Neutral Citation Number: [2017] EWCA Civ 1892

Case No: C1/2017/3101/PTA+A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(Lord Justice Gross and Mr Justice Lewis)
[2017] EWHC 2896 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2017

Before :

LORD JUSTICE FLOYD
LORD JUSTICE NEWEY
and
LADY JUSTICE ASPLIN

- -

Between :

The Queen on the application of MONARCH AIRLINES LIMITED (in administration)	**Appellant (Claimant)**
- and -	
AIRPORT COORDINATION LIMITED	**Respondent (Defendant)**

- -
- -

Miss Marie Demetriou QC and Mr Malcolm Birdling (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Appellant**
Mr Michael Crane QC, Mr Alexander Milner and Mr Nicolas Damnjanovic (instructed by **Bates Wells & Braithwaite London LLP**) for the **Respondent**

Hearing date: 17 November 2017

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Approved Judgment

Lord Justice Newey :

1. This is the judgment of the Court.

2. The case concerns "slots" at Luton and Gatwick airports. A "slot" is essentially the right to use airport infrastructure, and in particular to move an aircraft from a terminal to a runway (or vice versa), at a specific airport at a specific time. The term is defined in article 2 of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports ("the Slots Regulation") in these terms:

> "the permission given by a coordinator in accordance with this Regulation to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off as allocated by a coordinator in accordance with this Regulation".

3. The respondent, Airport Coordination Limited ("ACL"), is the coordinator for, among others, Luton and Gatwick airports. Under the Slots Regulation, the coordinator at an airport is the "sole person responsible for the allocation of slots" and is to allocate slots in accordance with the provisions of the Regulation (article 4(5)).

4. Slots are allocated twice a year: for the winter and summer seasons respectively. The process follows a timetable laid down by the International Air Transport Association ("IATA"). This year, coordinators (including ACL) were to inform airlines of the slots allocated to them for the summer 2018 season (or "scheduling period") by 26 October.

5. An airline that has held slots in a season in one year may be able to claim them for the corresponding season the next year. Provision for such "historic precedence" or "grandfather rights" is to be found in the Slots Regulation. Other slots are placed in a pool and distributed among applicants for them, on the basis that 50% of them are to be allocated to "new entrants" provided that there are enough applications from "new entrants".

6. The appellant, Monarch Airlines Limited ("Monarch"), went into administration at the beginning of October of this year (pursuant to an order made on 1 October which took effect at 4 am on 2 October). Shortly beforehand, on 26 and 27 September, it had made requests for slots at, among others, Luton and Gatwick airports for the summer 2018 season on the strength of its use of equivalent slots during the summer 2017 season. On 24 October, however, ACL informed Monarch's administrators that it did not consider that it was under a duty to allocate the relevant slots to Monarch, although it would reserve them pending the outcome of a proposal by the Civil Aviation Authority ("the CAA") to revoke or suspend Monarch's operating licence.

7. On 26 October 2017, Monarch issued an application for judicial review of ACL's decision. The matter came before the Divisional Court (Gross LJ and Lewis J) on 6 and 7 November. The Court granted permission to apply for judicial review, but dismissed the claim. Monarch now appeals.

8. Monarch does not pretend that it envisages using the slots it has requested itself. It hopes to exchange the slots for other, much less valuable ones and receive a payment reflecting the difference in worth. According to the company's administrators, this would result in a proper realisation of Monarch's assets.

9. The central question (though not the only one) raised by the proceedings is whether Monarch has ceased to be an "air carrier" within the meaning of the Slots Regulation and so has become ineligible to have slots allocated to it.

The legal framework

10. Recitals to the Slots Regulation note that the allocation of slots at congested airports should be based on "neutral, transparent and non-discriminatory rules". They record, too, that the "existing system makes provision for grandfather rights". They also, however, explain that it is "Community policy to facilitate competition and to encourage entrance into the market", that those objectives "require strong support for carriers who intend to start operations on intra-Community routes" and that there should be "provisions to allow new entrants into the Community market". "[I]t is desirable", the recitals state, "to make the best use of the existing slots in order to meet the objectives set out above".

11. Article 8 of the Slots Regulation deals with the "Process of slot allocation". So far as relevant, it provides:

> "1. Series of slots are allocated from the slot pool to applicant carriers as permissions to use the airport infrastructure for the purpose of landing or take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool as set up according to the provisions of Article 10.
>
> 2. Without prejudice to Articles 7, 8a, 9, 10(1) and 14, paragraph (1) of this Article shall not apply when the following conditions are satisfied:
>
> — a series of slots has been used by an air carrier for the operation of scheduled and programmed non-scheduled air services, and
>
> — that air carrier can demonstrate to the satisfaction of the coordinator that the series of slots in question has been operated, as cleared by the coordinator, by that air carrier for at least 80 % of the time during the scheduling period for which it has been allocated.
>
> In such case that series of slots shall entitle the air carrier concerned to the same series of slots in the next equivalent scheduling period, if requested by that air carrier within the time-limit referred to in Article 7(1).
>
> ...

> 5. The coordinator shall also take into account additional rules and guidelines established by the air transport industry world-wide or Community-wide as well as local guidelines proposed by the coordination committee and approved by the Member State or any other competent body responsible for the airport in question, provided that such rules and guidelines do not affect the independent status of the coordinator, comply with Community law and aim at improving the efficient use of airport capacity. These rules shall be communicated by the Member State in question to the Commission...."

