Neutral Citation Number: [2017] EWHC 2896 (Admin)

Case No: CO/4934/2017

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2017

**Before** :

**LORD JUSTICE GROSS**
**MR JUSTICE LEWIS**

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**Between :**

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| **R on the application of Monarch Airlines Limited (in administration)** | **Claimant** |
| **- and -** | |
| **Airport Co-ordination Limited** | **Defendant** |
| **- and –** | |
| **Manchester Airports Group PLC** | **Intervener** |

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**Bankim Thanki Q.C., David Allison Q.C. and Malcolm Birdling** (instructed by **Freshfields**) for the **Claimant**
**Michael Crane Q.C., Alexander Milner and Nicolas Damnjanovic** (instructed by **Bates Wells & Braithwaite LLP**) for the **Defendant**
**Akhil Shah Q.C. and David Murray** (instructed by **DLA Piper)** for the **Intervener**

Hearing dates: 6 and 7 November 2017

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# Approved Judgment

**Lord Justice Gross :**

INTRODUCTION

1. This is the judgment of the court to which both members have substantially contributed.

2. This case concerns the question of whether the defendant, Airport Co-ordination Limited ("ACL"), is under a duty to allocate slots at certain United Kingdom airports for the summer 2018 season to the insolvent Monarch Airlines Limited ("Monarch"). Slots are permissions to use the airport infrastructure necessary for the operation of air services at specific times for the purpose of the taking-off and landing of aircraft. On 24 October 2017, ACL decided not to allocate summer 2018 season slots ("the Summer 2018 slots") to Monarch but to defer the decision on allocation until the outcome of the proposal by the Civil Aviation Authority ("the CAA") to revoke or suspend Monarch's operating licence.

3. A claim for judicial review of that decision was issued on 26 October 2017. An application was made for the matter to be heard urgently to avoid possible prejudice to the claimant – with particular reference to the IATA Slot Conference, scheduled for 7 – 10 November 2017 - if ACL continued to maintain that it had no duty to allocate slots to Monarch. The court is always anxious, if possible, to assist parties in cases where there is genuine commercial urgency. A rolled-up hearing was ordered, that is an oral hearing at which permission to apply for judicial review would be considered, with the substantive hearing to follow immediately if permission were granted. A timetable for the provision of evidence was ordered. Manchester Airports Group plc ("MAG") was given permission to intervene pursuant to CPR 54.17 and submit evidence and make written and oral submissions. A Divisional Court was convened and the case heard on 6 and 7 November 2017. The Court's decision, granting permission to apply for judicial review but dismissing the claim, was announced on 8 November 2017. Brief reasons, attached herewith as Annex A, were given on that day. These are the full reasons for the dismissal of the claim themselves produced as expeditiously as possible.

4. In brief, Monarch went into administration on 2 October 2017. It contends, however, that it is entitled to be awarded the Summer 2018 slots at certain UK airports under the provisions of Article 8(2) of Council Regulation (EEC) No. 95/93 ("the Slots Regulation") as it is an air carrier with a valid operating licence which used 80% of the claimed slots in the previous scheduled period. It contends that it would be able to exchange those slots with other airlines in return for less valuable slots and would receive additional payments from those airlines by way of compensation for the difference in value.

5. ACL contends that Monarch is not entitled to be allocated the Summer 2018 slots as it is no longer a functioning airline and, further, that it may defer a decision on allocation until after the conclusion of procedures started by the CAA to revoke Monarch's operating licence. It also contends that it is not, in any event, obliged to allocate new slots to other airlines for the purpose of facilitating any agreement between them and Monarch for the exchange of slots.

6. MAG's stance at the hearing was to oppose ACL deferring a decision as to slot allocation. Third parties, not least MAG itself, would be affected by further delay which could or would impact on the utilisation of slots. MAG was neutral as to whether the Summer 2018 slots should be allocated to Monarch or placed in the slot pool. The important point was to have a decision, one way or the other, forthwith or as soon as possible.

## THE FACTUAL BACKGROUND

### *Parties and Operations*

7. The defendant, ACL, is a company limited by guarantee. Pursuant to the Slots Regulation and the duties there set out (see further below), ACL is the body responsible for allocating slots at certain airports known as co-ordinated airports.

8. Monarch operated an airline. In accordance with the legal framework in place, it obtained slots for the winter period 2017/2018 at Gatwick, Luton, Birmingham, and Manchester Airports. Those slots were allocated on 1 June 2017.

9. On 26 and 27 September 2017, Monarch applied to ACL for the allocation of the Summer 2018 slots at four airports in the United Kingdom, namely Gatwick, Luton, Birmingham and Manchester. These were slots which corresponded to slots that had been allocated to Monarch in the previous equivalent scheduling period (that is, summer 2017) and which (subject to certain minor exceptions) had been used by Monarch for 80% of the times for which they had been allocated.

10. Monarch also averred that it had entered into certain agreements with other airlines by which Monarch would have the right (but not the obligation) to exchange slots which it expected to be allocated at Gatwick and Luton for the summer 2018 season with other airlines. Under those agreements, Monarch would be entitled to exchange slots at those two airports with other airlines who had been allocated, or would request the allocation, of slots which were typically commercially or operationally less attractive. Monarch would expect to receive a cash payment to reflect the fact that any slots it exchanged would be more valuable commercially than the slots that it received in return.

11. The anticipated date by which ACL would have allocated the Summer 2018 slots was 26 October 2017. A conference is organised by the International Air Transportation Association ("IATA") for the purpose of facilitating, amongst other things, agreements between airlines and co-ordinators for the exchange of slots allocated to them. The conference intended to deal with slots allocated for the summer 2018 season was scheduled to take place on 7 to 10 November 2017.

