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Judgment: approved by the Court for handing down | *Delivered:* **25/06/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BELFAST INTERNATIONAL AIRPORT LIMITED

Plaintiff

-v-

AER LINGUS LIMITED

Defendant

WEATHERUP J

[1] The plaintiff airport claims damages for breach of contract by the defendant airline in relation to the operation by the defendant of a base at the airport. Mr Hanna QC and Mr McMahon appeared on behalf of the plaintiff and Mr Shaw QC and Mr Colmer appeared on behalf of the defendant.

The plaintiff's pleaded case.

[2] I propose to set out how the pleadings developed before turning to the evidence. The Statement of Claim pleaded that the plaintiff owns and operates Belfast International Airport ("BIA") and the defendant operated a base from BIA from December 2007 to October 2012.

[3] The plaintiff's claim arises from the unilateral withdrawal by the defendant from BIA. The plaintiff claims damages for the breach by the defendant of a ten year contract concluded in 2007 pursuant to which the defendant was to operate aircraft from a base at BIA on a charging structure which set lower rates for the early years and higher rates for the later years.

[4] Alternatively, if, as the defendant contended, there was no ten year contract for the defendant to operate the base, the plaintiff claims, for the years of the

defendant's operations at BIA, payment of charges based on the plaintiff's standard terms and conditions and/or for restitution of £900,000 paid in launch support for the defendant.

[5] BIA standard terms and conditions were issued to operators and were stated to apply unless the plaintiff and the operator agreed different terms and conditions. The plaintiff's terms and conditions were sent to the defendant on 18 March 2005 and set out provisions that included a passenger charge of £10.10 per departing passenger for domestic flights and £12.70 per departing passenger for international flights. Certain discounts were applicable and those discounts might be withdrawn in the event that the operator failed to operate the services provided for in the contract for the period of the contract. Similar standard terms and conditions applied year by year by BIA were sent to the defendant during its years of operation at the airport.

[6] On 5 February 2007 John Doran, Managing Director of BIA and Uel Hoey, Business Development Director, met representatives to the defendant, Brian Dodd, Head of Finance and Economic Planning and Cora Burke, to discuss the possibility of the defendant commencing operations based at BIA. On 12 March 2007 the plaintiff sent to the defendant a letter under the heading 'Proposal in relation to a three aircraft base'. The letter included a proposed charging structure on a sliding scale based on a ten year agreement commencing 1 January 2008. The proposed charges were £4 per departing passenger for domestic flights and £3 for international flights in the first year with increases on a yearly basis up to £8 per departing passenger for domestic flights and £7 for international flights.

[7] On 22 May 2007, at a meeting between representatives of the plaintiff and the defendant, the defendant stated that they would require launch support from the plaintiff as part of any agreement. An updated proposal incorporating launch support was sent by the plaintiff to the defendant on 15 June 2007. On 27 June a further meeting between representatives led to a letter of 28 June 2007 containing a revised proposal. The letter was stated to be 'Subject to contract and Board approval'. The letter contains what the plaintiff contends to be the terms and conditions of the contract entered into between the plaintiff and the defendant.

[8] Following receipt of the letter of 28 June 2007, Stephen Kavanagh, the defendant's Planning Director, telephoned Mr Dornan of the plaintiff in early July 2007 to indicate that the defendant was in a position to commence operations at BIA. A meeting took place on 26 July between representatives of the plaintiff and the defendant to complete arrangements in respect of the marketing and the public announcement and the commencement of operations by the defendant at BIA.

[9] The plaintiff relies on the letter of 28 June 2007 as containing the terms and conditions of the agreement, the plaintiff's offer having been accepted by Mr Kavanagh on behalf of the defendant in the telephone call of early July 2007.

Alternatively the plaintiff relies on the meeting of the parties on 26 July 2007 as amounting to the defendant's acceptance of the plaintiff's offer.

[10] The defendant subsequently operated three aircraft out of BIA beginning on 10 December 2007. The defendant was invoiced and paid the charges set out in the letter of 28 June 2007. A total of £900,000 in launch support was provided and was paid to the defendant as £225,000 on 18 December 2007, £225,000 on 13 March 2008, £200,000 on 10 November 2009, £100,000 on 14 December 2009 and £150,000 on 29 March 2010.

[11] In the alternative the plaintiff contends that the defendant's conduct in agreeing variations of the terms contained in the latter of 28 June amounted to acceptance of the plaintiff's offer. A further alternative relied on by the plaintiff is that the payment by the plaintiff and acceptance by the defendant of the first instalment of launch support was an acceptance of the plaintiff's offer. An additional alternative is that the commencement of operations by the defendant at BIA on 10 December 2007 was an acceptance of the plaintiff's offer. In addition the plaintiff relied on estoppel in that the defendant should be prevented from denying the contract by reason of the defendant's conduct.

[12] Primarily the plaintiff's case is that a contract was entered into between the parties on the terms and conditions contained in the plaintiff's offer of 28 June 2007 which was accepted by the defendant in a phone call in early July 2007. While the letter was stated to be 'subject to contract' that condition was subsequently waived by agreement between the parties. While the letter was also stated to be 'subject to Board approval' such Board approval was subsequently obtained by both the plaintiff and the defendant.

