. To deprive the airport operator for any period of time of an opportunity of generating return on the capital expended on the stranded

assets is to apply the Act of 2001 with a new standard and a new determination as to their allowance or disallowance with retrospective effect. For the regulator subsequently to apply a new obligation by reference to a new standard and thereby deprive the applicant of its vested right to be remunerated in respect of this expenditure is to fundamentally alter the character and consequences of these past capital investments and is a clear application of the Act of 2001 with retrospective effect.

The principle would be the same if instead of the regulator it had been the Minister who did this thereby reversing the earlier decision. That would be a clear example of retrospective operation.

Furthermore both distinguished regulatory experts have, in their affidavits, unhesitatingly described the treatment of stranded assets as the "retrospective disallowance of properly approved investment": this is one of the few things these experts agreed on.

The argument by the respondent that there was no retrospective or retroactive disallowance of the permission for the construction of the stranded assets misses the point. The complaint was not that there was a disallowance of permission but rather a determination that past capital expenditure ought not to have been occurred by reason whereof the applicant was to be penalised in being deprived of a return on this capital outlay. This is a clear example of an unfair retrospective application of the later Act.

**Respondent's Submissions**

The respondent submitted that the applicant's submissions involved a confusion between disallowance of a project in the sense of refusing permission to construct it and disallowance of charges calculated by reference to it. The respondent's determination did not retrospectively disallow permission for these projects but only determined

whether future charges should be adjusted or increased to pay for them. The problem therefore did not arise at all.

Furthermore as a matter of fact there had been no increase of the applicant's charges between 1998 and 2001 and therefore the respondent did not, by his determination, take away anything from them because there was nothing to take away.

Furthermore the rule against retrospective application is a presumption against the retrospective operation of a statute in the absence of clear language to the contrary. Clearly it is not contrary to this principle if the respondent looks back at the past capital expenditure of the applicant in order to assess future charges. This is all he did. The classic example of a retrospective operation is the making criminal of an act which was not a breach of the criminal law when it was perpetrated (or indeed increasing the penalty subsequently). Since the respondent did not disallow any element of the CAPEX there was no question of a retrospective disallowance. In fact what Aer Rianta had after the regulator's determination was what they had before, namely an asset and the knowledge that its capacity to generate a return was dependent on factors over which the applicant did not necessarily have complete control. In fact after the respondent's determination the applicant had some return in respect of the stranded assets whereas before (in fact) they had none.

**Aer Lingus' Submissions**

Submissions on behalf of Aer Lingus were to like effect. An example of true retrospective operation arose in the case of *In Re Hefferon Kearns Limited (No. 1*) [1993] 3 I.R. 177 which involved the offence of reckless trading which did not exist prior to that Act. The Act therefore had to be construed in a manner consistent with Article 15.5 of the Constitution which prohibits the Oireachtas from declaring acts to be

an infringement of the law which were not so at the date of their commission. This rule, which is a rule of interpretation, was explained by Fennelly J. in *Minister for Social Community & Family Affairs v. Scanlon* [2001] 1 I.R. 64 at 88 as follows

> "The two essential elements of the rule … are:- firstly, it is designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions; secondly, the rule is one of construction, not of law. It amounts to a presumption against retrospective effect which may be displaced by the clear words of the statute."

This was emphasised recently by Keane C.J. in *Murphy v. G.M.* [2001] 4 I.R. 113 at 129 and *Grealis v. Director of Public Prosecutions* [2001] 3 I.R. 144 at 159 where he emphasised that the rule had no application where the words of the statute were clear.

The Act of 2001 is clear: it obliged the respondent to make a determination within six months of the establishment day. He must (under s. 33) have regard to the matters set out therein and where this section refers to investment no exception is made in relation to investment incurred prior to the establishment day. This could easily have been done and given that it was not done the clear intention of the Oireachtas was that the stranded assets should also be included in the respondent's calculations. This was taking past events into account; not applying a new law to them.

**Conclusion**

In the first place it is clear that the rule against retrospective application is a rule of interpretation. And that it comprises a presumption that, in the absence of clear language to the contrary, an Act is to be interpreted as having effect on circumstances which come into existence after the date of its coming into force. So much is clear from the authorities already cited.

It is equally clear that there are no words in the Act of 2001 to suggest that it should have retrospective effect. Accordingly the true interpretation of this Act shows an intention of the Oireachtas that it would operate prospectively only.

A distinction is to be drawn between an Act which operates prospectively in the sense that it is applied so as to have effect on circumstances which come into existence after the Act itself comes into operation on the one hand, and on the other, the taking into consideration by the operator of the Act for purposes of carrying out the relevant statutory functions thereunder of circumstances which were in existence when the Act came into operation. This latter activity is perfectly commonplace and can be described as retrospection in the sense that in the present case the respondent takes into consideration and looks at elements of the applicant's CAPEX which because they are already in existence were the subject of decisions by the applicant and the Minister which took place before the Act of 2001 came into effect. The applicant takes no exception to such retrospective scrutiny by the respondent. The point it makes is that the effect of the determination is to reverse a pre-2001 Act decision by another authority authorising the construction of the stranded assets together with the necessary implication that the applicant had a right to be remunerated in respect of this capital outlay. By disallowing these stranded assets from his calculation this vested right has been impaired and this is a clearly retrospective application of the Act in breach of the principles of retrospection. Of course the charges are prospective: but this does not meet the point, however, according to the applicant, because the methodology by which the respondent set those charges, involved reversing in effect a pre-2001 Act decision that these assets would be allowed for the purpose of earning remuneration. The respondent's determination attached to this situation a disability and removed a vested right which was the right of the applicant to expect a return on the capital involved.

This was not merely taking past events into account, which is legitimate, but reversed past decisions which is not.

In my opinion the decision to authorise capital expenditure in the past is different to the decision taken by the respondent who has to decide (insofar as the stranded assets are concerned) what impact this expenditure should have (if any) on the calculation of the cap.

Furthermore I cannot agree that the expectation asserted on behalf of the applicant that these assets, at all times in the future, will generate a return on the capital expenditure involved (an expectation founded *inter alia* on the applicant's obligation to ensure a return on capital) is something which can properly be described as a "vested right" as that phrase is used in the context of the relevant jurisprudence. The concept of a *vested* right is a right which comprises an immediate fixed right: the concept of an *expectation* connotes an assumption in relation to future events. An expectation, no matter how legitimate (to borrow the word), can never, in my view, amount to a vested right.

Nor do I think that there is an element of injustice involved in the change of statutory regime because there could have been no reasonable expectation that the law in relation to airport charges would always remain the same insofar as it impacted on the stranded assets.

If the respondent had made a calculation that certain capital assets of the applicant had prior to the coming into effect of the Act of 2001 earned an excessive return (with the approval of the Minister) and had proceeded to make a deduction to disallow the appropriate amount, for example, with reference to the applicant's airport charge revenue for the year 1998, then this deduction might well be said to be a retrospective application of the Act of 2001 and *ultra vires* for this reason. This is

because it would have, under the guise of prospective charging, actually taken away something which had already happened namely the receipt of these moneys at a time when the Act of 2001 did not apply at all. The respondent has no business in determining airport charges prior to those levied after a month following the 26th August, 2002. In the foregoing example he would have in fact made such previous charges his business and in so doing I think could well have acted *ultra vires*. But this is, notably, what the respondent did not do.

His determination clearly applies only prospectively (as is accepted by the applicant) and in my opinion in making his calculations he did no more than consider the existing capital expenditure which had already been incurred by the applicant for the purpose of determining the cap. The subject matter of his decision was the identification of a maximum airport charge. It was not whether or not a particular piece of infrastructure should be built and he did not purport to reverse decisions in relation to this latter category. I do not agree with the applicant's submission that the methodology deployed by the respondent in dealing with the stranded assets involved a disallowance of these assets in a way which involved the retrospective application to past events of the Act of 2001. On the contrary, in my view all that was done was a retrospective consideration of these events for the purpose of determining airport charges with prospective effect.

I should clarify that in reaching this conclusion I am dealing only with the point relating to retrospective application.

**Q. 3-9 <u>THE ALTERNATIVE ARGUMENTS</u>**

**<u>Applicant's Submissions</u>**

The applicant further submits if, contrary to the foregoing, the court holds that the respondent does have jurisdiction to review its CAPEX both past, present and future then in doing so he is restrained in a number of ways as follows:

1. He may only review the CAPEX and projects within it on the grounds of unreasonableness in the *Wednesbury* sense thus giving the applicant a proper margin of appreciation and thereby having *due regard* to the level of investment in the relevant airports as required by s. 33 (a) as part of the overall objective of aiming to facilitate their cost effective development;
2. He may not micro-manage or micro-analyse the applicant's CAPEX in the sense of purporting to disallow individual projects within it as distinct from imposing an overall cap thereon;
3. He may not substitute his own CAPEX on the advice of his consultants (IMG) for that of the applicant;
4. He may not, without more, exclude projects in the applicant's CAPEX on the basis that the applicant has failed to justify them or on the basis that there has been insufficient consultation with airport users in respect thereof.

As will be seen the foregoing propositions involve, further, a determination as to whether the respondent did in fact *disallow* the applicant's CAPEX or any part thereof and of the issue whether the list of ten considerations set out in s. 33 is an exhaustive list.

As indicated earlier whilst it is possible to identify the foregoing questions as discrete issues they, or at least some of them, were, in fact, dealt with together at least in part during the argument. This was because to a certain extent they are organically

connected and in what follows I will not attempt a water tight compartmentalisation any more than did the parties during the hearing.

**Irrationality, Due Regard and Margin of Appreciation**

The applicant submitted that it was to the applicant and to no-one else that the Oireachtas had entrusted the development of the relevant airports imposing on it a clear statutory duty in this regard. The applicant had long experience and expertise explicitly acknowledged by the respondent who was in turn clearly obliged to have due regard to the level of investment in the airports under regulation. Moreover it is important to note that the overall objective of s. 33 which aims to facilitate the development of *cost-effective* airports which meet the requirements of users is effectively the same as the duty imposed on the applicant to develop airports under s. 16 of the Act of 1998 and to carry out that general duty in a cost effective manner (s. 24 (1) (c) of the same Act).

Whilst the emphasis in the Act of 2001 may also include reference to cost effectiveness which meets the requirements of users and to having regard to investment in the context of safety requirements and commercial operations which meet the current and prospective needs of the airlines, it is quite clear that the respondent is not at large and is *obliged* to have due regard to the actual investment carried out and proposed by the applicant at the relevant airports. What he did was exactly the reverse: namely he set up a non-statutory criterion that the applicant would have to *justify* its CAPEX and, in the event that the applicant failed to do this, stated that he was *statutorily bound* to exclude it. Whatever else this is it is not having *due regard* to the level of investment in the relevant airports.

