THE HIGH COURT

[2019 No. 2944 P.]

BETWEEN

ER TRAVEL LIMITED

PLAINTIFF

AND

DUBLIN AIRPORT AUTHORITY ALSO KNOWN AS DAA PLC

DEFENDANT

***EX TEMPORE* JUDGMENT of Mr. Justice Tony O'Connor delivered the 21st day of May, 2019**

Background

1. The head of commercial concessions in the defendant ("*DAA*"), at para. 6 of the first replying affidavit sworn on 1st May, 2019, explained that the DAA is mandated by statute to manage and provide the safe and secure operation of two airports in this State. Dublin Airport is the sole focus of this application for an interlocutory injunction restraining the DAA from interfering with the plaintiff's business model to supply rental cars for users at Dublin Airport.

2. Ultimately, these proceedings centre on the alleged unlawfulness of the DAA's methods to generate and maximise income from concessions for car rentals by passengers passing through Dublin Airport.

3. Three ways for passengers to avail of car rental at Dublin Airport have been identified to date:-

> (i) Go to a concession outlet in the airport which pays a fee based on turnover to the DAA for its office and car rental spaces which are either booked in advance or required on arrival.
>
> (ii) Go to a car rental firm which is situated outside the airport campus by public transport whether by bus, taxi or whatever other means may be available for the public.
>
> (iii) Pre-book and go to a firm, such as the plaintiff, which meets passengers at the airport and brings them to their premises where the car booked can be collected and returned at premises close to Dublin Airport.

4. In scenario (i), DAA enters into contracts after a tender process. Interestingly, expressions of interest have been invited recently for the contracts due for awarding in December 2019. The plaintiff readily acknowledges that it has expressed an interest merely to obtain the information that could be gained about the tender process.

5. In a draft determination dated 9th May, 2019, published by the Commission for Aviation Regulation, ("*Regulator*"), at para. 7.23, DAA is projected to increase its revenue from all concessions from €30.8 million in 2020 to €33.6 million in 2024, estimated to be 12% of total commercial revenues. The Court was informed today that some 9% of that 12% relates to the first scenario by which concessions are granted to car rental firms.

6. Car rental facilities last got an investment, according to this draft determination, in 2007 and reference is made to "*insufficient current capacity*".

7. In scenario (ii), DAA only gets limited income from the public transport providers which may carry passengers from the terminal to premises away from the airport. Paragraph 13 of the fourth affidavit by Ms. Scanlon, sworn yesterday, identifies fees, conditions and permits for chauffeurs, taxis, valet services, off-site hotels and others.

8. In scenario (iii), DAA does not acknowledge any income other than what the plaintiff pays in parking fees for collecting the plaintiff's customers which must comply with the parking rules of the DAA.

9. It should be stressed that the above is a summary background and should not be considered as binding in any way on the parties or on any other court deciding issues between the parties later in these proceedings.

The Alleged Unlawfulness

10. There is little dispute that at least one of the following categories of claim gives rise to a fair issue to be tried at the plenary hearing of these proceedings:-

> (i) An abuse of an undisputed dominant position of DAA in the "*market for car rental services using Dublin Airport facilities"* contrary to s. 5 of the Competition Act 2002, by reason of DAA's effective preclusion of alternative car rental models such as that offered by the plaintiff which could benefit consumers and competition. Creating an artificial market is another way to describe this type of claim. The non-exhaustive examples of abuse as set out in s. 5(2)(b), (c) and (d) of the 2002 Act were mentioned by counsel for the plaintiff and these will probably be pleaded with more particularity in the statement of claim to be delivered by next Friday, 24th May, 2019.
>
> (ii) A public law claim that the bye-laws which have been introduced by the DAA to allow for DAA's controversial interpretation of same are contrary to the enabling legislation. More particularly, the bye-laws are alleged to be *ultra vires* because they are disproportionate to the powers and objectives conferred on the DAA by the Oireachtas (see s. 15 of the State Airports Act 2004). Counsel for the DAA helpfully identified after the luncheon break today bye-law 36 of the Port of Waterford 2015, and bye-law 28 of the Dublin Port Company (revised in 2008), as somewhat analogous to bye-law 10(1) of the DAA which prohibits the use of the Airport *"for any business purpose".* I remain to be convinced that the generality of DAA's impugned bye-law is really that similar to those particular bye-laws.
>
> (iii) An abuse of fair procedures in the exercise of the powers by the Airport Police when there are powers given for the prosecution in the District Court of alleged breaches of the said bye-laws and the Airport Police act as judges in the cause of their employer, the DAA, as opposed to having a judge adjudicate upon the liability.