The defendant's pleaded case.

[13] The defendant's Defence addresses the plaintiff's alternative versions of the basis of agreement. The letter of 28 June 2007 was described by the defendant as 'the pretended contract'. The defendant referred to 'the true contract' and described the true contractual relationship between the plaintiff and defendant in paragraph 4(l) of the Defence as follows –

> "i. The defendant would begin operating from BIA;
> ii. The plaintiff would provide facilities and airport services to the defendant;
> iii. The airport services provided by the plaintiff to the defendant were such services as were required by the defendant from time to time in line with its operating requirements;
> iv. The plaintiff would charge the defendant in respect of the airport services that it had provided in accordance with the rates discussed between the plaintiff and the defendant;
> v. The defendant would discharge those invoices;

vi. The plaintiff would provide launch support to the defendant for three years in accordance with the rates discussed between the plaintiff and the defendant which would be repayable by the defendant if the aircraft concerned was withdrawn before the end of the year operation to which the launch support related."

[14] The defendant stated that, in the period from 2007 until the plaintiff sent a letter to the defendant on 2 July 2012, the plaintiff at no time contended that the defendant was bound by a ten year contract. The defendant denied that the plaintiff's standard terms and conditions applied and further rejected the plaintiff's other alternatives. As to the telephone call from Mr Kavanagh to Mr Doran in early July 2007 the defendant contended that Mr Kavanagh stated that he would seek internal approval to commence operations at BIA.

[15] The basis of the formation of the 'true contract' was not stated by the defendant in the Defence. The plaintiff, by a request for further and better particulars, sought to obtain further information in relation to the character of the 'true contract' and whether it was written or oral and how, when and where it was formed and what were its terms. The defendant replied to that request for particulars by providing limited additional information, indicating that the matter was adequately pleaded, that the rates were discussed orally, that the rates appeared in correspondence, that the defendant's aircraft used the airport, that invoices were raised and that payments were made.

[16] On the opening of the case Mr Hanna QC for the plaintiff outlined the agreement based on the plaintiff's letter of 28 June 2007 having been agreed by Mr Kavanagh's phone call of early July 2007. Mr Doran, who had received the phone call on behalf of the plaintiff, was not available to give evidence because of ill health. The defendant's position on the formation of the 'true contract' had not been stated beyond that appearing in the pleadings and further information was sought by the Court in relation to the defendant's position on the nature of the agreement between the parties.

[17] The result was a statement provided by Stephen Kavanagh on 24 April 2015 to explain the defendant's position. The purpose of the negotiations was said to be to ascertain whether it would be possible to conclude an agreement which provided for the prices which the plaintiff would charge the defendant in respect of aircraft departing from BIA in the event of the defendant opening a base at BIA. The emphasis was stated to be on a pricing agreement and not an operating/flying agreement. Mr Kavanagh stated that at the 27 June 2007 meeting a commercial understanding was reached between the plaintiff and the defendant as to the price per passenger and launch support. On 28 June Mr Doran sent his fourth letter to the defendant. In early July Mr Kavanagh telephoned Mr Doran to say that the letter reflected the commercial understanding that had been reached at the meeting of 27 June 2007 and that he would take forward the business case in order to secure internal approval to commence operations at the airport. Finally Mr Kavanagh

stated that the contractual relationship between the parties was to be gleaned from the conduct of the parties' performance commencing in December 2007 in the light of the discussions and the commercial understanding that had been reached.

[18] Mr Doran filed an affidavit which eventually was admitted in evidence. He did not regard the agreement as a pricing agreement but as a contract containing the terms set out in the letter of 28 June 2007 which represented the arrangements for the defendant to operate a base from BIA for a period of 10 years.

[19] While it is up to the plaintiff to prove his case of course, it is also up to the defendant to plead his case in order to enable the plaintiff to prove the case as required and to address the defendant's objections and to avoid unnecessary cost and time in addressing matters that are not germane. The defendant's pleaded position in relation to the contractual position was and remained elusive. It proved difficult to discern and identify what position was being adopted by the defendant in respect of what was described by the defendant as the true contract and the formation and character of the true contract.

The evidence.

[20] Uel Hoey was the Business Development Director of the airport from 2002 when John Doran was the Managing Director. He referred to the competitive landscape that existed in relation to aircraft and airports and the changed circumstances that had developed with low cost airlines being engaged in Belfast. Belfast City Airport was in the same market as the Belfast International Airport and was a competitor. The City of Derry Airport was less of a competitor but Dublin Airport was described as a major competitor. In 2006/2007 there were 8 or 9 scheduled airlines operating at BIA, 4 or 5 charters and 3 or 4 cargo enterprises. The concept of a base being established at an airport meant that the aircraft were parked at the airport and the staff and crew operated in and out of the airport and there would have to be provision made and accommodation for the aircraft and the personnel.