### *Monarch Enters Administration*

12. Monarch was experiencing financial difficulties. It had discussions with the CAA as to the likely consequences if it entered into administration. By letter dated 30 September 2017, solicitors representing Monarch set out its understanding of the process that would be followed if Monarch did so. In essence, the CAA would write to the administrators asking them to ground all Monarch flights so that no flights, with or without passengers, would take off and Monarch would not make any sales. In addition, the CAA might provisionally suspend Monarch's Air Operator's Certificate ("AOC") and would begin proceedings to suspend Monarch's operating licence. The letter summarised the procedures applicable in relation to certain matters, namely that

there would be provision for the making of representations within 10 days of the service of a notice of a proposal to suspend or revoke the operating licence and the decision would be taken following a hearing which would take place no earlier than 21 days after service of such a notice. Any decision to revoke the Operating Licence would not take effect for 14 days during which time Monarch would be entitled to appeal any such decision to the Secretary of State. If it did, the decision would not take effect until the conclusion or abandonment of the appeal. By letter dated 30 September 2017, the CAA confirmed that the Monarch letter correctly set out the CAA processes for suspension or revocation of an operating licence and the steps that the CAA anticipated it would follow if Monarch entered administration.

13. On 1st October 2017, an application was made to appoint administrators for Monarch and other companies within the Monarch Group. A witness statement was made by Mr Swaffield, a director of Monarch. He explained that attempts had been made to sell Monarch as a going concern but those attempts had failed. The statement recorded that the directors of Monarch had concluded that, with the forecast trading losses, and with little or no prospect of Monarch being able secure new investment or being sold, Monarch was likely to be unable to be able to pay its debts in the coming weeks. Mr Swaffield set out the statutory purposes of an administration. Importantly, he went on to say that the purpose of this proposed administration was to achieve a better result for the respective creditors of the companies. The secondary purpose was to realise property in order to make a distribution to one or more of the secured creditors. He did not state that one of the purposes of the proposed administration was to rescue Monarch as a going concern.

14. Furthermore, a witness statement was also, it seems, sworn on 1 October 2017 in support of the application by Mr Nimmo, one of the proposed administrators in which he said:

> "As matters currently 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. 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 for the reasons highlighted below that it will 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)".

15. On 1 October 2017, Newey J., as he then was, made an order that Monarch and 8 other companies in the Monarch group be placed into administration with effect from 4.00 a.m. on 2 October 2017.

*The Response by the CAA*

16. On 2 October 2017, knowing that Monarch was in administration, and following investigations and discussions with Monarch, the CAA found that Monarch could no longer meet certain EU law requirements for the continued validity of its AOC. As the accompanying oversight report made clear, Monarch could no longer demonstrate that all its activities could be financed and carried out in accordance with applicable requirements. The CAA therefore provisionally suspended the AOC. The CAA also

proposed to revoke the AOC. Monarch was given 14 days to request a review of the proposal to revoke the AOC. If it did not request a review of that proposal, revocation would become effective. If it did request a review of the proposal to revoke, Monarch would have 21 days to make written submissions and a hearing would be fixed.

17. On the same day, the CAA also gave notice that it proposed to revoke Monarch's operating licence pursuant to Regulation (EC) No. 1008/2008 of the European Parliament and the Council of 24 September 2008 on common rules for the operation of air services in the Community ("the Licensing Regulation"). The reasons given were that the CAA had carried out a detailed assessment of the financial problems of Monarch in accordance with Article 9(2) of the Licensing Regulation. It noted that Monarch had told the CAA that it had had discussions with credible purchasers or funders such that there was a realistic prospect of enabling Monarch to meet its actual obligations over a 12 month period. It noted that the evidence prepared on behalf of Monarch for the application for an administration order showed that there were no longer any such potential purchasers or funders and, as a result, the Board of Directors of Monarch had concluded that there was no reasonable prospect of Monarch continuing to trade. It recorded the CAA's understanding that the purpose of the administration was to achieve a better result for creditors as a whole and to realise property to make a distribution to secured creditors and not to seek to rescue Monarch as a going concern. There was no reasonable prospect of Monarch being able to meet its actual and potential obligations over a 12 month period and the primary position on the application for revocation was that "there is no basis on which the company will in the future be in a position to provide public transport operations to any person" and so Monarch's Operating Licence should be revoked.

18. The letter of 2 October 2017 invited Monarch to make submissions within 21 days and indicated that a hearing would be arranged for 23 October 2017 to consider the submissions and proposed revocation of the operating licence. The administrators indicated that they wished to make written representations and have a hearing. A hearing was eventually fixed for 8 November 2017 to consider the proposal to revoke the operating licence and a hearing was fixed for 28 November 2017 to consider the proposal to revoke the AOC.

19. On 16 October 2017, the CAA provided supplemental reasons in support of the proposal to revoke or suspend Monarch's operating licence. These included the fact that the lessors had terminated the leases of 34 of Monarch's 35 aircraft and the lessor had exercised a right of possession in relation to the 35th aircraft. Further, on the basis of material supplied by the administrators, the CAA recorded that Monarch had not retained any pilots. The CAA went on to note that Monarch did not meet the requirements in EU Law for an operating licence as it had no aircraft at its disposal and its main occupation was not to operate air services.