12. The expression "series of slots", which features in article 8 of the Slots Regulation, refers to "at least five slots having been requested for the same time on the same day of the week regularly in the same scheduling period and allocated in that way or, if that is not possible, allocated at approximately the same time" (see article 2(k)).

13. Slots not allocated on the strength of "grandfather rights" are placed in the slot pool for which article 10 of the Slots Regulation provides. Article 10(6) explains:

> "Without prejudice to Article 8(2) of this Regulation and without prejudice to Article 8(1) of Regulation (EEC) No 2408/92, slots placed in the pool shall be distributed among applicant air carriers. 50 % of these slots shall first be allocated to new entrants unless requests by new entrants are less than 50 %. The coordinator shall treat the requests of new entrants and other carriers fairly, in accordance with the coordination periods of each scheduling day...."

14. Article 10(2) of the Slots Regulation reiterates that, to take advantage of grandfather rights, an airline must demonstrate that it has used its past slots "for at least 80% of the time during the scheduling period for which they have been allocated", but that principle is qualified by article 10(4), which states:

> "If the 80 % usage of the series of slots cannot be demonstrated, all the slots constituting that series shall be placed in the slot pool, unless the non-utilisation can be justified on the basis of any of the following reasons:
>
> (a) unforeseeable and unavoidable circumstances outside the air carrier's control leading to:
>
> — grounding of the aircraft type generally used for the air service in question;
>
> — closure of an airport or airspace;
>
> — serious disturbance of operations at the airports concerned, including those series of slots at other Community airports related to routes which have been affected by such disturbance, during a substantial part of the relevant scheduling period;

> (b) interruption of air services due to action intended to affect these services which makes it practically and/or technically impossible for the air carrier to carry out operations as planned;
>
> (c) serious financial damage for a Community air carrier concerned, with, as a result, the granting of a temporary license by the licensing authorities pending financial reorganisation of the air carrier in accordance with Article 5(5) of Regulation (EEC) No 2407/92;
>
> (d) judicial proceedings concerning the application of Article 9 for routes where public service obligations have been imposed according to Article 4 of Regulation (EEC) No 2408/92 resulting in the temporary suspension of the operation of such routes."

15. Article 14(6) of the Slots Regulation allows slots to be withdrawn from airlines that are not making sufficient use of them:

> "(a) Without prejudice to Article 10(4), if the 80 % usage rate as defined in Article 8(2) cannot be achieved by an air carrier, the coordinator may decide to withdraw from that air carrier the series of slots in question for the remainder of the scheduling period and place them in the pool after having heard the air carrier concerned.
>
> (b) Without prejudice to Article 10(4), if after an allotted time corresponding to 20 % of the period of the series validity no slots of that series of slots have been used, the coordinator shall place the series of slots in question in the pool for the remainder of the scheduling period, after having heard the air carrier concerned."

16. It is also relevant to note article 14(2) of the Slots Regulation:

> "The coordinator shall withdraw the series of slots provisionally allocated to an air carrier in the process of establishing itself and place them in the pool on 31 January for the following summer season or on 31 August for the following winter season if the undertaking does not hold an operating licence or equivalent on that date or if it is not stated by the competent licensing authority that it is likely that an operating licence or equivalent will be issued before the relevant scheduling period commences."

17. Article 8a of the Slots Regulation is concerned with "Slot mobility". It provides:

> "1. Slots may be:

> (a) transferred by an air carrier from one route or type of service to another route or type of service operated by that same air carrier;
>
> (b) transferred:
>
> (i) between parent and subsidiary companies, and between subsidiaries of the same parent company,
>
> (ii) as part of the acquisition of control over the capital of an air carrier,
>
> (iii) in the case of a total or partial take-over when the slots are directly related to the air carrier taken over;
>
> (c) exchanged, one for one, between air carriers.
>
> 2. The transfers or exchanges referred to in paragraph 1 shall be notified to the coordinator and shall not take effect prior to the express confirmation by the coordinator. The coordinator shall decline to confirm the transfers or exchanges if they are not in conformity with the requirements of this Regulation and if the coordinator is not satisfied that: (a) airport operations would not be prejudiced, taking into account all technical, operational and environmental constraints; (b) limitations imposed according to Article 9 are respected; (c) a transfer of slots does not fall within the scope of paragraph 3...."

18. Miss Marie Demetriou QC, who appeared for Monarch with Mr Malcolm Birdling, told us that it was the understanding of those instructing her that article 8a(1)(b)(ii) relates to control of the air carrier's share capital while article 8a(1)(b)(iii) is concerned with a take-over of all or part of the business of the carrier.

19. The implications of a predecessor of article 8a of the Slots Regulation were considered by Maurice Kay J in *R v Airport Co-ordination Ltd ex p. The States of Guernsey Transport Board* [1999] Eu LR 745. At that time, article 8(4) of the Regulation stated:

> "Slots may be freely exchanged between air carriers or transferred by an air carrier from one route, or type of service, to another, by mutual agreement or as a result of a total or partial take-over or unilaterally. Any such exchanges or transfers shall be transparent and subject to confirmation of feasibility by the coordinator that:
>
> (a) airport operations would not be prejudiced;
>
> (b) limitations imposed by a Member State according to Article 9 are respected;
>
> (c) a change of use does not fall within the scope of Article 11."