In truth, given the clear and strong statutory duty imposed by the Oireachtas on the applicant and to which the respondent has to have due regard under s. 33 (i) of the

Act of 2001, the respondent should approach the applicant's CAPEX by presuming that the applicant has complied with the law (not the reverse which is in effect what he has done) and decide to exclude or reduce the relevant costings only if they are unreasonable in the *Wednesbury* sense. Such an approach is the only one which would involve having due regard to the applicant's investment.

What the respondent has done, on the contrary, was to look at each individual item contained in the applicant's CAPEX and require the applicant to justify it in the absence of which he has held himself statutorily bound to exclude it. Apart from involving an assumption that the applicant has failed to comply with its own statutory obligation, this approach involves an impermissible *micro-management* of the applicant's CAPEX. Not only is this *ultra vires* the powers of the respondent (the Oireachtas has given to the applicant and to the applicant alone the decision making function in relation to what projects are required for the development of the relevant airports) but when the consequences of this are considered it is apparent why this should be an impermissible straying by the respondent into the exclusive jurisdiction of the applicant.

The respondent has opted for the *single-till* approach which he is in principle entitled to do. Having done this, however, he must accept the consequence that there is no revenue out of which the applicant will be able to fund any portion of its proposed CAPEX which the respondent has *disallowed*. The respondent has included all revenue streams available to the applicant for the purpose of computing the price cap and therefore, if the applicant were to embark upon constructing any project which has been disallowed by the respondent, this can only be at the expense of another project which has been allowed and in respect of which, therefore, both the applicant and the respondent agree that it is necessary for the development of the airport.

No responsible board of management of the applicant could contemplate authorising a *disallowed* project in these circumstances even if they could persuade some third party to fund it. This is because they would not be able to guarantee any return on such an investment and it would be in breach of its general obligation under the Act of 1998 to remunerate its capital and pay interest on and repay its borrowings. By choosing to adopt the single-till approach and by further engaging in the micro-management of the applicant's CAPEX down to items of considerable detail, it can be seen that the respondent, despite his protestations to the contrary, has effectively taken management decisions out of the hands of the applicant. This cannot have been the intention of the Act of 2001 which, whatever about entitling the respondent to regulate airport charges and thereby qualify (it seems) the applicant's statutory obligations under the Act of 1998, it cannot have been the intention of the Act of 2001 that the respondent would become the effective manager of the applicant's CAPEX, pre-empting specific decisions in advance and in that regard at least reducing the applicant's board to the status of a rubber stamp or, perhaps the proposer of projects. In fact the respondent went further because, in place of the applicant's CAPEX to which it effectively paid no regard, it substituted its own as prepared for it by its independent consultants IMG. Indeed these consultants, in stating the statutory objective to which their efforts were directed, actually misstated the regulatory requirements of the Act of 2001 and this is something which in turn has infected the respondent's determination with invalidity since he adopted IMG's alternative CAPEX.

In the course of making his determination the respondent not only required the applicant to justify its CAPEX on pain of having it automatically eliminated for failure so to do, but also introduced a further non-statutory criterion, namely consultation with the airlines. The list of ten matters to which the respondent is obliged to have regard

under s. 33 of the Act of 2001 does not include consultation but does include an obligation to have due regard to the level of investment, in line with safety requirements and commercial operations, in order to meet the needs of those on whom the airport charges may be levied – namely the airlines and also a requirement to have due regard to the level and quality of services offered at the airport by the airport authority and the reasonable interests of the users of these services. In this way the interest of users are taken into account by the respondent.

For the respondent to go further and effectively erect consultation into a criterion by reference to which the applicant's CAPEX can succeed or fail is to introduce a non-statutory criterion and to give excessive weight to the views of airlines which are taken into account in the manner identified in s. 33 and not in the manner identified by the respondent. Indeed, in some instances, the respondent appears to have required consensus amongst the airlines in respect of a proposed CAPEX project as a test by reference to which it could be excluded. It should not be forgotten that s. 33 (i) requires the respondent to have due regard to "imposing the minimum restrictions on the airport authority consistent with the functions of the Commission".

By erecting justification as an additional non-statutory hurdle, the respondent has clearly failed in his duty to have due regard to the applicant's level of investment at the relevant airports. He has had no regard to it by reference to his own non-statutory criterion. He has thus failed in his statutory duty and his determination is *ultra vires* and should be quashed. Moreover, having adopted the single-till approach he should not have gone on to micro-manage the applicant's CAPEX on an item by time basis because the inevitable result in practice was that he thereby pre-empted the applicant board's decision-making function in regard to these items.

Specifically with regard to the respondent's decision to exclude elements of the applicant's CAPEX for inadequate consultation it should be noted that about €200 million worth of such CAPEX was excluded in the determination of 26th August, 2002, notwithstanding that it had been included in the draft determination. It seems that the respondent took the view that, following representation from airlines after the publication of the draft determination, he was satisfied that there had been inadequate consultation in relation to these items and on that basis decided to exclude them. This could not be a proper exercise of his statutory duty because presumably, in such a proper exercise, he had already included these items in the draft determination upon the basis, again presumably, that they satisfied all the s. 33 criteria including that they were part of a level of investment in the relevant airports which met the current and prospective needs of the airlines.

It is important to distinguish between the concept of consultation, which is not included in the Act of 2001, and the concept of satisfying the needs of the airlines which is. Part of the applicant's CAPEX which was not made the subject of consultation might well, nonetheless, satisfy the relevant statutory needs. Presumably the elements of the applicant's CAPEX which was included in the draft determination but excluded in the determination itself had satisfied this statutory requirement. The mere inadequacy of consultation (which is not accepted) in relation to this could not mean that these items subsequently and retrospectively failed the test which they had already passed.

Furthermore s. 33 contains an exhaustive list of the matters to which the respondent has to have due regard. The draftsman has notably declined to use any phrase such as, "in particular" or to matters "including the following" or any other such standard formula.

The respondent specifically misinterpreted the import of the Act of 2001 when he said that he regarded himself as statutorily bound to exclude items of the applicant's CAPEX which were not justified and thereby precluded him from exercising his statutory discretion in relation to the applicant's CAPEX which he was bound to do. Furthermore he adopted the substitute CAPEX from IMG which, in turn, fell into error in regard to the statutory requirements when it identified its objective in preparing the alternative CAPEX as the main purpose of the review of the applicant's CAPEX was to satisfy the Commission mandate that "the level of investment in airport facilities at an airport to which the determination relates be in line with safety requirements and commercial operations in order to meet current and prospective needs of those on whom the airports charges may be levied."

Not only does this objective fail to identify the overriding objective of s. 33 which is to aim to facilitate the development and operation of cost effective airports which meet the requirements of users but also misstates one out of ten matters to which the respondent shall have regard – specifying in effect that the level of investment in the subject airport shall be in line with safety requirements and commercial operations as identified rather than subject to the overall requirement that this determination shall aim to facilitate the development and operation of cost effective airports. Furthermore this identifies only one of ten matters to which the Commission shall have due regard and thereby fails to consider the other nine and places undue weight on the one identified. This error further fatally invalidates the Commissioner's determination.

**Respondent's Submissions**

With regard to the applicant's argument that the Commissioner can only review the applicant's CAPEX if unreasonable in the Wednesbury sense, there is simply no

justification for such a conclusion in the act. The act does include provision for judicial review but it is the court which performs this function as one would expect and not the Commission. Moreover the arguments relating to institutional competence do not apply because the Commission has available to it all the relevant expertise which the court does not. This proposition is wholly inimical to the notion of regulation and would mean that the intention of the Oireachtas was that, in regard to CAPEX, the regulator would have jurisdiction only on those rare instances when the courts would find the applicant's CAPEX unreasonable. With regard to the submission that the respondent was not entitled to require the applicant to justify its CAPEX and was entitled to disallow it (for the purpose of regulating the airport charges) by reference to inadequate consultation, this submission misrepresents the reality of what was done which was in fact in accord with the requirements of section 33.

If all that the respondent was empowered to do was to place an overall cap on the applicant's CAPEX and if he was specifically precluded from engaging in what the applicant has termed micro-management then there would be no need for the detail set out in s. 33 and s. 32 (combined with s. 7) would suffice. In fact the requirements of s. 33 show that the respondent is required to have regard to matters of considerable detail which clearly authorise him to have regard to the individual projects in the applicant's CAPEX if indeed they do not oblige him so to do. He is clearly required in aiming to facilitate the development of cost effective airports to have regard to the level of investment therein (in line with safety requirements and commercial operations) in order to meet current and prospective needs of the airlines. It is difficult to see how the respondent might discharge these statutory functions and obligations without having regard to the elements in the applicant's CAPEX and impossible to conclude that having such regard is specifically excluded.

The further indication that the legislators anticipated that the respondent's determination will be intrusive and have an impact on the applicant's CAPEX can be seen in the elaborate provisions facilitating appeal and time limit on the determination of five years with the possibility of review after two.

With regard to the argument that the micro-management by the respondent was prohibited this is clearly related to the consequences alleged to follow from such micro-management rather than to the concept that the respondent can be criticised for being able to furnish reasons and explanations as to why and how he has arrived at a particular cap. The consequences complained of are that the applicant's board are effectively pre-empted from taking the relevant decisions given that there will be no funding available for disallowed projects and also that these will, in all likelihood, not be included in the RAB for the next determination in five years time. With regard to this the respondent submitted that the applicant's board is required under the respondent's regime to do no more than face the uncertainty facing any board on a company whose activities are subjected to ordinary market forces. There is nothing in the Act which says that the applicant's board had to be given certainty in regard to proposed investments. So far is the Act of 2001 from requiring this, it requires, instead, that the respondent have regard to the many matters set out in s. 33 which clearly authorise him (if they do not require him) to assess the applicant's CAPEX in the detailed micro-managerial way in which he has done.

Section 33 of the Act of 2001 must not be construed as a straight jacket. In *Glencar Exploration Plc v. Mayo Co. Co.* [2002]1 I.L.R.M. 481 the Chief Justice, in the context of a statutory obligation on a planning authority to "have regard to … policies and objectives …of the Government insofar as they may relate to its functions" said:

> "There was no evidence to indicate that the respondents simply ignored the letter from the Minister for Energy: on the contrary, they adjourned the meeting at which they were to make the vital decisions so that the Minister's views could be considered. The fact that they are obliged to have regard to policies and objectives of the government or a particular minister, does not mean that, in every case, they are obliged to implement the policies and objectives in question. If the Oireachtas had intended such an obligation to rest on the planning authority in a case such as the present, it would have said so."

It is noteworthy that in regard to this aspect of the case the decision of the Chief Justice reversed that of Blayney J. in the High Court who appeared to consider that the local authority could not be said to have had regard to the relevant policy where its own policy in the development plan was opposed to it.