20. On 1 November 2017, solicitors for the administrators wrote setting out a response to the proposal to revoke Monarch's operating licence. The administrators did not suggest that Monarch could be rescued as a going concern. Rather, they made arguments to the effect that what they described as a "temporary non-availability of aircraft" should not per se lead to a revocation or a suspension of an air carrier's operating licence. So far as pilots were concerned, the solicitors said that Monarch "currently has a number of historically retained pilots". With respect, we strongly deprecate this most unhelpful and opaque formulation. Pressed by the Court as to what it meant, Mr Thanki Q.C. said there were three such pilots. In response to a question as to the meaning of "historically retained pilots", Mr Thanki explained that

they were people who had qualified as pilots but were currently in management posts. The letter asserted that it "would be perfectly feasible for MAL to hire more pilots and crew in the event that MAL was successfully restructured or sold in a solvent sale process (both of which are possible, if remote, outcomes of the administration process which the Joint Administrators are legally obliged to pursue if they become viable)".

21. For completeness, the court requested a copy of the written skeleton argument provided by the administrators to the CAA in advance of the hearing on 8 November 2017. That written argument makes it clear that Monarch's case was a simple one: namely, that the CAA should wait for a period of 3 months from the entry into administration before suspending or revoking the licence - that was said to be consistent with Article 9(2) of the Licensing Regulation. The skeleton argument states that the rescue of Monarch as a going concern is one of the statutory purposes of administration and that "…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." Beyond that the skeleton does not go. It does not suggest that Monarch is, or can become, a going concern. It does not suggest that Monarch will operate air services again. It says that there are several "hypothetically possible transactions" which could be envisaged, one being the exchange of slots. The written argument says that, apart from slot transactions, Monarch's administrators "are not currently negotiating any transaction which they feel at this stage are likely to materialise" although it said this was not impossible. However, in short and in our judgment, on all the evidence, it is clear that Monarch has no planes, no pilots and no more than a theoretical prospect of ever providing air transport services again.

*ACL's Response*

22. We turn next to the position of ACL. On 6 October 2107, ACL wrote to Monarch's administrators stating that they understood from an announcement made by the administrators that Monarch's AOC had been suspended and that the airline's aircraft would no longer be flying. They indicated that they understood that the vast majority of Monarch's employees, including pilots, had been made redundant and Monarch's 35 aircraft, which were leased, were being returned to the lessors.

23. Correspondence ensued between ACL and the solicitors for Monarch's administrators and ACL asked for copies of the CAA letter proposing to revoke Monarch's operating licence and Monarch's reasons for contesting that course of action. Monarch's administrators did not, initially, provide either the letter of 2 October 2017 or its reasons for opposing revocation of its operating licence. As appears from the letter dated 12 October 2017, in essence, Monarch's administrators contended that in discharging its functions in relation to the allocation of slots under the Regulation, the sole matter of concern to ACL was whether Monarch had a valid operating licence. It stated that Monarch continued to have a valid operating licence as that licence had not yet been suspended or revoked by the CAA. In those circumstances, it contended that Monarch was entitled to be allocated slots for the summer 2018 season in accordance with the provisions of the Slots Regulation.

24. On 18 October 2017, ACL was provided with copies of the two CAA letters of 2 October 2017, one provisionally suspending Monarch's AOC and proposing to revoke the AOC, and one proposing to revoke Monarch's operating licence. On 19 October 2017, ACL was provided with copies of the witness statements of Mr Swaffield and Mr Nimmo made in support of the application for an administration order. On 23 October 2017, ACL was provided with the copy of the oversight report of the CAA

attached to the 2 October 2017 letter from the CAA setting out the finding that Monarch could no longer demonstrate that it met the relevant EU requirements for an AOC.

25. On 24 October 2017, ACL informed Monarch's administrators that it was not under a duty to allocate slots for the summer 2018 season to Monarch but would reserve its decision until the outcome of the CAA's proposal to revoke or suspend Monarch's operating licence. It was said that this was a legitimate course, given that the CAA was under a duty under EU law to revoke the operating licence and had started the process for doing so. Further, it pointed out that Monarch had no aircraft or pilots, and appeared to have no prospect of carrying on any further business as an air carrier; in those circumstances, the Slots Regulation did not require ACL to allocate slots to that undertaking. It expressed the view that the objectives of the Slots Regulation would be frustrated if it agreed to allocate slots to a defunct airline, which was formally insolvent and was incapable of future operations as an air transport undertaking and at a time when the competent national authority was under an obligation under EU law immediately to revoke or suspend the operating licence. The letter also noted that, even if Monarch were entitled to be allocated the Summer 2018 slots, any exchange of those slots with other airlines would require ACL to issue slots to those other airlines for the purpose of carrying out the exchange. The letter noted that ACL was not under any obligation to issue new slots to airlines who were parties to agreements with Monarch for the exchange of any slots allocated to Monarch for the summer 2018 season.

THE LEGAL FRAMEWORK

Operating Licences

26. The provision of air services is regulated by the Licensing Regulation. Article 3 provides so far as material that:

> "1. No undertaking established in the Community shall be permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence.
>
> An undertaking meeting the requirements of this Chapter shall be entitled to receive an operating licence.
>
> "2. The competent licensing authority shall not grant operating licences or maintain them in force where any of the requirements of this Chapter are not complied with."

27. An operating licence is defined as "an authorisation granted by the competent licensing authority to an undertaking, permitting it to provide air services as stated in the operating licence": see Article 2.1 of the Licensing Regulation. Article 2 of that regulation defines air service, air operator certificate and air carrier respectively as:

> "4. 'air service' means a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire….
>
> "8. 'air operator certificate (AOC)' means 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…..

> "10. 'air carrier' means an undertaking with a valid operating licence…"

28. Article 4 of the Licensing Regulation sets out the conditions that must be met by an undertaking before being granted an operating licence including:

> "(b) it holds a valid AOC issued by a national authority….
>
> (c) it has one or more aircraft at its disposal through ownership or by 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…."