20. In the *States of Guernsey Transport Board* case, Air UK had agreed to transfer certain slots to British Airways ("BA") in return for an equal number of less useful (and so less valuable) slots and it was likely that a money payment was made to reflect the difference in value. The Guernsey Transport Board ("the Board") objected that the transactions were "not permissible exchanges of slots but were disguised impermissible transfers from Air UK to BA" (see 748). Maurice Kay J concluded, however, that "the words 'freely exchanged', when properly construed in their context, are … clear and unambiguous and they embrace the transactions between Air UK and BA" (see 750). He then said (again at 750):

> "[Counsel for the Board] makes it clear that his primary submission on the construction of 'slots may be freely exchanged' does not depend on there being a money payment accompanying the exchange of slots (as there probably was in the present case). However, he also advances an alternative or subsidiary argument to the effect that where money changes hands, there is a sale rather than an exchange of slots. I do not accept this argument. In my judgment, where slots are exchanged, the fact that there is an accompanying money payment by the acquirer of what are perceived to be the more valuable slots does not convert the exchange into a sale and does not take the transaction out of the scope of an exchange."

21. Maurice Kay J went on to make observations (obiter) as to the role of ACL. He recorded (at 751) that it was counsel for the Board's submission that (what was then) article 8(4) of the Slots Regulation "imposes on ACL, as the co-ordinator, a duty not only to confirm the feasibility of matters (a), (b) and (c), but also the duty to satisfy itself that the presented exchange was a permissible one" and that, on the facts, "it must have been obvious to ACL that the slots provided by BA were unusable by Air UK, that Air UK had no intention of using them, and that the slots would be returned to the pool".

22. Maurice Kay J, however, concluded (at 751) that article 8(4) of the Slots Regulation "simply does not confer upon ACL or other co-ordinators the kind of function or duty to which [counsel for the Board] refers" and that ACL "has a very limited remit, consistent with the need for speed and flexibility which are essential in this context". Maurice Kay J explained:

> "The Regulation simply does not establish the co-ordinator as the kind of investigatory or regulatory body to which [counsel for the Board] refers. In the context of Art. 8(4), its duties are limited to confirmation of feasibility by reference to the three stated matters. It seems to me that this is plainly the meaning of the provision. Moreover, as [counsel for IATA] goes on to submit, the imposition of a duty of the kind contended for by [counsel for the Board] would be both unworkable and undesirable. It would require an investigation into every transaction of slots exchanged which in turn would prevent the present rapid and efficient confirmation of exchanges particularly in the context of the periodic schedule co-ordination conferences. At present, co-ordinators are able to

> respond to requests for slot exchanges almost immediately. The imposition of a duty to investigate or regulate as envisaged by [counsel for the Board] would frustrate this process. The evidence shows that the consequent delays would have global implications, and would risk the fossilising of schedules to the detriment of customers and others. Disputes about the permissibility of a particular exchange might necessitate oral hearings, cross-examination and legal submissions. Procedures which pass wholly unmentioned in the Regulation (apart from the duty to provide information set out in Art. 7) would have to be implied. I agree with the submission made by [counsel for IATA] that the absence of such procedures in the Regulation points away from [counsel for the Board's] contentions."

23. Moving on to consider a challenge to ACL's allocation to Air UK of the slots exchanged with BA, Maurice Kay J said this (at 753-754):

> "As [counsel for the Board] concedes, this issue is intimately connected with the previous issues in respect of the lawfulness of the exchanges and the validity of ACL's confirmation of them. I have come to the same conclusion as in relation to previous matters. It follows that reallocation under Art. 8(1)(a) is not constrained by the restriction for which the Board contends. Moreover, for the same reasons as were identified in relation to issue 3, ACL does not have the kind of investigatory and regulatory function in respect of these matters which would be necessary if the Board's contentions were correct."

24. When the Slots Regulation was amended in 2004, the European Commission proposed that article 8a(1)(d) should read:

> "exchanged, one for one, between two air carriers where both air carriers involved undertake to use the slots received in the exchange".

In the event, however, the reference to the air carriers undertaking to use the slots received in an exchange was not included in article 8a(1)(d). Common Position (EC) No 22/2004 noted that certain provisions put forward by the Commission had not been taken on board by the Council and explained:

> "In not incorporating these provisions, the Council was primarily concerned that the whole issue of market access should be considered in the wider context of a more thorough revision of the slot allocation rules, which could be the subject of a separate Commission proposal in the future."

25. While, therefore, a slot cannot be the subject of an outright sale, it continues to be possible to exchange slots on the basis that the recipient of the more valuable slots will make a payment to the other airline. We were told that certain Member States do not permit such exchanges. In the United Kingdom, in contrast, ACL has sometimes

facilitated such transactions. Mr Christopher Bosworth, the managing director of ACL, said in a witness statement:

> "But in the UK ACL has itself sought to facilitate slot exchanges between active carriers. To this end, ACL has provided services in order better to satisfy airline scheduling and contribute to efficient use of airport capacity (including by putting together airlines which it knows wish to make exchanges), and created slots which it will be difficult or impossible to use without further steps being taken (e.g. a night slot or a slot without an accompanying Air Traffic Movement (ATM) (which might be described as '*dummy slots*'))."

26. The term "air carrier" is defined in article 2(f)(i) of the Slots Regulation. That says:

> "'air carrier' shall mean an air transport undertaking holding a valid operating licence or equivalent at the latest on 31 January for the following summer season or on 31 August for the following winter season. For the purpose of Articles 4, 8, 8a and 10, the definition of air carrier shall also include business aviation operators, when they operate according to a schedule; for the purposes of Articles 7 and 14; the definition of air carrier shall also include all civil aircraft operators".