11. There are variations to the above themes and causes which will be narrowed down hopefully by the exchange of pleadings and submissions before these proceedings come on for hearing. The Court last Friday indicated that it was minded, whatever way the Court decides this application, to direct the delivery of a statement of claim by next Friday and to direct consequential tight deadlines for requests, replies and the close of pleadings, which I will come to later.

12. Since last Friday, the Court has learnt that a plenary hearing of the most serious allegations including those involving the Competition Act will be facilitated in the Competition List in July or October 2019, if the parties cooperate and meet the deadlines which are set out later.

13. The suggestion of the plenary hearing in spring 2020 should be discounted at this stage, therefore. The Court notes that it is in the interests of the defendant to progress to a plenary hearing soon so as to provide certainty for those who will be applying for concessions to be granted in December 2019, and for its own budgetary demands. The plaintiff needs to provide certainty for its customers, partners and intermediaries which play some part in the relationships which the plaintiff has with its customers.

Relevant History

14. The business model of the plaintiff commenced with the establishment of Easirent in the north west of the United Kingdom in 1999. The plaintiff uses the website www.easirent.com which facilitates bookings in Ireland, the UK and Florida. The plaintiff "*was registered in September 2015*" and is a related company within the meaning of s. 2(10) of the Companies Act 2014 with ER Travel Services Limited, the latter having advanced some €525,000 in 2016 by way of loan to the plaintiff.

15. The plaintiff received "*cease and desist*" letters from the DAA on 30th March, 2016, 5th July, 2016, and 15th August, 2016, leading to the plaintiff's solicitors calling, by letter dated 6th August, 2016, for an undertaking that the plaintiff's employees would not be prevented from collecting clients or being threatened with arrest by the Airport Police.

16. Further exchanges of correspondence then occurred leading to the issue of seven summonses in Swords District Court which were ultimately struck out in September 2017, and March 2018, without any determination on the merits of those prosecutions. The plaintiff complains that the defendants have not discharged its costs of those proceedings. The tension between the parties abated while the plaintiff sought an negotiated way out of the impasse and paid car park fees due for cars used in collecting customers. A further, and a most recent cease and desist letter, dated 2nd April, 2019, was followed by the drivers engaged by the plaintiff in early April 2019 being stopped which allegedly caused embarrassment to the plaintiff in front of its customers.

17. Communications had occurred in May 2018 about a mediation but the parties remain evermore engaged in their dispute which leads to the issue of the plenary summons herein on 10th April, 2019, with leave on that date to issue and serve short notice of the notice of motion returnable for 7th May, 2019.

18. Last Friday, 17th May, 2019, four lever-arch folders containing affidavits, exhibits, authorities and submissions were submitted to the Court with leave granted for further affidavits to be sworn and filed by agreed times yesterday, Monday, 20th May, 2019. After all is said and done the plaintiff has limited its application at the prompting of this Court to the following relief as might be more refined again by the Court to:-

> *"an injunction pending the determination of these proceedings restraining the defendant from interfering with the plaintiff's access to and use of the short-term car parks at Dublin Airport in order to collect its customers provided such collection is in a manner that does not cause disruption or inconvenience to other users of the facilities at Dublin Airport."*