It is worthy of note in this context that the views of the House of Lords are equally disposed to allow a wide margin of discretion to the relevant statutory authority in a similar statutory context. In *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] 1 W.L.R. 759 Lord Keith of Kinkel said:

> "But it is entirely for the decision maker to attribute to the relevant considerations, such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense."

Lord Hoffman put it more assertively when he said

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that

> it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> The distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the Courts are concerned only with the legality of the decision- making process and not with the merits of the decision. If there is one principle of planning law more firmly settled then any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

In reliance upon these citations the respondent submits that it is a matter for him to determine what weight he must attach to the needs of the airlines. Once it is established that the respondent did have regard to this particular factor then it is a matter for him and not for the court as to what weight he has attached to it, if any.

In this context it was a perfectly reasonable implementation of his statutory function to give consideration to the level of consultation conducted by the applicant with airport users including the airlines in order to ascertain whether its CAPEX met their needs as identified in the Act.

It was, further, a reasonable implementation of his duty under s. 33 generally in aiming to facilitate the development of cost effective airports to require the applicant to justify its CAPEX and thereby demonstrate that it facilitated cost effective airports.

The respondent in further carrying out this part of its function commissioned an alternative CAPEX from IMG so that in making his determination he should be in a

position to aim to facilitate cost-effective airports. He was clearly entitled to prepare his own CAPEX as the applicant puts it in discharge of his statutory obligation.

**Third Party Submissions**

On behalf of Aer Lingus, it was submitted that s. 33 made it clear that the respondent had an obligation to consider the applicant's CAPEX. Moreover to adopt a CAPEX which did not take account of airport users was virtually worthless in the context of section 33.

This party emphasised the other sources of revenue available to the applicant not included in the single-till. It may make efficiency gains, borrow money, dispose of surplus assets or develop part of its lands, gain additional rent, sell water, recover monies for road, bridge and tunnel construction works, secure investment in the airports and engage in profitable business. It may develop self funding projects and devise new revenue streams from, for example, vehicle permits, access permits, clamp removals or such like. The respondent was entitled to require financial analysis and justification from the applicant so that it could discharge its statutory function and the matters complained of by the applicant are all matters which the respondent was entitled to have regard to in discharge of his own statutory functions under section 33.

This party submitted that the consultation engaged in by Aer Rianta was, in its view, wholly inadequate and the reliance on the applicant's consultation was an entirely reasonable method whereby the respondent assessed whether the proposed CAPEX met the requirements of users as he was required to do. In this context Aer Lingus submitted that it was not merely lack of consultation upon which the Commission placed weight but an overwhelming opposition of airport users and specifically airlines to the applicant's proposed CAPEX to which regard was had. This was clearly a

legitimate way by which the respondent could have had regard to the level of investment made in order to meet the current and prospective needs of the airlines and the level and quality of services offered and the reasonable interest of the users of those services. This was not the imposition of an additional criterion but rather the implementation by the respondent of the requirements set out in section 33. Given that this is so, there can be no question of the respondent attaching impermissible weight because it is up to him and not the court as to what weight he attaches to any particular statutory criterion.

It was submitted on behalf of Ryanair Limited that s. 33 of the Act of 2001 makes the requirements of users of an airport a paramount consideration in the making of a determination. The Act of 2001 places no restriction on what are to be the requirements of users which are to be taken into account by the respondent in carrying out his function thereunder. Clearly airlines are users and there is an argument (already detailed earlier in this judgment) to the effect that they are the only users. Even if they are not the only users it is clear that they are an important and indeed pre-eminent user, the needs of which must be taken into account by the respondent.

Equally clearly the applicant is not a user in this context and so the weight attached by the respondent to the needs and consultation with airlines was entirely justified and within the statutory scheme.

On behalf of Ryanair, it was also submitted that there are revenue streams available to the applicant outside the single till taken into consideration by the respondent including aeronautical fees other than airport charges, commercial revenues such as car parking charges, charges to concessionaires, inter-company loans and borrowings. Of course the setting of a cap for airport charges will inevitably impact on the applicant's business and managerial role. This, one assumes, must have been the

intention of the Oireachtas. But this is not the same as to say that the setting of a price cap involves usurpation of the applicant's managerial role or functions. All the respondent does in setting the price cap is to aim to facilitate the development and operation of cost effective airports: the statutory requirement is not that he ensure that this happen which would be language more appropriate to the functions of a manager.

The submission that, by requiring the applicant to justify its CAPEX, the respondent was introducing a fresh and new statutory criterion is to distort the procedures actually adopted by the respondent. The primary aim of the respondent must be to facilitate the development of cost effective airports. Clearly under the Act of 2001 the respondent had to consult widely before making a determination in order to satisfy himself with regard to the matters referred to in section 33. It is to be noted however that consultation *per se* was not the reason why the respondent factored out or disallowed part of the applicant's CAPEX. The immediate reason for this was – as clearly stated by the respondent himself in the reasons given for his determination – because the respondent found that much of the applicant's CAPEX was not cost effective and did not meet the needs of users. It was provided in the determination that

> "Airlines expressed a view that this statutory factor (that is section 33 (a)) must be considered in the context of the overall statutory objective. In particular, many airlines expressed their concern that the capital expenditure programme (CAPEX) of Aer Rianta did not and would not meet the needs of users. Following a careful analysis of the CAPEX at Dublin, Shannon and Cork, the Commission accepted many of their representations.…The Commission notes the following in relation to both the previous, as well as current CAPEX, for the Aer Rianta airports:
>
> - Poor consultation with the users of the airport,

- Lack of transparency in quality of information provided to users of the airport, particularly as to planned costs of proposed projects,
- Construction (both past and planned) of facilities that are inefficient and/or do not meet the requirements of users of the airports in line with best international practice,
- Inadequate or non existent cost-benefit-analysis or business cases undertaken to justify the specific CAPEX projects,
- Internal inconsistencies in information supplied by Aer Rianta to the CAPEX programme.

Therefore the Commission has not relied on the Aer Rianta CAPEX programme in making its determination on the maximum levels of airport charges, save to the extent that it identifies necessary compliance/safety projects.

In its draft determination, the Commission had prepared its best estimate of a CAPEX programme for Dublin, Shannon and Cork airports based on the information and the documentation it had gathered at that time, referred to in the draft determination as the recoverable CAPEX programme. Many users of the airport made representations that elements of the recoverable CAPEX programme did not meet the requirements of users. The Commission accepted some of these representations.

Therefore the Commission has revised its recoverable CAPEX programme for the final determination. It retains all projects deemed by the Commission to be necessary for safety or compliance. In addition, it also includes those projects required to increase needed capacity at the airports, but only those in line with the interest of users…"

This party submitted that it is clear from the foregoing that the issues of poor consultation and inadequate information and indeed the failure by the applicant to justify parts of its CAPEX is embedded in the main statutory criteria referable to the question of cost effectiveness and the requirements of users and has not been, as contended by Aer Rianta, erected into a new and unauthorised criterion invented by the Commission. The consultation issue has to be seen in its proper context which is that referred to in the citation from the reasons given by the Commission itself in its determination and this clearly shows the decision to have been taken by reference to the correct statutory criteria.

**Conclusions**

I can find no warrant in the language of the Act of 2001 to support the proposition that the respondent may only interfere with the applicant's CAPEX insofar as he finds it to be unreasonable in the *Wednesbury* sense. No such limitation appears attached to the concept of regulation itself in section 7. The language of s. 33 requires the respondent to aim to facilitate the development of cost effective airports which meet the requirements of users and this insofar as the subject airport's CAPEX is involved gives the respondent a far more intrusive relationship to it than that connoted by the concept of irrationality review.

He must, in my view, test and measure the CAPEX by reference to this overall aim and this in turn involves assessing whether the CAPEX or any particular element in it is conducive to that aim. If the applicant's submission on this point is correct then he must simply pass through the CAPEX unless he finds it irrational regardless of whether it facilitates such an aim or not. Such an interpretation would require specific language which is not present. On the contrary, in my view, the respondent when dealing with an

applicant's CAPEX *shall* aim in the manner specified and *shall* have regard to the ten matters listed in section 33. The manner in which he carries out his duties insofar as the applicant's CAPEX is concerned is set out comprehensively, albeit in fairly general language, in s. 33 which requires him to carry out an assessment and evaluation of the CAPEX by reference to the statutory criteria.

In this regard it is worth noting that the duty performed by the applicant in carrying out its functions under s. 16 and ss. 23 and 24 of the Act of 1998 is a different duty to that carried out by the respondent when carrying out his function under s. 32 of the Act of 2001. Clearly it makes sense that the legislature would have required the respondent under s. 32 to have regard to many of the matters which have a close relationship to the management and development of a subject airport but it is for the purpose of a distinctly different function albeit closely linked.

The respondent is not carrying out the self same statutory function as is carried out by the applicant under s. 16 of the Act of 1998. Once again it would have required specific statutory language, which is absent, in order to achieve this result.

What the applicant does under s. 16 is manage and develop airports and in doing this shall ensure the provision of certain specified services and facilities which are necessary for the operation, maintenance and development of same. What the respondent does under s. 32 of the Act of 2001 is make a determination specifying maximum levels of airport charges. The two functions are brought into harmony with one another by the statutory requirement that the respondent shall have regard to several matters listed in s. 33 of the Act of 2001 and specifying in s. 34 that the applicant's power to determine charges is subject to the function of the respondent. The fact that the two functions are brought into harmony does not mean, however, that they are the same, nor does the fact that the respondent's function is intended and will

inevitably impact quite intrusively, as may be, upon the discharge of the applicant of its functions. To that extent the latter's statutory duties are qualified but once again they remain the duties of managing and developing airports, not regulating airport charges and the respondent's function remains the duties of regulating maximum levels of airport charges, not managing and developing airports. To achieve another result would require different statutory language which is not present.

There is nothing in principle, therefore, inimical to the concept that the respondent should conduct an item by item analysis of the applicant's CAPEX with power to review, disallow or reduce it if this is the method by which he intends to carry out his functions under section 33. The fact that this may impact intrusively on the management function of the applicant is to be expected. It does not mean however that the applicant is relieved of its function: merely that the latter is qualified by reference to the available funding: no court would construe the duty of the applicant under the Act of 1998 as requiring it to do something which is impossible or to spend money which it does not have.

In my view there is a specific duty on the respondent to review a subject airport's CAPEX. This applies even if the subject airport fails to provide information in relation to such CAPEX or insufficient detail for the purpose of the respondent's analysis. The duty still remains on the applicant to aim to facilitate the development and operation of a cost effective airport and to have due regard to the level of investment in such airport in line with the statutory requirement. That is his duty and he must carry it out in my view even if the information given him by the subject airport is inadequate. Clearly if the subject airport provides relevant information this is something to which the respondent shall have due regard but in the absence of such

information or inadequate information he still has to have due regard to the statutory objective.