"Business aviation", which features in this definition, is itself stated (in article 2(l)) to mean:

> "that sector of general aviation which concerns the operation or use of aircraft by companies for the carriage of passengers or goods as an aid to the conduct of their business, where the aircraft are flown for purposes generally considered not for public hire and are piloted by individuals having, at a minimum, a valid commercial pilot license with an instrument rating".

27. The Slots Regulation also defines (in article 2(f)(ii)) the expression "group of air carriers". This means:

> "two or more air carriers which together perform joint operations, franchise operations or codesharing for the purpose of operating a specific air service".

28. The definition of "air carrier" refers to holding "a valid operating licence or equivalent". Within the European Union, the grant of an operating licence is governed by Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) ("the Licensing Regulation"). Article 4 of that Regulation deals with "Conditions for granting an operating licence". It provides:

> "An undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that:

> (a) its principal place of business is located in that Member State;
>
> (b) it holds a valid AOC [i.e. air operator certificate] issued by a national authority of the same Member State whose competent licensing authority is responsible for granting, refusing, revoking or suspending the operating licence of the Community air carrier;
>
> (c) it has one or more aircraft at its disposal through ownership or a dry lease agreement;
>
> (d) its main occupation is to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft;
>
> …
>
> (g) it meets the financial conditions specified in Article 5…."

29. Article 5 of the Licensing Regulation states that the "competent licensing authority" (which, in the United Kingdom, is the CAA) shall closely assess whether an undertaking applying for the first time for an operating licence can satisfy certain financial criteria. Article 9 allows for "Suspension and revocation of an operating licence" in the event of, among other things, later financial difficulties. It states:

> "1. The competent licensing authority may at any time assess the financial performance of a Community air carrier which it has licensed. Based upon its assessment, the authority shall suspend or revoke the operating licence if it is no longer satisfied that this Community air carrier can meet its actual and potential obligations for a 12-month period. Nevertheless, the competent licensing authority may grant a temporary licence, not exceeding 12 months pending financial reorganisation of a Community air carrier provided that safety is not at risk, that this temporary licence reflects, when appropriate, any changes to the AOC, and that there is a realistic prospect of a satisfactory financial reconstruction within that time period.
>
> 2. Whenever there are clear indications that financial problems exist or when insolvency or similar proceedings are

> opened against a Community air carrier licensed by it the competent licensing authority shall without delay make an in-depth assessment of the financial situation and on the basis of its findings review the status of the operating licence in compliance with this Article within a time period of three months….
>
> …
>
> 5. In case a Community air carrier's AOC is suspended or withdrawn, the competent licensing authority shall immediately suspend or revoke that air carrier's operating licence."

30. As is apparent from the definition given in the Licensing Regulation (at article 2(8)), an "air operator certificate" or "AOC" is:

> "a certificate delivered to an undertaking confirming that the operator has the professional ability and organisation to ensure the safety of operations specified in the certificate, as provided in the relevant provisions of Community or national law, as applicable".

31. The Licensing Regulation also contains a definition of "air carrier". The term is now defined (by article 2(10)) to mean:

> "an undertaking with a valid operating licence or equivalent".

When, however, the Slots Regulation was introduced, the predecessor of the Licensing Regulation that was then in force (viz. Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers) defined "air carrier" as:

> "an air transport undertaking with a valid operating licence".

In other words, the Slots Regulation's reference to "air transport undertaking" in its definition of "air carrier" reflects the definition that then applied in the context of licensing. "Air carrier" was also defined as "an air transport undertaking with a valid operating licence" in a Regulation mentioned in the recitals to the Slots Regulation, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community carriers to intra-Community air routes.

32. Provisions implementing the Licensing Regulation in the United Kingdom are to be found in the Operation of Air Services in the Community Regulations 2009. Regulation 7 of those Regulations states that the CAA may revoke or suspend an operating licence, but that it may do so "only after notifying the licence holder of its intention to do so and after due consideration of the case and any representations made by the licence holder". In general, moreover, a revocation or suspension does not take effect until the time for appealing (i.e. 14 days after notification of the decision) has expired (see regulation 8(2) and paragraph 3 of schedule 2). If an appeal is brought in time, the revocation or suspension is further postponed: it does not take effect before the determination or abandonment of the appeal (see regulation 8(3)).

33. Reverting for a moment to the reference in the Slots Regulation's definition of "air carrier" to holding "a valid operating licence or equivalent", it was common ground before us that the words "or equivalent" were intended to take account of the fact that a relevant carrier may come from anywhere in the world. It need not, therefore, be within the scope of the European Union's licensing regime.

Monarch's entry into administration and its aftermath

34. The application pursuant to which an administration order was made on 1 October 2017 was supported by witness statements from a director of the company, Mr Andrew Swaffield, and one of the proposed administrators, Mr Blair Nimmo. Mr Swaffield explained in his statement that the purpose of the proposed administration was to achieve a better result for creditors and, as the secondary purpose, to realise property in order to make a distribution to secured creditors. In a similar vein, Mr Nimmo said:

> "As matters stand, and based on the information provided by the Administration Companies, we do not consider it likely that it will be possible to rescue any of the Administration Companies as a going concern. During the administration, none of the Administration Companies will operate or book any further flights or holidays and, due to safety reasons, it will not be appropriate for the Proposed Administrators to continue to operate the [Monarch] airline business. However, I and the other Proposed Administrators are satisfied that the purpose of an administration order for each of the Administration Companies to which they are proposed to be appointed will be achieved in that it will be possible to realise property in order to make a distribution to one or more of the secured creditors. In respect of the Administration Companies we believe … that it will be also be possible to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)."