[21] Mr Hoey gave a description of the meetings that had taken place in relation to the development of a scheme for the base for Aer Lingus being moved from Dublin, Cork and Shannon to a site outside the Republic. There were perhaps five airports being considered and Mr Hoey was aware that BIA was in competition with other airports vying for the external base for Aer Lingus. A meeting took place in early 2007 in Dublin where the respective representatives met to discuss the base for three aircraft being established at Belfast. Aer Lingus invited proposals from BIA. There was an attraction to BIA because there are various major alliances in the aircraft industry and one such alliance , known as One World, is an alliance of BA and American Airlines. An important feature repeatedly referred to in relation to any Aer Lingus base at BIA was a Heathrow link with the One World alliance and an amalgamation of the Aer Lingus base and BIA would represent a considerable advantage, elsewhere described as the 'Heathrow halo'.

[22] A first letter was sent on 12 March 2007 setting out proposals which included passenger facilities on the airport site and a proposed charging structure for a suggested period of ten years. A second meeting took place on 22 May 2007 between the respective representatives and that led to a second letter on 15 June 2007. The routes crystallised at that time. Mr Hoey said that the meeting did not deal with a ten year agreement to his recollection, but BIA were emphasising the advantages to Aer Lingus of a base at BIA in terms of its central location, uncongested approach roads and all hours and all weather opening of the two cross runways.

[23] Launch support became a point of leverage, as it was described. Aer Lingus sought proposals in relation to financial incentives to be provided to Aer Lingus to operate the base from BIA. A third letter was sent on 25 June 2007 setting out the terms of further discussions that had taken place, including launch support and the prospect of two further aircraft. A third meeting occurred on 27 June 2007 when Aer Lingus officials came to Belfast. Mr Hoey did not recall discussion of a ten year agreement but he did not doubt that all the items referred to in the earlier letter were discussed. The result was a fourth letter of 28 June 2007 which set out the terms that the plaintiff relied on as constituting the agreement between the parties. Mr Kavanagh was said to have confirmed agreement in a phone call in early July 2007. Mr Doran took the phone call and came down the corridor where all the officials worked to say that the AIB bid for the Aer Lingus base had been successful.

[24] Derek McKnight, Financial Controller of BIA, had a telephone conversation with Ken Miller of Aer Lingus two days after the launch. There was discussion about a formal contract being entered into between the parties. Mr McKnight said that as the parties had effectively agreed the terms in the letter of 28 June 2007 it was not necessary to draw up a formal contract. Mr Miller agreed.

[25] Mr Doran gave his evidence by affidavit and in response to Mr Kavanagh's statement. In essence he stated that price was discussed but price was only one factor and the meetings were based on broader matters than simply a pricing structure. For Aer Lingus the deal represented favourable early prices and established assistance at the airport and a strong base outside the Republic and a good market. From the airport's perspective he described the attractions as having Aer Lingus at the airport, having the Heathrow route from the airport, the possibility of transatlantic services, the potential to develop other routes and in addition the return that the later years would yield. BIA treated the arrangements as a ten year commitment to operate from the base and that the airport would make financial gains in the latter part of the contract. He referred to the early July 2007 telephone call when Mr Kavanagh confirmed that Aer Lingus would commence operations at BIA. He said of the Aer Lingus approach that there was not a pick and mix menu in the letter of 28 June 2007 and it was never indicated in the discussions that Aer Lingus could, in effect, withdraw at any time. The contractual relationship

was reflected in the elements contained in the letter of 28 June 2007 and at no time did Mr Kavanagh ever raise the point that it was not a long term commitment.

[26] Stephen Kavanagh's evidence was that the agreement was a pricing structure agreement and no more. He described the risks for Aer Lingus of taking on the base in Belfast. One risk related to the market, which was uncertain with a question mark over whether or not the operation would yield a profit. Another risk was the operational risk because the defendant had no experience of operating aircraft outside the existing bases. Thirdly, there was said to be a financial risk as the defendant proceeded on a projected 15% return on capital. There were said to be two elements required in any agreement in order to meet the risks. One element was a pricing proposal and the other was a support proposal. The defendant approached five airports with a view to seeking proposals from each of them. Mr Kavanagh stated that if there had been an obligation to operate the base for ten years that it would have precluded that airport for consideration and such a requirement was not raised expressly as a condition by BIA. The defendant sought a pricing proposal for a three aircraft base and that is what was obtained.

[27] Mr Hanna's first question in cross examination of Mr Kavanagh sought to ascertain the Aer Lingus view of the character of the agreement between BIA and Aer Lingus. Mr Kavanagh's evidence was that the phone call in early July 2007, after the letter of 28 June 2007, was on the basis that the letter reflected the agreement between the parties and that there were no further negotiations between the parties thereafter. The letter reflected the commercial understanding there was between the parties. Mr Kavanagh did not have any dispute that the letter of 28 June 2007 represented the terms of the agreement.

[28] A great deal of time and money was wasted in reaching the point that should have been reached at the very beginning of the dispute, namely that the basis of the agreement between the parties was contained in the letter of 28 June 2007.

[29] The terms of the agreement were put to the defendant's executive team which signed off on the agreement letter on 1 August 2007. The matter was then sent to the Board of the defendant which ratified the position on 28 August 2007. Mr Kavanagh stated his expectation that a formal document would follow from the letter of 28 June 2007.