It is submitted by the applicant that in making his determination in the way he did the respondent actually trespassed into the area of management which is the sole prerogative of the applicant's board. By getting into the detail of the individual items contained in the CAPEX and purporting to allow or disallow or reduce the costs in relation to these items the applicant says that the respondent's decision has pre-empted and shackled their management function for the reasons already cited in the earlier part of this judgment. The respondent accepts that his decision will have an impact on theirs. This is intended and not surprising. But he says he does not manage and has argued that the applicant is free to develop its own CAPEX subject only to his determination in relation to maximum levels of airport charges.

As already stated, in my opinion the respondent was, if not obliged, certainly authorised by the specific provisions of s. 33 to carry out an item by item analysis and review of the applicant's CAPEX with power to allow, disallow or reduce same. Again already as stated, I do not think that this means that he was carrying out management and development functions as identified in s. 16 of the Act of 1998. It may well be that the applicant's board will feel itself constrained by the respondent's methodology and the information they have in relation to his approach to their CAPEX but this does not mean that it is his decision rather then theirs to carry it out or not to carry it out.

Nor does this mean that they are reduced to the function of a rubber stamp. The respondent and the notice parties have suggested various other revenue streams which may be available to the applicant and whilst I think that these arguments fail to fully take into account the effect of the single till approach adopted by the respondent it remains the case that it is the board of the applicant and not the respondent which will

continue to manage and develop the airport forward into the period affected by this determination. The respondent's decision no more deprives them of that duty and power than would a total collapse in passenger numbers due to some unforeseen world catastrophe resulting in the annihilation of their revenues from airports charges. So far from the language in the Aviation Regulation Act, 2001 supporting the applicant's contention in this regard it seems to me to go powerfully in the opposite direction.

The respondent has a duty to aim to facilitate the effect of cost effective airports which meet the requirements of users and must have regard to the level of investment in those airports in line with the statutory objectives. He must have regard to the level and quality of services at the airports and the reasonable interests of the users of these services. He must have regard to the cost, competitiveness and operational efficiency of the airport services with respect to international practice. This list of matters to which the respondent is obliged to have regard, in my view, clearly authorises him to conduct the detailed review of the applicant's CAPEX which he has done in this case: I do not say that he is obliged to adopt this item by item method in order to discharge his statutory obligation but I do say that in carrying out this item by item review he is clearly doing what the Oireachtas intended him to do under the characterisation of determining maximum airport charges and not under the characterisation of managing and developing an airport.

The nomenclature is unimportant: clearly it is possible to describe what the respondent did in relation to the new terminal at Cork for example as a disallowance: the issue is not whether he did or did not disallow the terminal or indeed what the word might mean. The issue is whether what he did was within his powers (and it was) and whether this amounted to a usurpation of the applicant's management function (and it did not).

The applicant further submits that in relying upon the airlines' allegation that there was inadequate consultation with them by the applicant in relation to its CAPEX, he is actually introducing a new statutory criterion by reference to which he then proceeds to exclude and disallow portions of the applicant's CAPEX. It is submitted that the true position is that he had already included some £200 million worth of the applicant's CAPEX in the draft determination and must therefore have already concluded at that point that such items had satisfied the various statutory criteria set out in section 33. Following the publication of the draft determination, it is submitted, the various airlines complained about the level of consultation and this was used by the respondent to remove £200 million worth of the CAPEX from his final determination. These items cannot have been removed from the category of items which meet the statutory criteria simply because it was subsequently shown that there was not adequate consultation in relation to them (this is contested by the applicant). Clearly they can satisfy the needs of the airlines even if there was no consultation.

The respondent in publishing the draft emphasised that it was just that and was subject to review. Furthermore in the determination the respondent in giving his reasons for justifying it referred to the view expressed by the airlines that the applicant's CAPEX would not meet their needs. This *primary* submission was accepted in part by the respondent. The reasoning then proceeds to note certain points in relation to previous and current CAPEX which are clearly secondary reasons and which include poor consultation with users of the airport and also inadequate or nonexistent cost-benefit-analysis or business cases undertaken to justify specific CAPEX projects. The determination then proceeds to say that *therefore* the Commission has not relied on the Aer Rianta CAPEX programme save to the extent that it identifies necessary compliance/safety projects. It is also clear, as I will point out

in a moment, that the respondent, having reached this conclusion, decided to subject the applicant's CAPEX for further analysis to its independent consultants IMG and ultimately adopted the latter's alternative CAPEX for the purposes of his determination.

Whilst of course it is true to say that the concept of consultation is not identical with the concept of meeting the needs of airlines or the reasonable interests of airport users, the two concepts are clearly intimately related. If, due to consultation, the airlines and users are unanimous in approval this would clearly greatly assist the respondent in reaching a decision that the approved project satisfied the statutory criteria. Equally, if there was strong opposition this would, as his counsel submitted, induce him reasonably to take a hard look at the project involved. The applicant submits, however, that the respondent did not even take a "hard look" at projects which he deemed not to have been justified by the applicant but rather regarded himself, as he stated, as statutorily bound on this basis alone to exclude it from his calculation.

At this point I wish to distinguish my findings in relation to the *consultation* element of this submission and the *justification* element. In relation to the former it does seem to me that the reasoning offered by the respondent in his determination, which I cited at some length in my account of the submission made on behalf of Ryanair, places the acceptance by the respondent of the claimed inadequate consultation in its proper statutory context, because the respondent gives as his reason for refusing many items of capital expenditure programme included in the draft determination, the fact that they would not meet the needs of the users - a conclusion which he reached, it is true, following their claims that there had been insufficient consultation in relation to them. However in my view he was perfectly entitled to

conclude in that context that the identified projects did not meet the needs of the users and for this reason to exclude them. This is a clear adherence to the statutory scheme.

Rather different considerations apply to his treatment of the failure of the applicant to justify the inclusion of certain items in its CAPEX. In this regard the respondent did specifically say in his reason for rejecting submissions by the applicant in Part II of the reasons given for his determination that he regarded himself as statutorily bound to exclude items which the applicant had not justified. (I note, as well, that this non-justification is also referred to by the respondent in the same context as the inadequate consultation namely as a list of noted elements given following the primary determination that the CAPEX was excluded because it did not meet the needs of users.) However it must be acknowledged that the respondent has misstated the effect of the statutory provisions when he described himself as statutorily bound to exclude items of the applicant's CAPEX which the applicant had failed to justify. I have already said that in my opinion, regardless of the fact as to whether the applicant submitted a CAPEX or did or did not submit adequate information in relation thereto, the respondent had an independent obligation to consider the matters identified in s. 33 which included aiming to facilitate the development of cost effective airports and having due regard to the level of investment therein. I do not think he can be relieved of this duty simply because the applicant fails to justify elements of its CAPEX.

Accordingly I now turn to see whether this description by the respondent himself which suggests that, contrary to the foregoing, he abandoned the exercise of his statutory discretion, once the applicants failed to justify its CAPEX, is an accurate description of what actually happened.

A description of how the applicant's CAPEX was treated is to be found in the third affidavit of the respondent and the first affidavit of Jorge Gonzalez sworn respectively on the 28th and 29th January, 2002.

The respondent in his affidavit says he first met employees of IMG on 23rd February, 2001, and discussed with them the proposed methodology and list of information required from the applicant in respect of CAPEX. On 20th and 23rd April a similar meeting reviewed information provided by the applicant in response to a first request for information and it was decided that a new list of information was required. On 21st May, there was a meeting to discuss IMG's review of the applicant's proposed CAPEX. More information was anticipated from the applicant on 24th May. On 11th June, 2001, IMG presented the respondent with initial results of its review of the new CAPEX information provided. It was agreed that IMG would provide a report by 22nd June, so that the respondent could review and comment on it before the draft report on 24th June, for inclusion in the draft determination (which was published on 26th June). The further review of IMG's work was done on the 20th July, 2001, and on 30th July, IMG were briefed as to what work was expected of them following receipt of the final statutory representations. They discussed, *inter alia*, the need to generate a new recoverable CAPEX for the final determination. There was another review of IMG's work on 6th August, 2001, and this meeting largely consisted of an analysis of all items in the applicant's and respondent's recoverable CAPEX – description, justification, cost, inclusion, exclusion, inclusion at a later stage. The respondent was presented with the latest results of IMG's recoverable CAPEX and there were discussions regarding reasons for allowing modifying or disallowing any CAPEX items. This discussion included consideration of the submissions made by the applicant and other bodies in response to the draft determination. There was a final meeting in respect of CAPEX on

20th and 21st August, 2001, where the subject was the content and results of the final review of the applicant's CAPEX. The respondent undertook a line by line review of the recoverable CAPEX proposed by IMG. He also reviewed items for inclusion in the final IMG CAPEX report. At that meeting the respondent decided that he would "use as (his) recoverable CAPEX for the purposes of (his) determination the recoverable CAPEX now contained in the IMG report included in the report on reasons for the determination."

Also in the same affidavit the respondent gives a history of the response by the applicant to the statutory request for information issued by the respondent. The applicant's response to the first statutory request provided some documentation and noted that certain documentation was designated as confidential and noted that "financial analysis performed to justify investment" was "not in existence". Therefore in respect of future capital expenditure totalling in excess of £1.351 million there was *no* documentation in existence relating to financial analysis of that expenditure. In relation to financial analysis to justify past capital expenditure a one page memorandum without any accompanying documentation was submitted which did refer to specific projects. Further information was indeed furnished by the applicant but on 24th May, 2001, it insisted once again that it would be seriously prejudicial to the applicant if the information provided in respect of planned capital expenditure were to be published at this level of detail. The respondent had, therefore, to consider how to protect the applicant's confidentiality on the one hand and on the other how he could publish in the draft determination sufficient material to achieve transparency and to enable representations to be made by interested parties in a meaningful way.

The respondent had received from IMG a recoverable CAPEX based on the applicant's CAPEX which identified individual projects and was now asked to

aggregate these so that each individual project and its cost could not be identified. On 14th June, 2001, it emerged from a telephone call that the applicant did prepare financial analysis of certain projects in its CAPEX programme which had been asked for on two previous occasions but not supplied. The respondent wrote expressing concern and demanding the information. Under pressure, the applicant furnished the information which provided a financial analysis only of certain projects and not others. The respondent refers to an averment in an affidavit sworn by Mark Foley on behalf of the applicant to the existence of formal appraisal including relevant cost benefit analysis and/or business cases prior to CAPEX projects being formally approved by its board and notes that he has never seen any such analysis despite the making of several statutory requests for information.