35. On 2 October 2017, the CAA provisionally suspended Monarch's AOC and proposed to revoke it. Monarch was given 14 days to request a review of the revocation proposal. If it requested a review (as it later did), it was to have 21 days to make submissions in writing and a hearing would be fixed.

36. Also on 2 October 2017, the CAA notified Monarch that it was proposing to revoke or suspend its operating licence. It explained that its primary position was that the licence should be revoked and not suspended:

> "This is because the purposes of administration do not include the rescue of Monarch Airlines as a going concern. That means that, following administration, Monarch Airlines will be wound up. Accordingly, there is no basis on which the company will in the future be in a position to provide public transport operations to any person, such that it requires an [operating licence]."

37. Subsequently, hearings were fixed for 8 November 2017 (to consider the proposal to revoke the operating licence) and 28 November (to consider the proposal to revoke the AOC).

38. On 16 October 2017, the CAA provided supplemental reasons in support of the proposed revocation of Monarch's operating licence. It referred to a document issued by Monarch's administrators in which it was explained that the leases of all its aircraft had been terminated and which indicated that Monarch no longer employed any pilots and that the sole remaining member of "Cabin crew" would not be employed by the second month of the administration. In the circumstances, the CAA now considered that:

> "C.3.1. Monarch Airlines has no aircraft at its disposal through ownership or a dry lease agreement; and
>
> C.3.2. Monarch Airlines' main occupation is not to operate air services in isolation or combined with any other commercial operation of aircraft or the repair and maintenance of aircraft".

39. Points of Agreement and Disagreement prepared in connection with the hearing on 8 November 2017 (relating to Monarch's operating licence) recorded that there was agreement on the following:

> "8. On 2 October 2017, approximately 1,900 Monarch employees were made redundant. Approximately 200 employees were retained to support the administration.
>
> 9. All the aircraft operated by [Monarch] on the day prior to its entry into administration are in the process of being repossessed by lessors."

40. In its skeleton argument for the 8 November hearing, Monarch's primary contention was that the CAA should not decide to revoke or suspend the operating licence (or the AOC) for a period of three months from the date of entry into administration. The skeleton argument explained that "[s]everal hypothetically possible transactions could be envisaged which depend on [Monarch] retaining its [operating licence]". Slot exchanges were "an obvious, but not the only, transaction conceivable": "[r]escue of [Monarch] as a going concern is one of the statutory purposes of administration" and "if, during the course of the administration, it appeared practicable to rescue the company as a going concern then the administrators would seek to do this." "Apart from the slot exchange transactions, [Monarch's] administrators are not currently negotiating any transaction which they feel at this stage are likely to materialise such that it is worth raising with [the CAA]", the skeleton argument said, but "because administration is a fast moving process, this is not impossible over the three month period."

41. The Hearing Panel's decision on Monarch's operating licence was given in a letter dated 9 November 2017. The Panel concluded that the operating licence should be revoked. It observed that Monarch "does not need an [operating licence] because there is simply no discernible prospect of it operating as an air carrier again".

42. Miss Demetriou told us that the Hearing Panel's decision would be appealed.

The Divisional Court's decision

43. The Divisional Court concluded that ACL was not under a duty to allocate summer 2018 slots to Monarch. In its view (as it stated in paragraph 65 of its judgment):

> "The imposition of such a duty would not accord with the underlying objects and policy of the Slots Regulation or the Licensing Regulation. Furthermore, it is clear that, by 26 October 2017, when slots were allocated by ACL, Monarch was no longer an air carrier within the meaning of the Slots Regulation as it was no longer an air transport undertaking. It therefore fell outside the language of the Slots Regulation."

44. The Divisional Court devoted separate sections of its judgment to "Underlying purpose" and "Language". The Court considered that there are various indications in the Slots Regulation that the allocation of slots "was concerned with those providing, or who would provide, air services, not those who had ceased to do so" (see paragraph 57), and that the Licensing Regulation "is, likewise, concerned with those who have aircraft at their disposal and who operate air services, whether flying passengers, cargo or mail" (paragraph 58). Under the heading "Language", the Court said:

> "60. The relevant part of the definition of 'air carrier' in Article 2 of the Slots Regulation has two essential elements. The air carrier must be an 'air transport undertaking' and it must hold 'an operating licence'. The definition includes the words 'air transport' before undertaking and those words need to be given meaning; the Monarch submission fails to do so. There is no definition of air transport undertaking in the Slots Regulations. However, in our judgment, the phrase means that the undertaking is engaged in the provision of air transport. In the context of the Slots Regulations, that means the provision of air services, i.e. the carrying of passengers or cargo for reward. Indeed, that definition of air transport, and its importance in the definition of air carrier, is reinforced by a reading of the Slots Regulation as a whole. It is concerned with the allocation of the use of airport infrastructure for take-off and landing. The purpose is to facilitate the operation of air transport services.
>
> 61. Furthermore, that conclusion is consistent with the Licensing Regulation. As discussed in paragraph 56 above, the material provisions and the definition provisions of that regulation read as a whole focus on licensing those engaged in the operation of air services and turns on them doing so.
>
> 62. Accordingly, having regard to the text of both the Slots and the Licensing Regulations, we are unable to discern any duty to allocate slots to an undertaking that has ceased to operate air transport services and has no realistic prospect of resuming them. For the avoidance of any doubt, different considerations

> may well apply to an undertaking that, for example, is no more than temporarily unable to operate air transport services; that is not because the wording and definitions in the Regulations have more than one meaning but because their application is necessarily fact specific."