[30] The defendant's financial performance at BIA fell short of what had been expected. A new Chief Finance Officer joined the defendant in 2009 and he became concerned about operations at BIA. The defendant had discussions with BIA about the future. At that time there was said to have been no reference to a breach of any 10 year agreement. The defendant could not be satisfied that there would be future financial success and decided to withdraw from BIA in 2012.

[31] As to the plaintiff's suggestion that a pricing agreement represented an unbalanced agreement because BIA was committed to the charges while Aer Lingus

could leave when it wanted, Mr Kavanagh stated that if the operation were successful the defendant would be tied in. The scheme had advantages for BIA. The rates charged were said to be double that of other long term airline charges and Mr Kavanagh explained that he became a fan of the proposals when the launch support increased, which it did with the trebling of the initial offer. He did not challenge the 10 year pricing proposal because of the added value in the launch support.

[32] Ken Miller, Head of Procurement in 2007, referred to the telephone call with Mr McKnight prior to the launch. He was checking whether anything needed to be done by way of formalities. Mr McKnight had stated and that the matter did not require formalities. Mr Millar was content. He accepted that the references to an agreement referred to the contents of the letter of 28 June 2007, which of course he referred to as a pricing agreement only.

[33] Andrew Knuckey gave expert evidence on behalf of the defendant. He had been the Chief Finance Officer of Flybe from 2007 to 2014. In response to the suggestion that this was a one-sided agreement from which Aer Lingus could walk away he stated that they were not free to walk away because of the significant investments that had been made by the airline. Aer Lingus operated at BIA for nearly five years and gave 3 to 4 months' notice of their intention to leave. He used the word 'halo' in relation to the connection with Heathrow, which he described as significant, and for a regional operation this was considered to be an important issue. The benefits to BIA included the presence of a new carrier at the airport, the halo effect of the Heathrow connection and the involvement of a second significant airline after Easyjet that helped the bargaining position of the airport.

[34] Without doubt the letter of 28 June 2007 contains the terms of the agreement between the parties, stated to be subject to contract and subject to Board approval. The former condition was waived by agreement between Mr Miller and Mr McKnight on behalf of the respective parties. Board approval was in due course obtained by both the plaintiff and the defendant in August 2007, in each case on the basis of the terms contained in the letter of 28 June 2007.

[35] The matter turns on the interpretation of the letter of 28 June 2007. The letter is set out in the Annex.

The interpretation of contracts.

[36] Lord Hoffmann set out the approach to the interpretation of contracts in Investors Compensation Scheme v. West Bromwich Building Society [1997] UKHL 28 as follows -

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been

available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945)

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201:

". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts

> business commonsense, it must be made to yield to business commonsense."

[37] Lord Hoffmann returned to the scope of the background evidence in Bank of Credit and Commerce International SA v. Munawar Ali, Sultana Runi Khan and Others [2001] UKHL 8 as follows -

> 39. The background is however very important. I should in passing say that when, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913, I said that the admissible background included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man", I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". I was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage.

The Durham Tees case.

[38] The plaintiff relied on Durham Tees Valley Airport v BMI Baby Limited [2010] EWCA Civ 485. Under the terms of a 'base agreement' the defendant airline was to base and operate two of its aircraft from the plaintiff airport. A later 'novation and variation agreement' was entered into between the parties. Neither of the agreements provided for a minimum number of flights or passengers. The issue arose as to the obligations arising under the agreements. It was held on the express terms of the agreement that the defendant airline was obliged to base and to operate two aircraft at the airport for the term of the contract until April 2014. This was said to be consistent with the factual matrix and also gave rise to a commercially sensible result.

[39] In the Base Agreement the 'Operation' was described as -

> "Initial 'lead-in' flying programme (to an agreed number of destinations) to commence no later than 31 October 2003 to support the establishment of a minimum x 2 based aircraft operation (initially B737) operating exclusively from TIAL by Summer 2004."

The 'Duration' was described as –

> "10 years from the establishment of the based aircraft operations as defined above."

[40] In the Novation and Variation Agreement the 'Operation' was described as –

> "bmibaby agrees to the establishment of a second based aircraft operation (initially B737) operating exclusively from Durham Tees Valley Airport (DTVA) by Spring 2006 (to commence no later than 30 April 2006). For the avoidance of doubt, therefore, from Spring 2006 bmibaby will support a x2 based aircraft operation operating exclusively from DTVA."

[41] The agreements provided for the airline to operate 'exclusively' from the airport. This connoted that a based aircraft will always fly from the base to a destination and return from that destination to the base. The Base Agreement also contained an 'exclusivity' clause by which the airline would not actively pursue further development of specified destinations and would not offer more favourable terms to other airlines.