Following the publication of the draft determination, the applicant made a detailed representation to the respondent on 26th July, 2001. This contained CAPEX information which differed in some respects substantially from that already provided. In summary, therefore, whilst the applicant submitted information on CAPEX on five occasions that information contained some inconsistencies, did not provide a full cost benefit analysis of all elements of the CAPEX nor did it appear to justify all elements of the applicant's CAPEX programme. Furthermore following the publication of the draft determination the respondent received a large number of representations from interested parties including a number of the airlines who expressed the view that the applicant's CAPEX did not and would not meet the needs of users. They also criticised the lack of consultation engaged in by the applicant.

This was taken seriously by the respondent and on 10th August, 2001, he wrote to the applicant and referred to its representation on 26th July, 2001, which stated that for all major capital projects general consultation was carried out and specific working

groups were set up. The respondent requested the applicant to provide this information because there was an issue on this subject between the users and the applicant. Publication of the draft determination was the first time that the airlines had seen any detail of the applicant's CAPEX albeit in an aggregated form. The respondent was now approaching the deadline for publication of his determination. At the request of the applicant, however, he extended the deadline for the applicant submitting information on consultation to 20th August and on that date the applicant provided the information. Having considered this information and also information from other interested parties, the respondent concluded that the consultation process engaged in by the applicant in relation to its proposed CAPEX with users of the airport had been poor. He therefore took the view that the users' comments about the recoverable CAPEX should be considered very seriously indeed and fully taken into account in deciding upon the recoverable CAPEX. He took this view in light of his statutory obligations. In his affidavit he says

> "Had the views of users and in particular those on whom the airport charges may be levied been taken into account then I would not necessarily have attached such weight to their criticism of the proposed CAPEX since I would have assumed that CAPEX had been arrived at following a consideration of the users' views. However where I had formed the view that consultation with users was poor I gave great weight to the views of users. In this regard I gave instructions to IMG to attach significant weight to the views of users in coming up with a recoverable CAPEX."

In his affidavit Jorge Gonzalez, vice-president of IMG, says that his company reviewed the applicant's proposed five year CAPEX programme taking into consideration the statutory obligations of the respondent, and in particular the

obligation on the respondent to have due regard to the level of investment in airport facilities at an airport to which the determination relates, in line with safety requirements and commercial operations in order to meet current and prospective needs of those on whom the airports' charges may be levied. He further says that IMG's review of the applicant's CAPEX proceeded from an initial assumption that IMG would accept the metrics (scale, timing and cost) of the applicant's CAPEX programme, subject to justification of the need for each component and verification of its cost. It became clear that there were difficulties with the information provided by the applicant in light of which the respondent concluded it could not rely exclusively on the applicant's information in deciding whether or not all of the proposed expenditure should be included by the respondent when calculating the level at which maximum charges should be set. It was decided to take into account the applicant's CAPEX as its initial starting point and analyse whether that CAPEX programme could be objectively justified.

In carrying out this process each and every project included in the applicant's proposed CAPEX programme was scrutinised in the same way. The first step was to review all relevant information that had been provided on the project by the applicant through its response to the respondent's information request. The need for the project was then determined by classifying the project within any of the six investment drivers identified by IMG and if the project was deemed to be driven by safety and compliance issues its need was established based on the requirement set by the Irish Aviation Authority or any other agency with jurisdiction on the subject.

If the project was classified as being required by any other driver, IMG first reviewed the applicant's information on the project and ascertained whether it provided any form of justification that could be verified.

If information was lacking, as was the case in many instances, IMG proceeded to review any relevant information associated with the project from third party sources. IMG then proceeded to analyse whether the project could be objectively justified.

IMG gave the applicant's CAPEX programme the benefit of the doubt and made every effort to justify each project through the use of industry practice and standards. Due to the lack of information provided by the respondent of the need to meet capacity demand, IMG developed a detailed demand/capacity study, a copy of which was included in Appendix V of the determination. The demand capacity study carried out by IMG was based on the applicant's own air traffic forecast. Where it was considered that the project was required, IMG then established what a reasonable amount of capital expenditure on that project would be, with reference to the information provided by the applicant, third parties and industry standards. In the absence of satisfactory information from the applicant, it was difficult to verify the need for any proposed investment, its timing and sometimes its cost, and how it would impact upon the level and quality of services at the airport.

Mr. Gonzales then refers to the fact that in publishing the draft determination the respondent was anxious that interested parties and the public would be able to provide as full a submission as possible and, with that in mind, IMG provided an annex setting out the recoverable CAPEX. Because of the applicant's insistence that much of this information was confidential, the information had to be published in aggregated ways so that it did not set out in detail the applicant's categories of CAPEX. Following publication of the draft determination, new information was provided by the applicant and also from representations made by interested parties and members of the public. In view of the users' opposition to the CAPEX and the respondent's instructions as to the weight to be attached to that opposition in view of the lack of consultation engaged in

by the applicant as well as the further analysis that the representations prompted, the recoverable CAPEX ultimately decided upon differed significantly from that set out in the draft determination.

From the foregoing it can be seen that, far from regarding himself as statutorily bound to exclude items in the applicant's CAPEX which the applicant had failed to justify, the evidence is that every facility and benefit of the doubt was given by or on behalf of the respondent to the applicant's CAPEX starting with IMG's initial assumption that it would accept the metrics (scale timing and cost) of the applicant's CAPEX programme subject to justification of the need for each component and verification of its cost. Each and every project included was analysed in a step by step process described in the affidavits and it is also clear that the recoverable CAPEX programme prepared by IMG was prepared on the basis of its analysis from this favourable starting point of the applicant's CAPEX. The CAPEX programme included in the final determination of 26th August, 2001, was completed after detailed and repeated review by the respondent in light of information relating to consultation (which the respondent considered was poor) and inadequate justification which came to light in some instances after the publication of the draft determination. It is clear, therefore, that despite the misdescription by the respondent in his own reasons included for rejecting Aer Rianta's submission in relation to the CAPEX to the effect that he regarded himself as statutorily bound to exclude items of the applicant's CAPEX which the applicant failed to justify, the respondent gave the true description of his application of the statutory provisions when giving his reasons for making his determination (Part I of CP8 /2001) as distinct from his reasons for rejecting Aer Rianta's submissions (Part II) under the heading "statutory factors" where he said

> "In particular, many airlines expressed a concern that the capital expenditure programme (CAPEX) of Aer Rianta did not and would meet the needs of users. Following a careful analysis of the CAPEX at Dublin, Shannon and Cork, the Commission accepted many of these representations."

This (namely that CAPEX would not meet the needs of users) is the respondent's reason for rejecting the applicant's CAPEX and it is clearly squarely within the provisions of section 33. In my view it would be a distortion of the process actually engaged in by the respondent as described in the affidavits referred to, to characterise it as has indeed the respondent himself at one point in Part II of CP8/2001 as a process whereby the respondent regarded himself as statutorily bound to exclude the elements of the applicant's CAPEX which had not been justified by the applicant. This is clearly not the way in which the respondent proceeded and to rely on this misdescription of the procedure would, in my opinion, result in an erroneous conclusion that the respondent had acted *ultra vires* his powers. The respondent was obliged, *inter alia*, to assess whether the applicant's CAPEX met the needs of the airlines and the reasonable interests of the users of airport services and this he clearly did in the process described in the affidavits referred to above.

Whilst issue was taken on behalf of the applicant (primarily in the affidavits sworn by Margaret Sweeney on 12th June, 2002, and by Cathal Guiomard on 12th April, 2002), with much of the substance in the conclusions of the respondent in relation to CAPEX, and whilst the account given by him and Jorge Gonzalez was adversely commented upon and subjected to doubt especially by Ms. Sweeney, it remains clear that so far from regarding himself as statutorily bound to disallow the applicants' CAPEX unless justified, the respondent's account given in these affidavits, which is substantially at variance with that description, is how it was dealt with in practice.

Accordingly what initially appears to be a worrying self-description by the respondent of this part of his process giving rise to an implication that he failed to exercise his own judgment and his own assessment as required to do by the statute turns out in reality to be a misdescription and when the process adopted by the respondent is subjected to closer scrutiny, it is clear that the respondent did in fact exercise his own judgment and make his own assessment in relation to the applicant's CAPEX in a manner which complied with his statutory duty.

The applicant has submitted, further, that by adopting IMG's alternative CAPEX which was itself based, according to IMG's own statement, on misdescription of the relevant statutory objections, the respondent himself acted *ultra vires*. In the first place, it should be noted that the primary work which IMG was required to do was indeed an analysis of the applicant's CAPEX. Whilst the overall objective required of the respondent in s. 33 is set out in the first three lines thereof it may well be thought that subpara. (a) is the one which deals most specifically with the CAPEX. In this context it is not entirely wide of the mark for IMG to identify this as the *particular* statutory objective to which they had regard in their work. More importantly, in my opinion, the respondent himself in giving his report of the reasons for his determination sets out at the very forefront of this document the primary objective as it set out in the first three lines of section 33. It would be a distortion, I think, to conclude that the respondent failed to aim to facilitate the development and operation of cost effective airports which meet the requirements of users when this is in fact what he sets out as the primary statutory objective to which he had regard. In my view the applicant has not made out a case to the contrary effect.

**Q. 10 EXOGENOUS UNFORESEEN COSTS**

**Applicant's Submissions**

These are costs imposed upon Aer Rianta from an outside agency which by definition cannot be specifically predicted or calculated at the time of the making of the determination. The example used in the submissions was security costs imposed on Aer Rianta which it is obliged to incur. It appears to be accepted that some such exogenous unforeseen costs will, in all probability, be incurred during the lifetime of any five year period. In these circumstances the applicant contends that the determination should have provided a mechanism for dealing with these costs if and when they arise and that the determination is invalid for failing so to do. The applicant points out that it made a submission prior to the making of the determination to the effect that compliance with the statutory requirements and in particular s. 33 (a), (b), (f) and (j) can only be achieved by making such a provision. Under these provisions, the respondent is required to have regard to the level of investment in airport facilities which, by definition, will include such costs (the appropriate mechanism will be "triggered" only if and when such costs are incurred) and a reasonable rate of return on such capital employed. Moreover, the respondent is obliged to have regard to the operating and other costs incurred by the airport authority and to national and international obligations which are relevant. The applicant relied on an example where the U.K. regulator allowed 95% of such costs, holding back 5% presumably as a way of incentivising the regulated airports to achieve economies. No objection could be taken to such a reduction but every objection is taken to making no provision whatsoever for these costs given that they will in all probability arise. The making of a nil allowance is incompatible with the obligations imposed on the respondent under section 33.

The reasons given by the respondent for refusing to make any allowance do not bear analysis in the submission of the applicant. These reasons are that cost pass

throughs are fundamentally at variance with the principle of cost effectiveness, and foreseen changes are provided for whereas unforeseen changes may constitute substantial grounds for reviewing the determination (in two years time). The applicant submits that these reasons may support a reduced allowance but cannot support a decision that the applicant should absorb the entire burden of such costs. Cost effectiveness could have been provided for by allowing a percentage: the argument does not support a complete disallowance. A complete disallowance cannot be the discharge by the respondent of his obligation to have due regard to the level of investment (which *ex hypothesi* include these costs), a reasonable rate of return on the capital employed, the operating and other costs incurred, and national and international obligations which are relevant. It is surely fundamentally mistaken of the respondent to argue that it was under no obligation, statutory or otherwise, to provide for the recovery of unforeseen exogenous costs as has been done.