29. Article 6.1 of the Licensing Regulation provides that the granting and validity of an operating licence is dependent upon the possession of a valid AOC specifying the activities covered by the operating licence. Article 8 provides that:

> "1. An operating licence shall be valid as long as the Community air carrier complies with the requirements of this Chapter.
>
> A Community air carrier shall at all times be able on request to demonstrate to the competent licensing authority that it meets all the requirements of this Chapter".

30. Article 9 of the Licensing Regulation deals with suspension and revocation of an operating licence. Article 9.1 and 9.2 deal with financial difficulties and provide that:

> "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."

31. Article 9.5 provides that:

> "5. In case a Community air carrier's AOC is suspended or withdrawn, the competent licensing authority shall immediately suspend or revoke the air carrier's operating licence."

32. Article 14 deals with the right to be heard in cases involving the revocation or suspension of an operating licence and provides that:

> "The competent licensing authority shall ensure that, when adopting a decision to suspend or revoke the operating licence of a Community air carrier, the Community air carrier concerned is given the opportunity of being heard, taking into account the need, in some cases, for an urgency procedure."

33. Domestic implementing regulations have been made setting out the relevant procedure for suspending or revoking an operation licence. These are contained in the Operation of Air Services in the Community Regulations 2009 ("the UK Regulations"). They provide for the CAA to revoke or suspend an operating licence that it has granted but only after notifying the licence holder of a proposal to do so (see regulation 7 of the UK Regulations). The revocation or suspension does not take effect until the time for appealing (that is, 14 days after notification of the decision) has expired: see regulation 8 and paragraph 3 of Schedule 2 to the UK Regulations. If there is an appeal to the Secretary of State within the 14 day period, the revocation or suspension does not take effect until the appeal is determined or abandoned (see regulation 8(3) of the UK Regulations).

34. There are detailed provisions governing the safety of aircraft, the training of pilots and similar matters in Regulation (EC) 216/2008 of the European Parliament and the Council of 20 February 2008 ("the EASA Regulation"). Article 10 of that Regulation imposes a duty on Member States in relation to the enforcement of and implementation of those requirements. Further implementing provisions, including provision for immediate action including suspension in cases of failure to comply with the requirements, are contained in Commission Regulation (EU) No 965/2012. In particular, provision ARO.Gen 350 (d) in Annex II provides, so far as material, that:

> "(d) when a finding is detected during oversight or by any other means, the competent authority shall, without prejudice to any additional action require by Regulation (EC) No 216/2008 and its Implementing Rules, communicate the finding to the organisation in writing and request corrective action to address the non-compliance(s) identified…..
>
> (1) In the case of level 1 findings the competent authority shall take immediate and appropriate action to prohibit or limit activities, and if appropriate, it shall take action to revoke the certificate, specialised operations authorisation, or specific approval or to limit or suspend it in whole or in part, depending upon the extent of the level 1 finding, until successful corrective action has been taken by the organisation."

35. Article 14 of the EASA Regulation provides that the provision of the Regulation and the implementing rules do not prevent a Member State from reacting immediately to a safety problem.

36. Domestic implementing legislation, namely the Air Navigation Order 2016 ("the Order"), also provides power to suspend certificates, including an AOC, and is in these terms:

> "**254. Provisional suspension or variation of EASA certificates, licences and other documents**

(1) The CAA may, subject to and in accordance with article 14(1) of the Basic EASA Regulation, provisionally suspend or vary any certificate, licence, rating, endorsement, approval, authorisation or other document which it has issued to a person under an EASA Regulation, pending inquiry into or consideration of the case.

(2) A provisional suspension or variation under paragraph (1) ceases to have effect where –

(a) it is withdrawn by the CAA; or

(b) it is revoked by the CAA following a finding, in accordance with article 14(3) of the Basic EASA Regulation, that is not justified.

(3) The CAA must revoke a provisional suspension or variation if it is found not to be justified under Article 14(3) of the Basic EASA Regulation".

The Slots Regulation

37. The allocation of slots is regulated by the Slots Regulation. A slot is defined in Article 2 as follows:

"'slot' shall mean 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."

And a series of slots is defined, broadly, as 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.

38. An air carrier is defined in Article 2(f) of the Slots Regulation as follows:

"(i) '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 purposes 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 Article 7 and 14; the definition of air carrier shall also include all civil aircraft operators".

39. Business aviation is defined to mean the operation or use of aircraft for the carriage of passengers or goods as an aid to the conduct of the business.

40. Article 4 of the Slots Regulation provides for the appointment of an airport coordinator who "shall be the sole person responsible for the allocation of slots". The airport coordinator is to allocate slots in accordance with the provisions of the Slots Regulations and is to act "in a neutral, non-discriminatory and transparent way". Articles 5 and 6 provide for the appointment of a coordination committee who shall, twice yearly, fix the parameters for slot allocation.

41. Article 7 of the Slot Regulation requires air carriers operating or intending to operate at a coordinated airport to provide information in the format and at the times specified by the airport coordinator.

42. Article 8 of the Slots Regulation deals with the process of slot allocation and provides at Article 8.(1) and (2):

> "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 Article 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)."

43. Article 8(5) of the Slots Regulation also requires the airport coordinator to take into account additional rules and guidelines established by the air transport industry world-wide and Community-wide, as well as local guidelines. The material air transport rules are the IATA "Worldwide Slot Guidelines" eighth edition.

44. Article 8a of the Slots Regulation provides for slots to be transferred including between parents and subsidiaries, or as part of the acquisition of an air carrier or they "may be exchanged, one for one, between air carriers". Article 8a(2) provides that such transfers or exchanges shall not take effect prior to the express confirmation by the coordinator, who "shall decline to confirm" them "if they are not in conformity with the requirements of this Regulation…".