[42] Davis J at first instance [2009] EWHC 859 (Ch) stated –

> [72] The duration of the Base agreement is, without any qualification defined as 10 years from the establishment of the based aircraft operation. It is very difficult to extract from such definition justification for Mr Shah's assertion that this was 'mere projection'. 'Operation' was so defined as to extend to an initial lead-in flying programme to commence no later than 31 October 2003 'to support the establishment of a minimum x 2 based aircraft operation (initially B737) operating exclusively from [Durham] by Summer 2004'.
>
> [73] This is not the language of permission (as is Mr Shah's contention). It is the language of obligation. It is clear that the 'Operation' term is a key to the whole contract. Further, as Mr Brealey pointed out, the phrases 'to commence no later than', 'a minimum x 2 based aircraft' and 'operating exclusively' and 'by Summer 2004' all connote obligation.

> [80] Turning then to the Novation and Variation agreement, this is even plainer, as I see it, as to the obligation both to establish and operate a two based aircraft operation.

[43] Davis J found support for his conclusion in the provisions for progressive charging, advertising and route support. He found support for the defendant's position in a clawback provision but noted that a reason for its inclusion was the existence of external funders who required protection. In any event he found that the clawback provision did not displace the otherwise clear meaning of the contract.

[44] The Court of Appeal agreed with this interpretation of the agreements. Patten LJ stated -

> 33. The judge's view was that the requirement to commence a lead-in flying programme by no later than 31st October 2003 to support the establishment of the two aircraft base operation "operating exclusively from TIAL by Summer 2004" constituted, as he put it, the language of obligation. The treatment of these provisions as permissive was also inconsistent in his view with a continuing obligation on the part of TIAL to offer the preferential rates of charge set out in the agreement. It seems to me that the judge was right about this. What BMRL was required to do by the dates specified was to establish "a minimum x 2 based aircraft operation … operating exclusively from TIAL". The contract does not therefore distinguish between the basing of the two aircraft at the Airport and their operation and any ambiguity is resolved by the stipulation that the aircraft should be "operating exclusively" from the Airport by Summer 2004. On the judge's construction of the word "operate", which is accepted, this points more naturally to an obligation rather than a permission to fly.
>
> 37. The same goes for the provisions of clauses 5.1 and 5.3. In the Base Agreement TIAL agreed that it would not actively pursue the development of the routes to the destinations specified in Schedule 1. These were destinations within the existing bmibaby network at the time. As Mr Crane pointed out, TIAL could not in fact grant BMRL a monopoly of use of such routes from the Airport to the exclusion of all other carriers because to do so would be anti-competitive and involve a breach of the company's obligations under the 2000 Air Navigation Order (SI 2000 No. 1562). But to the extent that TIAL was able to promise not actively to encourage other carriers to compete on the same routes, it did so. Again for an airport operator anxious to develop the Airport this makes no

sense if, in return, it was to receive no guarantee that BMRL or later BMIB would operate there at all."

[45] In essence the terms of the document determine the meaning of the agreement. This is an objective inquiry as to what the reasonable person would understand to be the meaning of the terms of the document. Consideration must be given to the factual matrix and the commercial purpose and the context in which the agreement was entered into. The Court will not consider a party's subjective intentions and therefore what a party thought was being achieved by the terms of the document is not what determines the meaning of the agreement. Nor is it the case that the contractual negotiations contribute to the interpretation as the outcome will be the final document. Subsequent actions of the parties are also of limited value in relation to the interpretation of the agreement. However they may be used to show what the contract terms were or that contract terms had been varied. The present case crossed most forbidden territory with evidence given of intentions and negotiations.

[46] Was there an obligation on Aer Lingus to operate the aircraft from the base at BIA for a period of 10 years or was there an agreement to apply the specified charges for a period of 10 years to Aer Lingus flights from a base at BIA?

[47] The 'Background' section states that the proposal is predicated upon the operation by Aer Lingus of initially three Airbus A320 aircraft to be based at Belfast International Airport from December 2007. It was stated to be a 'proposal' otherwise described as an 'offer'. The proposal/offer was stated to be 'predicated' upon the 'operation' by Aer Lingus of the three Airbus aircraft from the base at BIA. 'Operation' means the flying of the aircraft on a commercial basis from the base in Belfast. The proposal/offer was conditional upon the operation of the base at BIA.

[48] The 'Destinations' section refers to the Aer Lingus 'initial proposition'. Aircraft one, starting in December 2007, was to fly to Amsterdam and Barcelona on certain days. Aircraft two, starting February 2008, was the Heathrow flight with the qualification that it may be desirable to enhance the Heathrow capacity when justified and possible. Aircraft three, starting March 2008, was to fly to four specified destinations but also some short sectors such as Rennes and Jersey. Further flexibility was suggested, including the prospect of aircraft four and five.

[49] The 'passenger facilities' include gates and lounges at a new south pier, a business lounge for which Aer Lingus would be charged, fast track security for which there would also be charges, handling agents who were to be specified agents who operated within the airport, self-service check-ins, staff accommodation to be paid for, engineering accommodation at current rental and car parking spaces at a charge. The incentives provided were in relation to the four self-service check in kiosks which were provided free of charge, staff accommodation where there was a discount rate provided for two years and staff car parking with discounts over two years.