**Respondent's Submissions**

The respondent submitted that, absent s. 33, its determination on this aspect could only be challenged by reference to *Wednesbury* criteria. Clearly it gave consideration to this question and has adduced its own reasons and clearly in the respondent's submissions there is no question of *Wednesbury* unreasonableness.

The additional duties which s. 33 might impose on the respondent, as contended for by the applicant, must be seen against the overriding statutory objective of facilitating the development and operation of cost effective airports meeting the requirements of users. In this context none of the specific paragraphs referred to by the applicant is capable of imposing upon the respondent a mandatory duty to provide for these costs (as distinct from having due regard to the relevant criteria) which are not

even identified or mentioned in the statutory objectives. The respondent accepted that he was obliged to have due regard to these costs given that they were mentioned in the applicant's submission, but not necessarily to provide for them.

The court is entitled to test whether such due regard was had by the respondent, but with regard to the substantive result, may only interfere with it on *Wednesbury* principles. The applicant is in effect requiring the court to review the substantive decision in this respect otherwise than by reference to *Wednesbury* principles. The reasons given in the statutory documentation must be considered. In its report dated 26th August, 2001, on the reasons for its determination the respondent made it clear that he had due regard to the applicant's safety compliance obligations under national and international obligations: separately with regard to security, immigration and health and safety requirements - these are evolving and could be the subject of change during the period of the determination: changes in compliance obligations required over the next five years, the effects of which are quantifiable, have been allowed but, in relation to cost pass throughs for security, the Commissioner decided that inclusions would be fundamentally at variance with the statutory objective of cost effective airports. He noted, further, that the applicant is planning to reorganise its use of human resources in the discharge of compliance obligation in respect of fire and security. This is likely to lead to costs savings. He also noted that after two years, if there was a material change in respect of its compliance obligations, this could constitute substantial grounds leadings to a review of the determination.

In light of the specific reasons published the respondent argues that it is clear that he did have due regard to the question of how exogenous unforeseen costs are to be dealt with. Clearly he has reasons (which were given) for his determination and therefore there can be no question, it is submitted, of a *Wednesbury* review. Equally it

is clear that he did have due regard to the relevant factors which included that all existing and foreseeable changes in compliance obligations had been provided for and it is not necessarily the case that such increases in costs are always passed on to customers, for example airlines, which had to incur higher security costs following September 11th and have not necessarily increased their fares but have made cost cuts elsewhere.

The respondent submits that it is also relevant that the applicant has never given any indication of the magnitude of these exogenous costs or defined what it considers are included in this definition; moreover, it did not appeal this decision to the appeal panel and its example from the U.K. has not been supported with sufficient detail.

**Conclusion**

I have already referred to the observations of the Chief Justice in *Glencar Exploration Plc v. Mayo Co. Co.* [2002] 1 I.L.R.M. 481 and to the observations in particular of Lords Hoffman and Keith of Kinkel in *Tesco Stores Limited v. Secretary of State for the Environment* [1995] 1 W.L.R. 759 above, indicating how the courts construe a statutory obligation on a decision maker to have regard to certain matters defined in the statute. It is, in short, a matter for the decision maker to determine what weight should be attached to the relevant statutory objectives and indeed in Lord Hoffman's view it is for the decision maker to decide to give them "whatever weight the planning authority thinks fit or no weight at all".

In my opinion it is clear that the reasons given by the respondent for his decision in this matter clearly preclude any possibility of arguing that his conclusions are irrational. It is not irrational, in my opinion, for someone in the position of the respondent to say, in effect, that given the overriding objective to aim to facilitate the development of a cost effective airport, given that exogenous unforeseen costs are not

necessarily passed on by the persons primarily responsible (for example by airlines to their passengers), given also the fact that there is a mechanism for a review of this decision in two years time and given its opinion that pass throughs are inherently inimical to the principle of cost effectiveness that there should be no mechanism in the initial determination for such a pass through. In my view this is clearly a rational conclusion and cannot be impugned on *Wednesbury* grounds.

Does it, however, show that the respondent had "*due regard"* to the matters identified by the applicant in argument? Is the applicant entitled to say, as it has, that no regard was paid to these matters, for example, to the operating and other costs incurred by the applicant or the national and international obligations which are relevant to the respondent's function? The respondent has specified that it has built into its determination a calculation in respect of identified exogenous costs. With regard to unforeseen exogenous costs it has indicated that changed costs for the applicant may provide substantial grounds for review. I think this is an important feature in the respondent's thinking because it shows that this is not a determination in regard to these costs once and for all and for all time. It seems, rather, that the respondent's attitude is that given its overriding statutory objective to aim to facilitate the development and operation of cost effective airports and given its opinion that pass throughs are at variance with the principle of cost effectiveness (they provide no incentive to the airport operator to manage a cost increase in the most efficient manner possible) I think it is perfectly reasonable for the respondent and in compliance with his statutory duties under s. 33 to effectively adopt a wait and see attitude and specifically keep the door open to the possibility of a review in two years time.

Given the jurisprudence I find it impossible to say that the respondent has not had due regard to the various statutory objectives in light of its own stated reasons for

making no provision in its initial determination. The applicant submits, however, that the objective of incentivising cost effective airports could equally be attained by allowing a percentage (say 90%) of these unforeseen costs but that to disallow them entirely involves ignoring (paying no regard to) the statutory objectives identified in argument. This submission seems to me to ignore the overall approach of the respondent in this context and in particular his submission that such cost increases are not necessarily passed on to customers and also his clear indication that an increase in such costs might well trigger a review in two years' time.

I am unable to agree with the applicant's submission that an obligation to have due regard to the various matters identified in argument means or amounts to an obligation to make provision for this particular element of unforeseen costs. The fact, therefore, that no provision has been made in the determination under challenge does not of itself mean that there has been a failure to comply with the statutory objective. For these reasons the respondent's decision cannot be challenged on this ground.

Q.11 **MINISTERIAL POLICY DIRECTION**

The background to this issue is that on 16th August, 2001, the Minister under s. 10 of the Act of 2001 gave the Commission a direction "that the Commission make every reasonable effort to ensure that its final determination reflects the important emphasis which the Government has placed on balanced regional development".

Section 10 where relevant provides

> "**10.**—(1) The Minister may give such general policy directions (including directions in respect of the contribution of airports to the regions in which they are located) to the Commission as he or she considers appropriate to be followed by the Commission in the exercise of its functions.

(2) The Commission shall comply with any direction given under *subsection (1)*."

The direction already quoted came as the conclusion to a two page letter addressed to the Commissioner by the Minister. In the course of that letter she wrote

> "As I, indeed the Oireachtas in general, regarded the issue of the contribution of the airports to their regions, as being of particular importance, a separate obligation in respect of this matter was inserted in the list of regulatory objectives in section 33, to which the Commission was required to have regard. I wish to advise you that I have decided that it is appropriate at this juncture to give you a direction under section 10, so that as you reflect on your conclusions on the proposed price cap determination, you are aware of the purpose and intent of Government Regional Development Policy."

She then drew the Commissioner's attention to the two relevant policy documents as follows

> "1. <u>The National Development Plan – 2006 (NDP)</u>
>
> …
>
> "The fostering of balanced regional development" is one of the four national objectives identified in the plan. Specifically, the plan states that it is the Government's objective to achieve more balanced regional development in order to reduce the disparities between and within regions and to develop the potential of the regions to "contribute to the greatest possible extent to the continuing prosperity of the country."

The government considers that our airports have a key role to play in supporting the national objectives of the plan.

2. National Spatial Strategy:

In order to bring together the various elements of regional policy and to achieve the necessary balance in accordance with the principles of economic competitiveness and sustainable development, the Minister for the environment was mandated to prepare a National Spatial Strategy (NSS) which would translate the broad approach to regional development into a more detailed blue print for spatial development. One of the key principles to be achieved under the strategy is the creation of the right conditions for balanced regional development to take place by developing the potential of areas in the regions to create and sustain economic strength in a structured way. In that regard you are referred to the "scope and delivery" document which is available on the Department of the Environment's website."

These introductory paragraphs were then followed by the direction which I have already quoted.

For the purpose of considering the arguments, which I will outline in a moment, I have been furnished with and have carefully considered both of these documents where relevant to the issues raised by the applicant.

In the determination, as will already have been seen, the respondent fixed a general overall cap which applied to all three airports in the sum of €6.34 and an individual sub-cap for Dublin in the sum of €5.38.

**Applicant's Submissions**

The applicant submits that the Commissioner failed to comply with the direction in two regards: firstly, he disallowed a £73 million new terminal project for Cork and allowed instead only a £36 million extension and secondly, by so arranging the caps as to confer a significant advantage on Dublin, his decision was entirely inconsistent with the objective and so far from reducing the disparities between and within regions and developing the potential of regions, it in fact contributed to widening those disparities and hindering such development.

The Commissioner is obliged to comply with s. 10 – it is a mandatory duty cast upon him and can be distinguished from his obligations under s. 33 which are merely to have regard to the statutory objectives which include at (d) "the contribution of the airport to the region in which it is located". It is not sufficient for the Commissioner to have regard to the directive or to the contribution of the airport to the region in which it is located: rather he is under a strict statutory obligation to comply with the direction. This he clearly failed to do, and it is of no avail to the respondent in this particular context to pray in aid the jurisprudence and principles which apply to his s. 33 (d) obligation.

Moreover, the direction requires the respondent to "make every reasonable effort to ensure" that his determination reflects Government policy as identified. He must, in short, deliver: it is not sufficient that he merely takes this policy into consideration.

Given this direction, it was perverse for the respondent to fix a cap for Dublin airport which is considerably lower then the cap applying to all three. He cannot on any basis be said to have made every reasonable effort to ensure that this determination complies with the ministerial direction.

The respondent's submission that he is free to have regard to the direction and, by implication, to determine what weight to give it is wide of the mark: he is not so free. He *must* comply with it and his non-compliance has been misinformed by his misunderstanding of the nature of his legal obligation.

It is accepted that there may be a range of determinations which would have complied with the ministerial direction. But the determination actually made is outside that range because it is clearly inconsistent with the direction itself. The respondent appears to have regarded the idea that Dublin would subsidise the regions as something objectionable. However, s. 33 clearly contemplates that he would consider airports, in the plural, together, and this clearly permits subsidisation as does s. 32 (4) under which it is clear that the respondent may consider several airports in the aggregate – a course he has chosen to adopt in the present determination. Any suggestion that the Act of 2001 prevented the respondent from permitting the applicant so to conduct his business as to subsidise costs at one airport from income at another, is unsustainable.