45. Applying its analysis to the facts, the Divisional Court said this (in paragraph 64 of its judgment):

> "we reach the clear conclusion that there was no duty on ACL to allocate the Summer 2018 slots to Monarch. The regulatory authority had suspended Monarch's AOC. It had done so because Monarch had entered into administration and could no longer demonstrate that it could satisfy the requirements imposed under EU law. It could not lawfully engage in the operation of air transport services whilst its AOC was suspended. Indeed, the regulatory authority had commenced proceedings to revoke, or alternatively, to suspend Monarch's operating licence. Furthermore, it was clear that there was no more than a theoretical possibility that Monarch would resume air transport operations again. The directors of Monarch and the administrators had made it plain in their evidence to the court which granted the administration order that they did not consider it likely that Monarch could be disposed of as a going concern; the purpose of administration was to realise assets to pay secured creditors and achieve a better result for Monarch's creditors. Furthermore, nothing has changed since. The regulatory authority correctly identified, and the administrators confirmed, that Monarch had no aircraft at its disposal through ownership or dry lease agreements and no pilots (save for three qualified pilots who were in management posts) and no plans to resume air operations. Monarch had ceased to be a functioning airline and any suggestion that it could resume the operation of air transport services was no more than a mere theoretical possibility."

46. Given its conclusion that ACL is not under any duty to allocate the summer 2018 slots to Monarch, it was "unnecessary [for the Court] to reach any decision on whether or not any remedy should be refused as a matter of discretion" (paragraph 75 of the judgment).

47. The Divisional Court added at the end of its judgment (in paragraph 77):

> "We were properly informed by Monarch's solicitors that, on the 9 November 2017, the CAA took the decision to revoke Monarch's operating licence. Our judgment in no way rests on this development but our views are fortified by it."

The issues

48. The following issues arise:

i) Has Monarch ceased to be an "air carrier"?

ii) Should Monarch, even if still an "air carrier", be denied slots on the basis that allocating them to it would be inconsistent with the purpose of the Slots Regulation?

iii) Should the Court anyway decline to grant Monarch any relief in the exercise of its discretion?

49. We shall take these in turn.

Has Monarch ceased to be an "air carrier"?

50. The definition of "air carrier" given in the Slots Regulation is set out in paragraph 26 above. The Divisional Court considered that the inclusion in it of the words "air transport" meant that ("business aviation operators" apart) an undertaking has to be "engaged in the provision of air transport" if it is to be an "air carrier". Since Monarch "had ceased to be a functioning airline and any suggestion that it could resume the operation of air transport services was no more than a mere theoretical possibility", it could no longer be an "air transport" undertaking or, hence, an "air carrier". "[D]ifferent considerations" might, though, apply to an undertaking that, "for example, is no more than temporarily unable to operate air transport services".

51. Mr Michael Crane QC, who appeared for ACL with Mr Alexander Milner and Mr Nicolas Damnjanovic, supported the Divisional Court's analysis. He argued that it accords with both the language of the Slots Regulation and its purposes. Since the definition of "air carrier" uses the words "air transport", they should, he said, have a meaning ascribed to them, and that attributed to them by the Divisional Court chimes with the definitions of "business aviation" and "group of air carriers", each of which suggests a *current* operation. The role in which, on the Divisional Court's approach, ACL is cast is, Mr Crane submitted, neither unduly onerous nor substantially different from tasks it has to undertake in other contexts. Further, relying on the requirement for a "valid operating licence or equivalent" to determine whether an undertaking is sufficiently operational to be allocated slots would render allocation unacceptably dependent on accidents of timing and nationality. Thus, were entitlement to slots to rest solely on possession of an operating licence that had not yet been revoked, capricious and arbitrary consequences would follow, according to how quickly the relevant national licensing authority proceeded to revocation, and the treatment of a defunct airline by coordinators would depend on which Member State had issued its operating licence. As for the Slots Regulation's purposes, these included, as can be seen from the recitals, to "facilitate and encourage entrance into the market", to "avoid a situation where, owing to a lack of available slots, the benefits of liberalization are unevenly spread" and to "strengthen the provision of adequate air services to regions and to increase potential competition on intra-Community Routes". It is, so Mr Crane said, self-evident that to treat Monarch as an undertaking eligible to receive slots purely to enable it to sell them to incumbent airlines would run directly counter to these purposes.

52. Mr Crane referred in support of his submissions to the decision of the European Court of Justice in *Adidas AG* (Case C-223/98) [1999] 3 CMLR 895. The Court said in its judgment (at paragraph 24):

> "where a provision of Community law is open to several interpretations, only one of which can ensure that the provision retains its effectiveness, preference must be given to that interpretation".

Here, Mr Crane said, the effectiveness of the Slots Regulation is ensured by adopting the Divisional Court's construction of "air carrier".