[50] In effect the BIA proposal/offer involved financial incentives to Aer Lingus to adopt BIA as the base. The 'proposed charging structure' included 'aeronautical charges', stated to be 'based on a 10 year agreement', commencing on the earlier of 1 January 2008 or the commencement date of the first service, which was 10 December 2007. Different charges applied to years 1 to 5 and then to the succeeding years in respect of domestic passengers, existing internationals, new international destinations the Brussels route.

[51] The 'launch support' provided for payments over three years for each of the aircraft based at BIA, such sums to be used to market the routes. If an aircraft was withdrawn the payment for that year was to be repaid.

[52] I bear in mind that the document was not the product of a legal draftsman and was in letter form summarising discussions at an earlier meeting.

[53] BIA made a proposal conditional on Aer Lingus operating three aircraft based at BIA from December 2007. The scale of the operation was to start from an initial proposition by Aer Lingus for specified destinations. BIA offered passenger facilities for the operation, which would have been required for any successful operation by Aer Lingus, albeit in some cases at favourable rates for a period. BIA offered a charging structure based on passenger departures. It was here that reference was made to a 10 year agreement. Various incentives were offered for increased operations. Also offered by BIA was three year launch support for each aircraft to be used for marketing the routes. A default provision related to a withdrawal of the aircraft before the end of the year in which launch support was paid, that was within three years.

[54] If Aer Lingus was to avail of the benefits of the proposal it was obliged to operate the base at BIA. The terms of the agreement contained in the letter do not include the obligation on Aer Lingus to maintain the operation of the base from BIA for a defined period. Nor do I find it to be implicit in the agreement that the operation of the base from BIA would continue for a defined period.

[55] This conclusion finds support in the clawback provision for the launch support. This anticipates that one or more of the aircraft for which launch support was provided may withdraw within the period of three years, in which event the support was to be repaid. The penalty for withdrawal did not concern the termination of the agreement but the repayment of the relevant launch support. This was not a provision introduced to protect external financial supporters.

[56] As to the commercial sense of the arrangements, the BIA and Belfast City Airport axis is unique in being half an hour away from each other in a regional centre. Each is competing with the other. I accept the evidence of Mr Knuckey that for BIA to have Aer Lingus based at BIA was a coup for BIA and to have the Heathrow link was to add a halo effect. I am satisfied that as a pricing agreement

this was not a one sided agreement. I am satisfied that it made commercial sense for BIA to enter into such an agreement.

[57] I am satisfied that the terms of the agreement did not impose on Aer Lingus the obligation to continue the operation of the aircraft from the base at BIA for a period of 10 years. Rather the terms of the agreement imposed obligations on BIA to apply and Aer Lingus to pay the stated charges for 10 years while Aer Lingus operated the BIA base.

[58] In contrast to the Durham case I do not consider that the language of the BIA/Aer Lingus agreement is the language of an obligation imposed on Aer Lingus to continue operations at BIA for 10 years.

[59] It may be that, if a formal agreement had been drawn up by solicitors for BIA, the draft of the formal agreement would have sought to include an obligation that the defendant operate from the base for 10 years. However I am considering the meaning of the agreement entered into by the parties as contained in the letter of 28 June 2007 and not any other agreement that either party may have intended to enter.

[60] Thus I conclude that the agreement between the parties is to be found in the letter of 28 June 2007, the agreement was ratified by the plaintiff and the defendant in August 2007 and the agreement did not provide for a ten year flying operation based at BIA but rather a ten year pricing agreement while Aer Lingus was based at BIA.

[61] The question arises as what implied terms, if any, applied when Aer Lingus sought to terminate the pricing agreement. That is the next matter to be determined.

[62] In relation to the question of costs, there have been six days of hearings and I have already expressed a view on the defendant's approach to the issues as much time and expense I believe was wasted by the defendant's equivocation as to the character of the agreement between the parties. I am minded to order the defendant to pay half the plaintiff's costs to date because of the time that has been engaged in what I consider to have been the unnecessary examination of issues. As to the other half of the plaintiff's costs, that will be considered at the conclusion of the matter.

ANNEX

28 June 2007

Subject to contract and Board approval

Mr S Kavanagh
Planning Director
Aer Lingus
Fifth Floor Head Office
Dublin Airport
DUBLIN

Dear Stephen

Proposal in relation to a new Aer Lingus base at Belfast International Airport

Further to our meeting yesterday, I am writing to confirm our revised proposal in relation to the above. This offer supersedes all previous correspondence.

1. Background

The following proposal is predicated upon the operation by Aer Lingus of initially three Airbus A320 aircraft to be based at Belfast International Airport from December 2007. The intention would be to include 1 core route to the UK mainland to be operated on a dedicated aircraft with the other 2 aircraft to operate services to European destinations. The offer also covers a further two additional aircraft.

2. Destinations

From recent discussions you had indicated that your Initial proposition for BFS was as follows:-

Aircraft 1 (starting December 2007)

Amsterdam	2 x daily (KLM codeshare)
Barcelona	1 x daily

Aircraft 2 (starting February 2008)

Heathrow	3 x daily in February and March rising to 4 x daily from April onwards

As discussed, it would of course be desirable to enhance Heathrow capacity when justified and possible to ensure the optimum spread of times on the Heathrow service to tie in to interlining possibilities and also provide a late evening departure from Heathrow for returning business traffic.