In argument it appeared that the respondent was contending that Dublin also is a region but this contention ignores the direction to achieve "balanced regional development" when the whole purpose of government policy is to address imbalances in development and to reduce disparities in the regions. The context (identified in the National Spatial Strategy) is to achieve economic competitiveness and sustainable development and therefore, the whole purpose of government policy is to address imbalances in development and reduce disparities between regions such as the disparity which exists in favour of the greater Dublin area region, which is not sustainable in the long term and the consequent need to develop the other regions so that they can achieve economic competitiveness with the greater Dublin region. To make a decision which

accentuates that imbalance is simply inconsistent with that policy and therefore fails to *comply* with the direction.

**Respondent's Submissions**

The Minister's is a *general* policy direction and does not dictate any specific outcome. The respondent clearly has a wide discretion as to how he may comply with it. The wording of this general direction requires merely that he "make every reasonable effort" to ensure that his determination reflects the important emphasis that government policy has placed on balanced regional development in light of the identified documents. Clearly there may be a number of reasonable views as to how he should comply with this direction.

The respondent has set out in detail how he has done this. He summarises the direction, refers to his review of the two documents, identifies two objectives namely first, the need to provide Dublin with sufficient resources to provide for its continued infrastructural development to deal with congestion and bottlenecks and second, the need to ensure that Shannon and Cork can develop strong and sustainable economic growth and therefore further develop as regional gateways. The respondent has said that the first of these objectives is met by providing Dublin with a separate price determination, thereby preserving the particular place allocated to it in the documents and also ensuring that development at Dublin will not be restricted by a cross subsidy to Shannon or Cork and further states his belief that the second objective is met by both the individual price determination on Dublin and the overall price determination for all three airports, which approach will ensure that development at Shannon and Cork will be sustainable in line with the interplay of market forces, location and accessibility and also ensures that Shannon and Cork will both have adequate resources for development

while providing the applicant with the maximum flexibility possible as to the implementation of an appropriate development strategy.

The applicant further submits that there has been no objection to his determination by the Minister and this in the context that the direction was given some ten days before that determination was due to be made. Moreover no group has appealed it.

The respondent submits that it is clear that he did give considerable attention to the direction and to both relevant documents and further submits that once this has been established a court can interfere with it only if it is irrational in the *Wednesbury* sense. Clearly there is no evidence of this. By challenging this decision by way of judicial review rather than by way of appeal the applicant must, accordingly, establish that there is only one *right* way to implement the ministerial direction and that the respondent has not achieved it. Indeed if there were to be only one right way then this could have been much more clearly expressed in the legislation.

With regard to the element of this argument that the respondent by allowing only an extension of the existing terminal at Cork rather than allowing for a new one has failed to comply with the direction, the respondent submitted that he has not been given leave to advance this ground in the appropriate order. Accordingly the court should not now concern itself with this particular proposition.

**Conclusion**

Before I consider the substance of this submission I think I should first deal with the last point referred to above.

In the order of Murphy J. of 22nd April, 2002, the applicant was given liberty to amend its statement grounding application for judicial review, which now included a

claim for a declaration at para. 16 that the determination failed to have any or any proper regard to the provisions of s. 10 of the Act of 2001, the direction of the Minister for Public Enterprise thereunder and s. 33 (b) of the Act of 2001. Ground 14 is relied upon to support this relief. 14.1 recites the obligations under s. 33 (d) and also under s. 10 and includes reference to the specific direction. 14.2 asserts that the implementation of the maximum charges allowed "would result in a significant reduction in the number of passengers per annum at both Cork and Shannon airport" and para. 14.3 asserts that no reasonable regulator "could have determined charges … of this nature, consistent with the statutory obligation and direction referred to herein."

There is no reference in this pleading to the specific point that the respondent failed to allow a new terminal as distinct from an extension of an existing one as a basis on which to ground the claim for the declaration. In my opinion the applicant has not been given leave to base its claim for this relief on this particular ground and accordingly I decline to consider it.

Turning to the generality of the submission it does seem to me that there is a clear distinction between the character of the obligation cast upon the respondent in s. 33 (d) whereunder he is obliged to have *due regard* to the contribution of the airport to the region in which is located, on the one hand, and on the other the obligation cast upon him under s. 10 which requires him to *comply* with the direction. In this context I do not agree with the submission of the respondent that the cases in relation to *"due regard*" obligations are of relevance to my consideration of the respondent's obligation under section 10. On the contrary, I think a clear distinction should be made between them. I agree with the applicant's submission that under s. 10 the respondent must comply with the direction and whilst there may be a choice and a variety of ways in which he can achieve this, I do not think that the true test as to whether he did so

(assuming it is established, as it has been, that he considered the direction and the relevant documents referred to) is whether his decision can be faulted on the grounds of irrationality alone. I think the test is simply whether he has complied with the direction, which is a ministerial direction, that he make every reasonable effort to ensure that his final determination reflects the important emphasis which the government has placed on balanced regional development. If I conclude that he has made every reasonable effort to achieve this then he has complied. If I conclude that he has not, then he has not, no matter how rational his own thought processes and procedures may have been.

Having said this, it is also clear that the ministerial direction itself is cast in the language of generality. The obligation cast upon the respondent is to make every reasonable effort: it is not an obligation to achieve a particular result or to aim for a policy objective in a particular way. Indeed given the wide language of s. 10 itself, which refers to making a *general* policy direction, a specific direction might well be open to question.

I also think it is true to say that a court, when considering whether or not there has been compliance with such a generally worded direction in respect of which both sides agree there is no black and white answer, must accord to the respondent a measure of deference or a margin of appreciation if only for the fact that the respondent has available to him a level of economic and other relevant advice which is not available to the court. By this I mean that if I, myself, were to conclude, having read the relevant documents, that if I were the regulator I would comply with it in a way other than the regulator has done I must not proceed to say that therefore the regulator has not complied. Both parties agree there may be different ways in which compliance can be achieved and it is not for me, I think, to gainsay this or to conclude that a particular way chosen by the respondent does not amount to compliance unless I am clearly satisfied

on this point. This does not mean, however, that I cannot be satisfied unless I am also satisfied that the determination is itself irrational.

It seems to me that the detailed three page account of his reasons given by the respondent on this topic bears – certainly on a first reading – all the hallmarks of a careful balanced and considered response to the Minister's direction. His obligation under s. 10 is clearly identified as are the two relevant national documents. The respondent then proceeds to say that he undertook an intensive review of both of these and had to determine how the objective of balanced regional development could be integrated into his final determination. This, it is noted, must still achieve the statutory objective (of regulation) whilst having due regard to the statutory factors set out in section 33.

A more detailed account of the contents of the National Development Plan is set out and it is noted that this plan seeks to promote two types of policies simultaneously, namely the addressing of urban congestion and general bottle necks to growth, particularly as regards economic and social infrastructure and human resources, and secondly the policy of further developing counterbalances to Dublin, relieving pressure on the capital and its hinterland and distributing growth more widely throughout the region. The respondent says that in his final determination he has attempted to promote both policies to the extent that it furthers the statutory objective by ensuring that Dublin has sufficient resources to relieve congestion and bottlenecks while also providing Shannon and Cork with the necessary resources to develop as counterbalances to Dublin. He specifically says that preferring one policy at the expense of the other would be at variance with the National Development Plan.

The respondent goes on to say that the plan identifies particular means of fostering balance to regional development by calling for focused development at

regional gateways at a limited number of strategically placed centres and acknowledges that he must have consideration in his final determination for these focused development regional gateways. These are self selecting gateways in the interplay of market forces location and accessibility. It is stated that the respondent should not undermine the position of regional gateways by facilitating the development of inefficient infrastructure which cannot be sustained in the medium to long term.

Turning to the scope and delivery document of the National Spatial Strategy the link of the latter with the National Development Plan is noted. This envisages continued economic growth for the south and east and the border, midlands and western region but also (as does the National Development Plan) sees the need for greater infrastructure development in Dublin: hence the need to combine two objectives namely to provide Dublin with sufficient resources to provide for its continued infrastructure development and secondly the need to ensure that Shannon and Cork can develop strong and sustainable economic growth and therefore further develop as regional gateways. I have already referred to the conclusions of the respondent as to how, in his opinion, these two objectives can be integrated into his determination.

It seems to me, in argument, that the applicant's submission included the proposition that in order for the applicant to derive maximum revenue from the caps identified by the respondent, it is compelled by the way the determination has been framed, to levy airport charges at Shannon and Cork which are significantly higher than those which can be charged in Dublin. This means, the submission runs, that Shannon and Cork are disadvantaged by comparison with Dublin and indeed this is true to such an extent that the evidence shows that the applicant has not been able to charge the full amount at Shannon and Cork because of its strong conclusion that if it does it will loose passengers at these airports – the very thing, its says, the National Development Plan is

aimed at avoiding. This seems to boil down to a submission that no airport charge arrangement dictated by the respondent which involves the applicant having to charge more at Shannon and Cork than at in Dublin can amount to a compliance with the ministerial direction, given that the purpose of the direction is to favour Shannon and Cork at the expense of Dublin.

It seems to me that, on the other hand, the regulator's view is that, in order to comply with both objectives which he has identified and published in his reasons for his determination and which include providing Dublin with the necessary resources to develop its infrastructure so as to avoid congestion and bottlenecks, it is appropriate that there should be a separate price determination for Dublin and that Dublin should not be restricted by cross-subsidising Shannon and Cork.

Perhaps it is over simplistic to say that in the view of the applicant, compliance with the ministerial direction can only be achieved by a price arrangement which inevitably means that charges in Shannon and Cork will (in the case of a full implementation of the allowed expenditure) always be cheaper than in Dublin, whereas in the view of the respondent, his determination must reflect the two objectives of ensuring that Dublin will not be hampered by cross-subsidisation in its need to provide infrastructure to avoid bottlenecks and congestion together with a second objective to ensure that regional gateways (which are self-selecting locations) will be able to secure the necessary resources to develop as counterbalances to Dublin.

No attack was made by the applicant on the respondent's reasoning process insofar as it identified these twin objectives. Moreover having considered the relevant documentation his summary and analysis appear to me to be justified. In those circumstances, and bearing in mind that both parties agreed that there may be different ways of achieving compliance with the ministerial direction, I cannot say that it is clear

that the respondent has failed to comply with the direction. Accordingly in my view the applicant is not entitled to the declaration sought in this regard.

Q.12 **UPDATED PASSENGER ESTIMATES**

The background to this issue is as follows:

In his determination of the 26th August, 2001, the respondent said that in his formula he intended to use the centre line forecast for passenger growth provided by Aer Rianta. He subsequently discovered that this was not done due to an oversight and communicated with the appeal panel in this regard. The panel stated that the respondent should review its treatment of passenger numbers and this the respondent decided to do, thereby varying his original determination to correct this oversight by introducing the correct (centreline) passenger forecast number as given by the applicant, instead of the erroneous figure which had been used through the oversight.