45. Article 10 of the Slots Regulations provides for the creation of a slot pool. The material provisions provide as follows:

> "1. The coordinator shall set up a pool, which shall contain all the slots not allocated on the basis of Article 8(2) and (4). All new slot capacity determined pursuant to Article 3(3) shall be placed in the pool.
>
> "2. A series of slots that has been allocated to an air carrier for the operation of a scheduled or a programmed non-scheduled air service shall not entitle that air carrier to the same series of slots in the next equivalent scheduling period if the air carrier cannot demonstrate to the satisfaction of the coordinator that they have been operated, as cleared by the coordinator, for at least 80% of the time during the scheduling period for which they have been allocated.

"3. Slots allocated to an air carrier before 31 January for the following summer season, or before 31 August for the following winter season, but which are returned to the coordinator for reallocation before those dates shall not be taken into account for the purposes of the usage calculation.

…..

"6. 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 new applicant air carriers. 50% of these slots shall 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.

….."

THE ISSUES

46. In the light of the grounds of claim, and the written and oral submissions of the parties and the intervener, the issues can be conveniently summarised as follows:

(1) Was ACL under a duty to allocate the Summer 2018 slots to Monarch ("Issue I: The Duty to Allocate")?

(2) Was ACL entitled to defer a decision on the allocation of those slots until the conclusion of the CAA process dealing with the proposal to revoke Monarch's Operating Licence ("Issue II: The Power to Defer")?

(3) Was ACL under an obligation to issue slots to other airlines for the purposes of enabling those airlines to have slots available to them which they could exchange with Monarch for Monarch's commercially more valuable slots and, if not, whether as a matter of discretion this Court ought to refuse relief even if ACL was obliged to allocate slots to Monarch ("Issue III: Discretionary Relief")?

47. A further point concerned the question of whether the decision of ACL infringed one of the principles of the domestic insolvency regime, namely the "anti-deprivation principle". In essence, the principle provides that an insolvent entity should not be deprived of property by reason of having become insolvent. In the event, Monarch accepted in argument that this principle would have no bearing on the outcome of this case. If ACL were under a duty to allocate the Summer 2018 slots to them, then Monarch did not need to rely upon that principle. If, *per contra*, there was no duty to allocate those slots to Monarch, the principle would not assist them. We therefore say no more about this issue.

ISSUE I: THE DUTY TO ALLOCATE

48. Mr Thanki Q.C., on behalf of Monarch, submitted that it met the requirements for the allocation of the Summer 2018 slots under Article 8(2) of the Slots Regulation and was, therefore, entitled to be allocated those slots. Monarch had previously been allocated slots and it had used those slots for 80% of the time for which they were allocated. He submitted that Monarch was an air carrier. On a proper interpretation, the definition in Article 2 of the Slots Regulation simply required that the carrier be an undertaking with a valid operating licence. That interpretation was reinforced by the definition of air carrier in Article 2 of the Licensing Regulation. Monarch still had

a valid operating licence; that had not yet been revoked or suspended. The purpose of Monarch in seeking the allocation of slots was irrelevant. In particular, the fact that Monarch did not intend to use the slots but to exchange them (and would not use any slots it received in return) was irrelevant. In the light of the decision in *R v Airport Co-ordination Limited ex parte States of Guernsey Transport Board* [1999] E.U. L. R. 47, the intentions of the parties as to the future use of slots was irrelevant in determining the lawfulness of any exchange of slots between them. Further, ACL did not have an investigatory function to inquire into and determine facts as to the future intentions of the parties. Nor did Articles 8 and 10 of the Slots Regulation confer any discretion on ACL or permit it to defer a decision on allocation pending the outcome of regulatory processes being carried out by the CAA. Consequently, Monarch was entitled to be allocated the Summer 2018 slots in accordance with Article 8(2) of the Slots Regulation.

49. Mr Crane Q.C., on behalf of ACL, submitted first that there was no duty on ACL to allocate slots to applicants once the competent regulatory authorities of the Member State had commenced proceedings to suspend or revoke an applicant's operating licence following the cessation of operations as an air transport undertaking. Furthermore, he submitted that reserving the position on allocation pending the outcome of the regulatory authority's process was not unlawful as it was inherent in the Slots Regulation, and the guidelines to which ACL had to have regard, that there be an element of flexibility in the allocation of slots.

50. Secondly, Mr Crane submitted that, in any event, only an air carrier as defined in the Slots Regulations could hold slots. He submitted that, on the facts of this case, it was incontrovertible that Monarch had ceased to be an air carrier as it had ceased to be an air transport undertaking and has no genuine or realistic prospect of recommencing such operations. He submitted that the objectives of the Slots Regulation and the policy considerations which underpin it would be subverted if slots were allocated to an entity that had ceased to be an air transport undertaking and had no prospect of resuming operations.

51. Mr Shah Q.C., on behalf of MAG, contended that, on a proper interpretation of Articles 8 and 10 of the Slots Regulation, ACL had to allocate the Summer 2018 slots by, at the latest, the date on which it established the pool into which slots would be placed for allocation. ACL therefore had to deal with the allocation of slots, either by allocating them to Monarch, or by placing them in the pool for allocation in accordance with Article 10. ACL could not defer a decision beyond the date on which it established the pool. MAG was neutral on the question whether ACL should allocate the summer 2018 slots to Monarch or place them in the pool.

52. Pausing here, it is apparent that timing is crucial to Monarch's case, hinging, as it does, on a decision in its favour on the Summer 2018 slots before the conclusion of the CAA process to revoke its operating licence (apprehending as it must an adverse outcome). That may be opportunistic but, if right in law, Monarch is entitled to succeed. The question is whether it is right in law. To that question, we now turn.