Aircraft 3 (starting March 2008)

Rome	4 x weekly
Budapest	3 x weekly
Malaga	4 x weekly
Faro	3 x weekly

You also indicated that some short sectors (e.g. Rennes or Jersey) might be used to make up aircraft utilisation.

During our conversation, you had indicated that there might be some flexibility within the above proposal and that you would see the possibility of additional aircraft being based in future years, though we understand that this is not guaranteed. We therefore set out below our proposals for variations to the initial programme and for the additional aircraft:-

Aircraft 1

You had indicated that you may be prepared to operate Barcelona in conjunction with another route. We now understand that your intentions centre upon replacement of certain Barcelona services on off-peak winter days with ski flights.

Aircraft 3

The filler sectors on this aircraft to be:

Brussels	6 x weekly
Rennes	1 x weekly

You had indicated a concern that to operate Brussels would mean late operations on some of the other sectors but we do not think that later services on such destinations as Malaga or Faro would cause a problem. Brussels is a destination which we are particularly interested in developing as it is not currently served. We believe that a late afternoon/evening service would work best in this marketplace and we offer a special charging structure under section 3.1 below.

Aircraft 4 and 5

Destinations to be served would include:-
Munich
Madrid
Paris
Warsaw
Riga
Vienna
Lisbon
Copenhagen
Vilnius

Those routes not currently served would qualify for improved terms over existing destinations as set out under section 3.1 below.

Other destinations which you might consider in due course for any further aircraft could include (in addition to those referred to above) Venice, Bordeaux, Poznan, Wroclaw and Dubrovnik.

2. Passenger facilities

2.1 Gates/Lounges

As discussed, we are currently finalising plans to build a new south pier and related stands. This is a gate access pier only for which we already have planning approval. This pier will accommodate sufficient stands to facilitate the 3 aircraft proposed and subsequent additional aircraft. You indicated that it would be a single class operation with no dedicated lounges required. If a decision is made at the end of June 2007, and a contract concluded relatively shortly thereafter, then we believe that

the expanded pier would be available by May/June 2008. In the interim, alternative facilities would be available.

2.2 Airbridges

We understand that you have no requirement for airbridge access.

2.3 Business Lounge

As discussed, we have a pay on access Business Lounge. You had indicated that you would like to offer access to a Business Lounge as an add-on and we can confirm that this facility would be made available. There would be a charge for this In line with our current policy on rates for airline customers, typically £10.00 plus VAT, *to* which you would be at liberty to add your own mark-up and to sell it online. The pay on entrance charge is moving to £15.00 shortly.

2.4 Fast Track Security

As also discussed, we have a fast track security channel which could speed business class customers to the front of the security queue at Central Search on production of the appropriate boarding pass and form of ID (to be agreed). The use of this facility by those using the Business Lounge is included in the price under 2.3 above.

2.5 Handling Agents

There are currently three handling agents operating at Belfast International which are Aviance, Menzies and Servisair. Aer Lingus would be responsible for the costs of handling and we would assume that you would enter into discussions with these agents directly in due course. We have already provided contact details for each of these handling agents separately.

2.5 Self Service Check-in

None of the existing airlines currently operates self-service check-in other than remotely via the internet, and we do not therefore currently have any self-service check-in facilities. However, we are planning to merge the existing Airport Entrance Hall where the old security search (now removed) was located and the Check-in Hall. This will create additional queuing space at check-in desks and will also facilitate the siting of CUSS machines if required or indeed your own self service machines. There would be a charge for this which will be determined once we know the exact footprint required. By way of indication, the charge would be based on the cost of servicing the area required and would be in the region of £38.00 per square metre. We are willing to waive this charge for the four self-service kiosks we discussed yesterday and are happy to discuss any further requirements. In terms of home check-in, we already have a facility at Central Search to process passengers with hand baggage who have checked in remotely.

2.7 Staff Accommodation

Staff accommodation can be provided as required with charges in line with current rental rates which are rent £27.00 per square foot plus service charge of £3.59 per square foot plus heating charge of £1.60 per square foot plus rates of approximately £10.00 per square foot. You had indicated the establishment of a cabin crew base for 60-70 people. Information on detailed space requirements will be needed in order to determine available locations. We will offer free staff accommodation for the first year of operation, with a 50% discount for year 2 rising to full charge in year 3 on an area to be agreed.

2.8 Engineering Accommodation

Similarly, engineering accommodation, if required, can be made available at current rental rates which are as outlined under staff accommodation above. Please advise requirements.

2.9 Staff Car Parking

You indicated that you would require in the region of 35 spaces. The current charge is £300 per space but we will offer free staff car parking up to this number of spaces in year 1, with a 50% discount in year 2 rising to full charge in year 3.

3. Proposed Charging Structure

3.1 Aeronautical charges

The following charging structure based on a 10 year agreement, commencing on the earlier of 1 January 2008 or the commencement date of the first service, is proposed.