53. Miss Demetriou, on the other hand, submitted that the Divisional Court's interpretation of "air carrier" is incorrect because it fails to accord with either the wording of the Slots Regulation or its purpose. The definition of "air carrier", Miss Demetriou argued, is to be read as a whole and the reference to "air transport undertaking" is simply descriptive of the type of undertaking that the Regulation is concerned with. Miss Demetriou observed that, although the Court spoke of the definition's inclusion of "air transport" signifying that the undertaking "*is* engaged in the provision of air transport" (emphasis added), it went on to recognise that an undertaking that was "no more than temporarily unable to operate air transport services" might nonetheless fall within the definition and held Monarch not to be an "air carrier" because it "had ceased to be a functioning airline and any suggestion that it could resume the operation of air transport services was no more than a mere theoretical possibility", thus proceeding on the basis that "an undertaking that has ceased to operate air transport services and has no realistic prospect of resuming them" cannot be an "air carrier". Miss Demetriou maintained that there are three "fundamental difficulties" with that approach:

i) There is nothing in the Slots Regulation to suggest that this is the test;

ii) The question whether an undertaking has a realistic prospect of resuming air transport services will often involve a complex factual assessment that the coordinator is not well-placed to undertake and which the Slots Regulation does not envisage; and

iii) There is a separate process for determining that question, namely the licensing procedure which is carried out by a different regulator (here, the CAA), according to its own regulatory framework.

54. Miss Demetriou sought support for her submissions in article 14(2) of the Slots Regulation (quoted in paragraph 16 above). Miss Demetriou suggested that article 14(2) shows that an undertaking can be an "air carrier" even though it is as yet only in the process of establishing itself. In our view, however, article 14(2) can just as well be read as referring to an undertaking that is in the process of establishing itself *as an air carrier*. That being so, it can be of no help to Miss Demetriou.

55. For his part, Mr Crane relied on the difference between the definition of "air carrier" given in the Slots Regulation (including "air transport") and that found in the Licensing Regulation (which omits "air transport"). Once, however, it had been discovered that the predecessor of the Licensing Regulation that applied when the Slots Regulation was introduced used "air transport", this point lost any force it might otherwise have had.

56. In the end, we have concluded that Miss Demetriou's interpretation of "air carrier" is to be preferred. Our reasons include these:

i) It cannot be supposed that an undertaking inevitably ceases to be an "air carrier" for the purposes of the Slots Regulation whenever, and as soon as, it becomes unable to operate air transport services. The Divisional Court recognised this in what it said about the position of an undertaking that is "no more than temporarily unable to operate air transport services", and Mr Crane did not suggest otherwise. If, however, the reference in the definition of "air carrier" to "air transport" does not necessarily require the undertaking in question to be actively engaged in air transport services at the relevant time, it is hard to know quite how it should be understood on ACL's case and also to find a basis for such an interpretation in the wording of the Slots Regulation. The Divisional Court evidently considered that an undertaking that "has ceased to operate air transport services and has no realistic prospect of resuming them" is not an "air carrier", but it is not clear where it would draw the line between such an undertaking and one that is "no more than temporarily unable to operate air transport services". In the course of his submissions, Mr Crane endorsed the words of the Divisional Court, but also spoke of it being incumbent on an undertaking wishing to have slots allocated to it to demonstrate it will be capable of operating air transport services in the scheduling period in question, which appears to imply a somewhat different test. What matters most, perhaps, is that the wording of the Slots Regulation provides no guidance on where any line should be drawn. Had it been intended that there should be such a line, the Slots Regulation could be expected to have said something about it, but it does not;

ii) Wherever the line might be, assessing which side of it an undertaking lay could be far from straightforward. In the case, say, of an undertaking which has gone into administration, there might be very real scope for argument as to whether there was a "realistic" chance of its resuming operations. The particular objective or objectives that were thought to be potentially achievable when the company entered administration would not always provide a reliable guide since the picture may change: as Rimer LJ said in *Key2Law (Surrey) LLP v Gaynor De' Antiquis* [2011] EWCA Civ 1567, [2012] BCC 375, an administration order is made for the purpose specified in paragraph 3 of schedule B1 to the Insolvency Act 1986, which "keeps all the administrator's options open", and the *Key2Law* case provided "a good working example of how an administrator who assumes his office with the thought that he might be able to achieve the purpose of administration in one particular way may quickly find that circumstances compel him to change tack and seek to achieve it in another way" (see paragraph 98 of the judgment). A coordinator might, moreover, have to assess how much substance there was in pending negotiations and in the chances of a viable bidder emerging in the future. To make matters worse, a coordinator could be dealing with an undertaking based anywhere in the world and subject to an unfamiliar insolvency regime. Had it been intended that a coordinator should undertake such functions, the Slots Regulation could be expected to have said something about it, but it does not;

iii) Mr Crane suggested that "Slot Guidelines" published by the European Airport Coordinators Association (or "EUACA") is of assistance. That document sets out a procedure that it proposes should be followed with "Air carriers whose operating license becomes invalid (suspended or withdrawn)". It is perhaps noteworthy that undertakings which have lost their operating licences are nonetheless being referred to as "air carriers". The key point, however, is that the guidelines are addressing the position where an undertaking's operating licence has become invalid, not one where (as here) the debate is as to whether an undertaking has ceased to be an "air transport undertaking";

iv) It is true that there are other matters that a coordinator may need to investigate and make judgments on for the purposes of discharging its duties under the Slots Regulation. As Mr Crane pointed out, there could, for example, be a dispute as to whether a carrier had operated its slots enough to qualify for "grandfather rights" or whether non-utilisation could be justified for one of the reasons given in article 10(4). In such instances, however, the coordinator's function is evident from the Slots Regulation itself, which is not the case with its suggested role in assessing whether an undertaking is still an "air transport undertaking". Moreover, for ACL to be charged with checking that an undertaking has, say, "ceased to operate air transport services and has no realistic prospect of resuming them" would seem to be inconsistent with the "very limited remit, consistent with the need for speed and flexibility", that it was recognised as having in the *States of Guernsey Transport Board* case. In that connection, it is to be noted that that case concerned allocation of slots as well as their exchange and that, as to the former, Maurice Kay J concluded that ACL "does not have the kind of investigatory and regulatory function" that would have been needed if the Board's contentions were correct (see paragraph 23 above);