*Discussion*

53. *(1) Underlying purpose:* First and as is common ground, EU Regulations are to be interpreted purposively. We therefore take as our starting point the underlying purpose of the Slots Regulation, involving, at once, a consideration of the nature of "slots". Slots are defined (in Article 2(a)) to mean the permission to use the airport

infrastructure "necessary to operate an air service at a co-ordinated airport on a specific date and time for the purpose of landing or taking-off". The focus is on flying and, necessarily, on functioning airlines, capable of flying – not defunct airlines. The Slots Regulation is concerned with providing a mechanism by which the provision of air transport services at airports can be facilitated.

54. It is correct that a secondary market has developed in slots. Airlines have developed methods of exchanging slots to obtain slots that are more commercially desirable or more advantageous to their particular business. Such slots may be exchanged (but not sold) and the exchange may be accompanied by cash payments to reflect the different commercial value of slots. The fact that a secondary market has developed in the exchange of slots does not, however, extend to encompass companies in administration or insolvency which are no longer engaged in, and will not resume, the operation of air services. That would be to treat the secondary market that may have emerged from the allocation of slots as being the purpose or rationale for the allocation of slots under the Slots Regulation. It would be an instance of the tail wagging the dog. There is, in our judgment, a fundamental difference between permitting those who operate air services to exchange slots, and compelling an airport coordinator to allocate slots to those who are not engaged in the operation of air services so that they may seek to obtain commercial value from the exchange of those slots. It follows that the existence of a secondary market in slots does not warrant the conclusion that the slot coordinator is under a duty to allocate slots to an insolvent company which has no more than a theoretical chance of emerging as a going concern or resuming the operation of air services.

55. Nor too does the "carve-out" in Article 8(2) of the Slots Regulation for historical precedence or "grandfather rights" alter matters. The Recitals to the Slots Regulation underline the purpose of promoting competition and ensuring that the benefits of liberalisation are evenly spread. In keeping with these purposes, the airport coordinator is to set up a pool to contain slots which will be allocated to applicant air carriers. Those who want slots, that is those who want permission to use the airport infrastructure for take-off and landing, will have to apply for and be allocated slots from the pool. The Article 8(2) carve-out is itself directed to the stability or continuity of air transport services, furnished by incumbent operators. It is not intended to separate out, and reward, historic use of slots irrespective of future use of slots for the operation of air transport services. Still less is it concerned with maximising the recovery of creditors or secured creditors of a defunct airline. A duty to allocate slots to entities who, although they historically had slots, but who had ceased to operate air transport services and had no prospect of resuming the operation of such services would not, therefore, accord with the purpose underlying the Slots Regulation.

56. It is right that the Slots Regulation (by way of Article 14(2)) furnishes a degree of indulgence, in terms of timing, to start-up air carriers. That, however, reinforces rather than undermines the emphasis in the Slots Regulation on the encouragement of competition – together with an inquiry as to the realistic future prospect of the entity in question becoming a functioning airline.

57. There are other indicators within 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. Air carriers include business aviation operators. Those are further defined as a particular sector of general aviation which "concerns the operation or use of aircraft for the carriage of passengers or goods as an aid to their business" rather than for the public generally. That subset of "air carriers" is defined by reference to

operation or use which indicates that the Slots Regulation in general, and the definition of "air carrier" in particular, is concerned with those who operate air transport services. Furthermore, groups of air carriers are defined to mean two or more air carriers which together perform joint operations or certain other functions "for the purpose of operating a specific air service". That again indicates that the Slots Regulations is concerned with the operation of air transport services.

58. 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. That regulation is concerned with the requirements for an operating licence. Article 3 of the Licensing Regulation provides that no undertaking established in the Community is to be permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has the appropriate operating licence. An operating licence is, in turn, defined as an authorisation permitting an undertaking to provide air services and those, in turn, are defined as "a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire": see Article 2 of the Licensing Regulation. There is nothing in the purpose underlying the Licensing Regulation lending support to the imposition of a duty on the slot coordinator to allocate slots to a defunct airline.

59. *(2) Language:* Secondly, in our judgment, the wording of Article 8(2) of the Slots Regulation itself leads to the same result as a consideration of its underlying purpose. Article 8(2) reserves the allocation of certain slots to "air carriers". These are defined as "air transport undertakings holding a valid operating licence" and also "business aviation operators". Monarch contend that all that is necessary is that an undertaking has a valid operating licence; the key to entitlement under Article 8(2) is that the applicant has such an operating licence and has previously been allocated slots which it used for 80% of the time. Monarch refers to Article 2(10) of the Licensing Regulation which defines an air carrier as "an undertaking with a valid operating licence or equivalent". Monarch, it is submitted, is such an undertaking – it has a valid operating licence that has not, as yet, been revoked by the CAA. We are unable to accept this submission.

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.

63. *(3) The decision in Guernsey States:* The decision of the High Court in *Guernsey States* is distinguishable. There, the court was concerned with two undertakings who were engaged in the operation of air transport services. They wished to exchange slots. It was likely that one of the air transport undertakings would exchange its slots for slots which it did not intend to use (and which, ultimately, it did not use) and it was likely to have received a cash payment to represent the difference in value between the slots it gave up as compared with the ones that it received in exchange. The High Court held that an exchange was not unlawful because of the terms upon which the slots were exchanged or the intention of the parties as to their future use. That case was concerned with the circumstances governing an exchange of slots between subsisting air transport undertakings. It was not concerned with the different question, namely whether there is a duty on the coordinator to allocate slots to a body which is no longer an air carrier as it has ceased to be an air transport undertaking. On the facts of *Guernsey States,* the unsuccessful contention would have required the slot coordinator to act as an "investigator" of the relevant transactions, a role it is neither entitled nor equipped to play. As will be seen, that difficulty does not arise in the present case.

64. *(4) Application to the facts:* Applying our approach to the facts of this case, 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.