Year of operation	Domestic per departing passenger	Existing International destinations per departing passenger	New International destinations per departing passenger	Brussels
Year 1	£4.00	£3.00	£2.00	£1.00
Year 2	£4.50	£4.00	£3.00	£1.50
Year 3	£5.00	£4.75	£3.75	£2.00
Year 4	£5.50	£5.50	£4.50	£2.50
Year 5	£6.00	£6.00	£5.00	£3.00

The above charges are fixed for years 1 to 5. Charges for years 6 to 10 would be the year 5 charge as increased annually by RPI from year 6 onwards with the first increase as at 1 January 2013, the start of year 6. The percentage increase in RPI will be measured over the 12 month period ending in October immediately prior to the start of the relevant calendar year. RPI means the general retail price index (all items) in the UK.

Existing International destinations refers to those city pairs already served at the date of service introduction. New International destinations refers to those city pairs not currently served at the time of service commencement.

These charges would cover all landing and navigation charges and passenger related charges including PLS, and current HBS, security and insurance costs as per the airport's standard Terms & Conditions of Use. Please note that there are no additional charges for air traffic services as these are included in the above rates.

Charges will be subject to review in the event of mandatory or recommended changes to the airport's regulatory environment, including insurance payments, arising from regulations, guidance and/or codes of best practice Issued or promulgated by regulatory bodies which define the airports regulatory environment, thereby affecting the Airport's cost structure.

3.2 Additional Aeronautical Charge incentives
3.2.1 Load factors

Where load factors on a destination exceed 75%, a rebate of 10% on the relevant PLS charge will be given for passenger numbers above this level. This rebate will be calculated at the end of each calendar year on a route by route basis and will be paid on receipt of an appropriate invoice from Aer Lingus.

3.2.2 New services

New city pairs introduced after Year 1 will be chargeable initially at Year 1 rates and will progress up the scale (as increased by RPI from the start date of the agreement to the start of the calendar year of introduction) annually as set out in paragraph 3.1. This only applies to new city pairs rather than additional rotations on existing services which are defined as those on the three initial aircraft.

3.2.3 Aircraft Type

In order to encourage the introduction of larger aircraft such as the A321, the capacity figure for the rebate referred to under 3.2.1 will be based on a 75% load factor for the A320 aircraft to be introduced initially. Please provide details of proposed A320 aircraft capacity at your convenience.

3.2.4 Diverted/non-based Aircraft

The charging structure set out in the preceding paragraphs relates to based aircraft only. However, we will agree to a 50% reduction against standard charges (as set out in the airport's Terms & Conditions of Use) in respect of diverted or non-based aircraft.

3.3 Launch Support

Launch support will be offered for each of the three based aircraft as follows:

Year 1	£150,000
Year 2	£100,000
Year 3	£ 50,000

The Year 1 amount will be payable at the commencement of operations of each aircraft upon receipt of the relevant invoice from Aer Lingus. Amounts for Years 2 and 3 will be paid at the start of the year to which they relate. The latest amount paid in respect of each aircraft would be repayable if the aircraft is withdrawn before the end of the year of operation to which it relates. Launch support is to be used for the purposes of marketing the routes being introduced.

A similar level of launch support will be payable in due course in respect of aircraft 4 and 5, and any subsequent additional based aircraft as agreed.

3.4 Marketing Support

We will offer the services of our aviation marketing staff to assist with the establishment of the proposed Aer Lingus services as key routes from Belfast International Airport.

3.5 Branding/Advertising

Any advertising should be placed through the airport's advertising agents, Eye Media. We will be happy to facilitate any introductions required.

4. External Assistance

We were able to introduce you to officials from Invest Northern Ireland during your visit yesterday and they will revert to you directly with their assistance proposal in due course. They have expressed their willingness to provide a programme of support for your crew base.

We are aware of the strong working links between you and Tourism Ireland. We also work closely with Tourism Ireland and we are led to believe that significant leverage could be brought to bear in support of new Aer Lingus operations from BFS.

You will no doubt have picked up from the speculative press coverage in the media that the Northern Ireland Assembly is in favour of providing assistance to Aer Lingus to help the airline become established in this market place. Whilst the exact nature of the assistance is unclear at this time, it is anticipated that support will be available. We understand that in due course we will be able to broker meetings with Government officials to help you settle into your new and important role within the region.

5. Operational capability

Belfast International is an ideal operational base with our all year round 24 hour operation, two long cross runways (main runway 2,780m) providing unlimited range, no significant airspace limitations, a central location serving the northern half of the Island, the most technologically advanced airfield on the Island, and widebody aircraft handling capability. Our all year round 24 hour operation would allow later flights than currently available between Northern Ireland and Heathrow which would present additional opportunities in terms of interlining traffic connections. It would also provide the perfect base for the development of transatlantic and other long haul services. We also have previous experience of helping out your operational colleagues in times of emergency.

I trust that this accurately covers the content of our agreement. Please do not hesitate to contact Uel or myself if you require any further information and I look forward to talking to you again soon.

Yours sincerely

[pp D. McKnight]

JOHN DORAN
Managing Director