v) There is force in Mr Crane's submission that Miss Demetriou's construction of "air carrier" is capable of giving rise to arbitrary consequences. In the context, for example, of the present case, Monarch's ability to present itself as an "air carrier" could be said to have been dependent on how fast the CAA's proposed revocation of its operating licence could be brought into effect. On the other hand, Mr Crane's interpretation of "air carrier" could also generate arbitrary results. As he accepted, for instance, Monarch's entitlement to the slots it requested would have been unimpeachable had its administration been delayed until the beginning of November;

vi) There is a compelling case for saying that matters relating to an undertaking's financial circumstances and ability to continue in business are best left to, and intended to be left to, the licensing process. Approaching matters in that way achieves certainty, avoids the need for a coordinator to undertake a potentially difficult assessment of an undertaking's position and prospects, and avoids the danger of a coordinator's work cutting across that of the licensing authority. On ACL's approach, a decision by a coordinator could render academic a decision on, say, a proposal by the CAA that an operating licence should be revoked and so, in effect, render nugatory the procedural safeguards that apply in relation to the revocation of an operating licence;

vii) Mr Crane suggested that Miss Demetriou's approach would make the words "air transport" redundant, but his own might be said to leave little role for the requirement that an "air carrier" hold a "valid operating licence or equivalent";

viii) As a matter of language, it seems to us that a collapsed airline, even one that has "no realistic prospect of resuming [air transport services]", can perfectly well be referred to as an "air transport undertaking". It may be a *failed* "air transport undertaking", but that need not stop it being an "air transport undertaking";

ix) The inclusion of the words "air transport" in the definition of "air carrier" could possibly have been intended to distinguish such undertakings from "business aviation operators";

x) We do not think that the tenses used in the Slots Regulation's definitions of "business aviation" and "group of air carriers" cast any light on how "air transport undertaking" should be interpreted; and

xi) Although the purposes of the Slots Regulation include those mentioned in paragraph 51 above, its recitals also recognise the existence of "grandfather rights". Further, even on ACL's case the Regulation allows an undertaking to exchange slots in order to obtain a payment and when there is no prospect of its using the slots that it is to receive in return.

57. In short, it seems to us that, notwithstanding the views of the Divisional Court to the contrary, Monarch was still an "air carrier" when slots fell to be allocated on 26 October 2017 and, in fact, remains one now.

Should Monarch, even if still an "air carrier", be denied slots on the basis that allocating them to it would be inconsistent with the purpose of the Slots Regulation?

58. Mr Crane argued that, even if Monarch is still to be regarded as an "air carrier", its appeal should fail because it would be inconsistent with the purpose of the Slots Regulation to require ACL to allocate slots to Monarch in the present circumstances. In this context, he once again prayed in aid the *Adidas* case (as to which, see paragraph 52 above).

59. We cannot accept this submission. We have already referred to the purposes of the Slots Regulation when considering whether Monarch has ceased to be an "air carrier". We do not think that those purposes are important independently of that issue. The *Adidas* case helps on what should happen where "a provision of Community law is open to several interpretations", as might be said to be the case with the Slots Regulation's definition of "air carrier". Mr Crane was, however, unable to identify any other part of the Regulation that was "open to several interpretations" and could be construed in such a way as to allow ACL to decline to allocate slots to Monarch.

60. We would add that we do not understand this point to have formed part of the Divisional Court's decision.

Should the Court anyway decline to grant Monarch any relief in the exercise of its discretion?

61. Mr Crane submitted that, even if the Court arrived at conclusions adverse to him on other issues (as, in the event, it has), it would not be appropriate for the Court to exercise its discretion to grant Monarch the relief it seeks. In this connection, he explained that ACL does not intend to issue "dummy" slots that a counterparty could exchange for those that Monarch has requested. That being so, he contended, it would be futile for the Court to accede to Monarch's application as regards slots at Gatwick airport, where (he said) the plan is to effect an exchange for "dummy" slots. Mr Crane argued, too, that it would be a paradoxical outcome if a coordinator were to be ordered to allot slots after the licensing authority of the Member State had decided to revoke the applicant's operating licence, but the effect of that decision was temporarily suspended under provisions of the Member State's domestic law.

62. If, however, the conclusions we have reached earlier in this judgment are correct, Monarch was *entitled* under the terms of article 8(2) of the Slots Regulation to the slots that it had claimed. Further, we are in no position to decide that the allocation of slots to Monarch, even as regards Gatwick airport, would be futile. Miss Demetriou told us that the relevant slots are particularly valuable and need not necessarily be exchanged for "dummy" slots. She also suggested that the allocation of the slots to Monarch could conceivably make it more attractive to a potential acquirer.

63. In all the circumstances, it would not, in our view, be appropriate to deny Monarch the relief it seeks. To the contrary, we consider that we should grant relief along the lines of that specified in paragraphs (a) and (b) of section 7 of the claim form. Those paragraphs ask for, first, a declaration that Monarch is entitled to be allocated the relevant slots and that ACL may not lawfully delay their allocation and, secondly, a mandatory order requiring ACL immediately to allocate the slots in question to Monarch.

Conclusion

64. We shall allow the appeal. In our view, Monarch remains an "air carrier" and is entitled to the slots it claimed.