65. In our judgment, there was no duty to allocate the Summer 2018 slots to Monarch in those circumstances. 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.

66. We underline that our decision does not require ACL to act as an investigator. The fact is that the regulatory authority, the CAA, had provisionally suspended Monarch's AOC and proposed to revoke or alternatively suspend its operating licence. The reasons for doing so arose out of Monarch's entry into administration and its inability to meet the requirements imposed by EU law. The reasons in support of that proposal referred to the fact that Monarch had no planes, no pilots and no prospect of resuming the operation of air transport. Those reasons and the relevant evidence were provided to ACL. Our decision simply involves ACL considering and determining whether, on the material presented to it, it was under a duty to allocate the Summer 2018 slots to Monarch.

67. We also deal with one further submission made by Mr Thanki on behalf of Monarch. He submits that the provisional suspension of the AOC was done by the CAA as an act of domestic law and lacking in due process was not a suspension within the meaning of Article 9(5) of the Licensing Regulation. Consequently, the CAA was not obliged to commence the process of suspending or revoking Monarch's operating licence. In our view, this argument does not assist Monarch for each of two separate reasons. First, it is clear that this could be and was a suspension within the framework of EU law, imposed because Monarch could no longer demonstrate that it was able to meet the requirements of EU law. The relevant provision of the Implementing Regulation set out in paragraph 34 above empowers the relevant authority to take immediate action when significant non-compliance is identified and that action may in appropriate cases be to suspend an AOC. That is what happened here. The CAA investigated the matter. The AOC was provisionally suspended under Article 254 of the Order, that being the domestic legal measure that enabled the suspension to take place. The suspension was not therefore a domestic law act separate from EU law. There is no evidence that it was imposed without due process; rather it was done following investigation and discussion and there has been no challenge to the validity of the decision provisionally to suspend the AOC. As a result, Article 9(5) of the Licencing Regulation was triggered by the suspension of the AOC. Secondly, and in any event, whether or not Article 9(5) was triggered does not affect our conclusion that there was no duty in the circumstances of this case to allocate summer 2018 slots to Monarch. It does not affect our conclusion that Monarch had ceased to be an air transport undertaking.

ISSUE II: THE POWER TO DEFER

68. Mr Shah, on behalf of MAG, submits that ACL had no power to defer a decision on the allocation of the Summer 2018 slots pending resolution of the CAA process dealing with the proposal to revoke Monarch's operating licence. There is nothing in the language of Article 8(2) to permit postponement of a decision to await the outcome of regulatory proceedings. Further, he submits that Article 10 of the Slots Regulation contemplates the establishment of a pool, that slots (excluding those allocated under Article 8(2)) will be included in that pool and those slots then allocated in accordance with the relevant provisions of the Slots Regulations. There is no scope for the postponement of the decision on the allocation of slots beyond the date (in this case 26 October 2017) when the pool was established. By that date, ACL had to determine whether to allocate the summer 2018 slots to Monarch or include them in the pool. That was a binary decision which could not be deferred.

69. Mr Thanki for Monarch also submitted that there was no power in the present case for ACL to defer a decision on the allocation of the slots that Monarch claimed. He too relied upon the provisions of Articles 8(2) and 10 of the Slots Regulation as

supporting that conclusion and submitted, further, that that was consistent with the IATA Guidelines to which ACL was required to have regard.

70. Mr Crane, as indicated, submitted that reserving the position on allocation pending the outcome of the regulatory authority's process was not unlawful as it was inherent in the Slots Regulation, and the guidelines to which ACL had to have regard, that there be an element of flexibility in the allocation of slots. In response to questions from the Court, he submitted that if ACL had to take a decision, it would not allocate the Summer 2018 slots to Monarch but would include them in the pool because, as he expressed it, ACL considers that Monarch is not an air transport undertaking and there is no or zero prospect of it resuming the operation of air transport services.

71. Whatever flexibility and discretion ACL enjoys in other circumstances to reserve or postpone a decision to allocate slots under Article 8(2) of the Slots Regulation, we are satisfied in the present case, that ACL can no longer justify its decision to defer allocation of the Summer 2018 slots until the outcome of the CAA regulatory process. We note that, in ordinary circumstances, ACL would have decided to allocate the Summer 2018 slots to Monarch, or to place them in the pool, by 26 October 2017. By that date, Monarch had ceased to be an air transport undertaking and there was no prospect of it ever resuming operations as an air transport undertaking. Furthermore, as already explained, ACL had all the information necessary to take its decision by 26 October 2017. As ACL's solicitors said in their letter of 24 October 2017, ACL "is of the firm view that it is not currently under any duty to allocate the Summer 2018 slots to [Monarch]". It noted that Monarch was not in a position to resume operations as an air transport undertaking and ACL did not consider that the Slots Regulation required it to allocate slots to a "defunct airline which is formally insolvent and incapable of future operations as an air transport undertaking". Having formed this view, rightly in our judgment, ACL was bound to act upon it. The time for deferring a decision has passed.

72. By contrast, deferring a decision on allocation pending the outcome of the regulatory process would have adverse consequences for others. The hearing into the proposal to revoke was scheduled for 8 November 2017. Any decision to revoke would not take effect for 14 days at least and, if Monarch appealed to the Secretary of State, until that appeal was determined or abandoned. Deferring a decision on allocation – in circumstances where it was of the firm view that Monarch was not entitled to the Summer 2018 slots it claimed – would prevent the slots being included in the pool and allocated to other applicants. It would prevent the slots being available for exchange at the scheduled 7 – 10 November 2017 IATA slots conference. It would sterilise or distort part of the market to the potential detriment of third parties for an uncertain period of time.