By the time the respondent came to make his varied determination, these original centre line figures had become out of date by reference to a number of factors which included the subsequent impact of foot and mouth disease, the decline in the world economy and the impact on air passenger numbers of the terrorist attacks of September 11th. Accordingly, an argument was advanced that the originally intended centre line passenger forecast numbers should be replaced by more up to date figures which would take into account these factors.

There were various contentions made on either side on the merits of this argument but it was agreed at the hearing before me that the issue boiled down to one simple point of statutory interpretation: namely whether the respondent was correct in interpreting the relevant statutory provisions as precluding him from taking into account events which occurred after the 26th August, 2001, the date of his original

determination. At issue is simply this single point of statutory interpretation and nothing else.

The relevant provisions from the Act of 2001 are

"40. – (5) An appeal panel shall consider the determination and, not later than 2 months from the date of its establishment, may confirm the determination or, if it considers that in relation to the provisions of *section 33* … there are sufficient grounds for doing so, refer the decision in relation to the determination back to the Commission for review.

…

(8) The Commission, where it has received a referral under *subsection (5)* from an appeal panel, shall, within one month of receipt of the referral, either affirm or vary its original determination and notify the person who made the request under *subsection (2)* of the reasons for its decision."

In giving its reasons for its varied determination the respondent said with regard to the review which it carried out of the matters referred back to it by the appeal panel

"In carrying out the review, the Commission has not taken into account facts which came into being or events which occurred after the making of the original determination."

It was accepted by the parties at the hearing before me that this refers to the view taken by the respondent on the relevant statutory provisions that he was not authorised thereby to introduce passenger forecast numbers which came into existence after that date.

**Applicant's Submissions**

On behalf of the applicant it was submitted that the respondent had originally intended to use passenger forecast numbers which were credible: in error he used the incorrect numbers. When it came to correcting the error, however, the originally intended numbers had lost all credibility and it was clearly not the intention of the legislature that such figures would be used; in the circumstance that the respondent decided to review the original determination, the original determination did not stand and therefore the original centre line figures did not stand. By substituting a new determination it was clearly intended that he would have statutory jurisdiction to include in this exercise a substitution of the original figures. It can never have been the intention of the legislature that the respondent would be forced to use a figure which he knew was "wrong". This he has done because of his view of the law which was, therefore, clearly mistaken. No interpretation of the law can require such an irrational approach; the irrationality of the respondent's approach is underlined by the fact that a few weeks later an up to date passenger centreline forecast was used in the respondent's determination and report on aviation terminal service charges reflecting a five per cent reduction in traffic from the earlier (2001) figure. These two determinations were made within three weeks of each other and highlight the irrationality of the respondent's interpretation. It is accepted that passenger forecast figures will always be subject to updating and change: in the present case, however, the figures actually used were clearly erroneous by reference to an external set of objectifiably verifiable factors and therefore the appropriate updated figures should have been used.

The refusal of the respondent to use these figures was clearly in breach of his duties under s. 33, which included an obligation to have regard to a reasonable rate of return on the capital employed which can only be properly calculated by reference, *inter alia*, to appropriate passenger forecast figures.

Furthermore, it is an absurd construction of the relevant statutory provisions to read them as requiring the respondent to use passenger numbers known to be obsolete. Moreover, it is absurd that in "correcting" admittedly erroneous numbers, the respondent should use "correct" numbers which were known to be false. If the respondent was indeed correcting the numbers then up to date numbers should have been used as envisaged apparently by the appeal panel.

Section 40 (8) entitles the appeal panel to send the determination back "for review" and enables the respondent to "vary" its original determination. These powers are not limited and should not be construed so as to bring about an absurd result. Moreover this runs counter to the much eulogised system in the 2001 Act for "running repairs" extolled, in particular, by the respondents in their submission to the court.

Furthermore, the varied determination is unlawful because it fails to take into account a relevant consideration, namely, updated reliable figures. Moreover it is invalid because based upon an error of law, namely, an erroneous interpretation of the statute.

Finally leave was granted to advance this argument and has not been excluded by the judgment of the court delivered on the 16th January, 2003, as contended for by the respondent.

**Respondent's Submissions**

In the order giving leave to bring judicial review proceedings of Murphy J. dated 27th April, 2001, an order of *certiorari* quashing the determination is sought on the grounds, *inter alia*, that the determination of the respondent to use centreline forecast figures which were out of date was unreasonable, no adequate reason has been advanced for this decision and the respondent failed to take an account of a relevant

factor in arriving at the decision namely the revised passenger figures. It is submitted that those grounds were excluded by the judgment which I delivered on the 16th January, 2003: moreover the declarations relating to alleged procedural defects in the varied determination which were allowed in the order of the 26th April, 2002, make no reference to the challenge in relation to the revised passenger forecast figures and therefore under the existing jurisprudence (*McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 and *Keane v. An Bord Pleanála [1997] 1 I.R. 184*), the applicant may not now introduce a new ground outside the relevant statutory two month period.

Without prejudice to the above, it is submitted that the respondent acted lawfully. Section 40 (8) provides that the respondent on a referral back to it from an appeal panel shall *"either affirm or vary its original determination"* . The use of this phrase shows that the respondent must consider only its original determination and consider whether it should be affirmed or varied and also shows that, of necessity, it is precluded from taking into account any factual occurrence that took place subsequent to that determination.

The general scheme of the Act is also relevant because it is clear that there is provision for a review two years after the original determination if substantial grounds justify it and such grounds clearly *are* matters which may come into existence after the date of the original determination. In this context the power of the respondent is to *amend* the determination as distinct from its power to *vary* it on a reference from an appeal panel. The use of two different words indicates two different kinds of review.

Furthermore subs. (7) – (13) show that, in making a determination, there is a strict requirement that the respondent would notify the public and permit representations which must be considered and reasons must be given for its determination. No such requirements exist in relation to the s. 40 (8) procedure when

the respondent receives a referral back from an appeal panel. This shows that new matters will not be taken into account at this stage (as distinct from at the two year review stage) in respect of which the public would under the policy of the act have a right to make submissions.

The view of the Act taken by the respondent is justified by the consideration that all production figures are likely to become obsolete and inaccurate by reference to later events. Moreover if one were to permit the introduction of up to date figures at the stage of reviewing the original determination then the question arises where would one stop? On a practical basis as intended by the legislature this was never intended.

Furthermore to introduce up to date passenger figures would allow subsequent events to alter the determination in a random manner which lacks consistency. Such alteration would appear to depend on whether a new factual situation was raised by an appellant and if so whether the appeal panel decided to refer it back and if so whether the respondent decided to vary the determination. Other new factual situations may not have gone through this process and would thereby be excluded, thus producing an imbalanced or partial view.

Moreover, one particular figure cannot be separated from the overall. For example, the introduction of a change in passenger forecast might affect CAPEX or commercial revenue and operating costs. If only passenger figures had been referred to the respondent (as in this case), would the respondent be able to consider these other issues which were not referred back? Or if he could, would his jurisdiction extend to taking account of further new factors in relation to those other matters, even though it did not have the information gathering powers available to it in the event of the original determination. The applicant's submission takes no account of the question of how the respondent would inform himself of these relevant matters.

Indeed the applicant has not informed the court of how far in its view the original passenger numbers are inaccurate and obsolete.

The respondent adopted different passenger numbers in relation to its Irish Aviation Authority determination because that original determination was adopted six months after the determination in the present case.

Moreover the Supreme Court, in its general jurisprudence, has adopted the view that the power of the court to receive new evidence on appeal is discretionary and should be admitted where a serious injustice would be suffered by a plaintiff.

**Conclusion**

I am unable to agree with the respondent's submission that my judgment of the 16th January, 2003, has precluded the applicant from raising this point. It appears to me that the clear proposition alleged by the applicant that the respondent had failed to take into account a relevant factor, namely, the revised passenger figures was itself sufficient to cover this point and has nothing to do with the grounds based on alleged irrationality for computational error. Accordingly, I propose to consider the submission.

The arguments on both sides of this issue are forceful and impressive. It is forceful and impressive for the applicant to say that it is irrational and absurd for the respondent to use an avowedly obsolete figure for its passenger forecast. It is equally forceful and impressive for the respondent to say that if post determination material is to be considered on one topic, in principle all topics should be open for consideration in order not to produce an imbalance and that, furthermore all estimates are inherently prone to prove inaccurate in the event.

The question for decision is whether the statutory provisions should be construed as precluding or not precluding the respondent from considering post determination information on a review by him on a reference back by the appeal panel.

An appeal can be taken by an airport authority or an airport user in the limited sense of (effectively) an airline. Accordingly the scope of the appeal panel's jurisdiction is limited, potentially, to grievances by either an airport authority or airlines. Within that, the scope of appeals seems to be unlimited and the procedure to be adopted is to be determined by the appeal panel itself, subject, of course, to the limitation that it must either confirm the determination or refer "the decision in relation to the determination" back to the Commission for review within two months from the date of its establishment. What is referred back to the Commission, therefore, is a decision which has aggrieved either an airline or an airport authority or both.

On receipt of this referral back, the Commission appears to be also at large save only that it has one month to either affirm or vary its original determination (and notify the appellant of its reasons).

The language of s. 40 (8) to the effect that the Commission shall "either affirm or vary its *original* determination" (emphasis added) is crucial to the point at issue. One could legitimately ask what the difference would be if the word "original" had been omitted. What meaning should the court ascribe to the use of this word? It seems to me that it connotes an intention to refer the respondent backwards in time to the date of its determination rather than to some or any information or event which came into existence after that date. It may well be that the reason for this provision is to avoid the difficulties and anomalies identified by the respondent in its submission. Equally it is fair to say that if post-determination events rendering pre-determination events obsolete

cannot be taken into account at this stage by the respondent then that too many produce an anomalous result. Either way, it seems, there will be difficulties.

Having said that, I must look at the words actually used. In my opinion the word "original" in the phrase "original determination" connotes an intention that on review the respondent shall consider only information which was available at the time of the determination and not subsequently.

It would seem, accordingly, that post-determination facts and events can only be dealt with on review after two years or in a subsequent determination rather than by way of appeal. Such a conclusion seems to me to be consistent with the overall approach of the Act of 2001 which is to provide intermittent quinquennial determinations, with interim reviews if there are substantial grounds for them, and with periods of relative stability or relative predictability in the interim. In my view, therefore, the respondent was correct in taking the view that he was precluded by statute from considering the updated passenger forecast numbers.

Insofar as the issues raised in this judgment are concerned, accordingly, I decline to grant the applicant the reliefs sought.