73. Accordingly, in the circumstances, ACL is no longer entitled to reserve its decision on the allocation of the summer 2018 slots claimed by Monarch. As Monarch is not entitled to those slots, the consequence of our decision is that they are to be placed in the slot pool.

## ISSUE III: DISCRETIONARY RELIEF

74. The third issue concerns the question of whether ACL was under an obligation to issue slots to other airlines for the purposes of enabling those airlines to have slots available to them which they could exchange with Monarch for Monarch's commercially more valuable slots. If there were no such duty, the question arose as to

whether this Court ought to refuse relief as a matter of discretion as, even if ACL were obliged to allocate slots to Monarch, Monarch might not be able to exchange those slots with other airlines. There was a dispute as to the extent to which the arrangements made by Monarch for exchange depended on the issuing of further slots by ACL. Mr Thanki submitted that, even if ACL did not issue further slots, it may well be that some airlines might be prepared to exchange some or all of the slots already allocated to them in order to obtain slots from Monarch as Monarch's slots might be more commercially valuable than the slots already allocated.

75. It is unnecessary to reach any decision on whether or not any remedy should be refused as a matter of discretion, in light of our conclusion that ACL is not under any duty to allocate the Summer 2018 slots to Monarch.

CONCLUSION

76. In summary, therefore, we grant permission to apply for judicial review but dismiss the claim. For the reasons and on the facts as set out above, ACL is not under a duty to allocate the Summer 2018 slots to Monarch. Such a duty would not accord with the purpose underlying the Slots Regulation and the Licensing Regulation. Furthermore, Monarch is not an air carrier within the meaning of Article 8(2) of the Slots Regulation. ACL no longer has power to defer this decision. Consequently, the Summer 2018 slots are to be placed in the slot pool.

POSTSCRIPT

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.

**ANNEX A**

Case No: CO/4934/2017

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date of Decision: 08 November, 2017

**LORD JUSTICE GROSS**
**MR JUSTICE LEWIS**

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**Between :**

| | |
|---|---|
| **MONARCH AIRLINES LTD** | **Claimant** |
| **- and -** | |
| **AIRPORT COORDINATION LTD** | **Defendant** |
| **- and –** | |
| **MANCHESTER AIRPORTS GROUP PLC** | **Intervener** |

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**Bankim Thamki QC, David Allison QC and Malcolm Birdling** (instructed by **Freshfields Bruckhaus Derringer**) for the **Claimant**
**Michael Crane QC, Alexander Milner and Nicolas Damnjanovic** (instructed by **Bates Wells & Braithwaite LLP**) for the **Defendant**
**Akhil Shah QC and David Murray** (instructed by **DLA Piper UK**) for the **Intervener**

Hearing dates: 6 and 7 November, 2017

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# DECISION

**Lord Justice Gross :**

1. We grant the Claimant ("Monarch") permission to apply for Judicial Review but dismiss its claim. Our full reasons will be given in a judgment, to be delivered in due course.

2. However, with a view to assisting the parties, we now summarise, in the briefest of terms, why we have reached this conclusion.

3. This case concerns slots for take-off and landing at certain airports in the United Kingdom.

4. So far as the parties and we are aware, this is the first court application in this jurisdiction on the part of an insolvent "airline" (to use that term neutrally), asserting an entitlement to and seeking to compel the allocation of, slots for a future season. Here, the slots sought are for the Summer 2018 season ("the Summer 2018 slots").

5. The key facts on the material available to us are these:

   i) Monarch was placed in administration by an order of the Court dated 2nd October, 2017.

   ii) Monarch's Air Operator Certificate ("AOC") was provisionally suspended by the CAA on the 2nd October, 2017.

   iii) Monarch no longer has any aircraft at its disposal through ownership or a dry lease agreement.

   iv) Monarch has no pilots – other than, at most, 3 "historically retained" pilots, currently holding management positions.

   v) The CAA has commenced proceedings (a) to revoke, alternatively suspend, Monarch's Operating Licence ("OL") and (b) to revoke Monarch's AOC.

   vi) Having regard to the reasons advanced on Monarch's behalf for being placed in administration and, amongst other things, the Freshfields letter of 1st November, 2017, there is no more than a theoretical possibility of Monarch emerging as a going concern or resuming the operation of air services.

6. In these circumstances, we reject the Monarch claim that the Defendant slot coordinator ("ACL") was under a duty to allocate the Summer 2018 slots to Monarch by reason of historical precedence ("grandfather rights"). On the facts as summarised:

   i) Any such duty would not accord with the purpose underlying both Council Regulation (EEC) No. 95/93 as amended ("the Slots Regulation") and Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 ("the Licensing Regulation"); and

   ii) Monarch falls outside the language of the Slots Regulation, read in context.

7. It is one thing to permit a "secondary market" in slots. It is another to extend it to companies in insolvency, in circumstances such as those outlined here.

8. Our decision does not require ACL to act as an investigator.

9. The decision in *R v Airport Co-Ordination Ltd, Ex p. The States of Guernsey Transport Board* [1999] EU LR 745 is distinguishable.

10. Whatever flexibility and discretion ACL enjoys in other circumstances to reserve (or postpone) a decision, it is no longer entitled to reserve its decision on the Summer 2018 slots on the facts of this case. That would be to sterilise or distort part of the market, to the potential detriment of third parties, for an uncertain period of time. In this regard, we agree with the case advanced by the Intervenor Airport ("MAG").

11. Accordingly, the consequence of our decision is that the Summer 2018 slots are to be placed in the slot pool.

12. For completeness:

    i) It is unnecessary for us to reach any decision on the so-called "discretionary relief" point.

    ii) As became common ground, the "anti-deprivation" principle is irrelevant; either Monarch (if otherwise right) does not need it; or it does not assist Monarch (if Monarch is not otherwise right).