Principles Issues for this Interlocutory Injunction Hearing

19. Mr. Doherty SC for the DAA submitted, *inter alia*, that:-

> (i) Damages will be an adequate remedy for the plaintiff if it succeeds at trial because it can keep records while directing passengers to use public transport to get to the plaintiff's premises.
>
> (ii) If damages were not an adequate remedy, the Court should find that damages are not an adequate remedy for the DAA because of the undetermined effect on terminals, the undermining of its concession policy and the imminent tendering due for award in December 2019.
>
> (iii) The plaintiff by this action is actually upsetting the actual *status quo* which is the known unlawfulness of the plaintiff's model for providing rental cars in the context of the bye-laws 2014 which prohibits, at bye-law 10, *inter alia*, (1) use of the airport for business purposes, (5) performing any business activity and (15) leaving a vehicle at an airport longer than is reasonably necessary other than as permitted by the DAA.

20. Most significantly, Mr. Doherty emphasises that the plaintiff is actually seeking a mandatory injunction requiring the DAA to facilitate the car rental business model of the plaintiff which the plaintiff cannot foist on the DAA given the DAA's statutory objectives and policies to recover revenues which will reduce the individual capitation fees for passengers as outlined in the Regulator's paper 4/2010, entitled 'Defining the Regularity Till', published on the 30th November, 2010, and more particularly section 3, which refers to Single-Till and Dual-Till Regulation.

21. The defendant not only submits, relying upon the judgment of Clarke J. in *Okunade v. Minister for Justice & Ors* [2012] 3 I.R. 152; [2012] IESC 49, ("*Okunade*"), that the plaintiff in these circumstances is obliged "*to put forward, in a straightforward way, a case which meets the higher threshold*" of probable success, (para. 80), but also argues that the Court "*cannot simply assume at this stage that the applicants would not be entitled to recover damages if they were ultimately successful*" in their claim involving alleged rights. The last quoted words are taken from the judgment of Ní Raifeartaigh J. in *Fitzpatrick v. Minister for Agriculture, Food and the Marine* [2018] IEHC 77, (unreported, High Court, 11th January, 2018), ("*Fitzpatrick*").

22. The judgment of Finlay C.J. in *Curust Financial Services Ltd v. Loewe-Lack-Werk* [1994] 1 I.R. 450, ("*Curust*"), looms large in the resistance of the DAA to this application. Three particular issues arise which this Court needs to consider:-

> (i) Whether there is an impossibility of assessing damages for the applicant if the sought injunction is declined.
>
> (ii) Is the loss exclusively a commercial loss in what has been a well-established market until the plaintiff entered with its model in 2016 and which has continued with the history of District Court summonses and cease and desist letters?

(iii) Is this an application directing the DAA to facilitate the plaintiff to share the Dublin Airport car rental market?

The Effect on the Plaintiff and its Customers
23. Mr. Paul Hanley, in his supplemental affidavit sworn on 7th May, 2019, took issue with the suggestion that damages would be an adequate remedy. He set out at para. 15 that the DAA discloses "*a peculiar grasp of the concept of customer service*". He averred:-

> "*Asking customers to join a taxi queue to get to our offices is unreasonable for many reasons:-*
>
> *(a) the queue can be substantial which adds to an already long journey, the customer has endured;*
>
> *(b) the taxi drivers do not like short journeys so further adds to the poor service by voicing this to the customer and sometimes refusing the fare;*
>
> *(c) the cost per journey range from €10 to €12 depending on the attitude of the driver."*

24. He further averred that the repeat business makes up 45% of the plaintiff's business and he anticipates a huge impact if the DAA persists in its current stance.

25. In his fourth affidavit sworn last Thursday on 16th May, 2019, Mr. Hanley averred further that its second largest partner, which has a link with Ryanair, refused to continue its sale of the plaintiff's services at Dublin Airport until the "*issue had been resolved*".

26. Yesterday a further affidavit sworn on behalf of the DAA took issue with the length of queues for taxis and identified that taxi drivers who have a short fare are given priority if they are returned to the airport within 20 minutes. It is quite clear that the parties to these proceedings are at loggerheads about perceptions, attitudes and effects on their customers.

Significant Points of this Interlocutory Application
27. Sifting through the informed submissions, I identify the following core questions:-

> (i) Is the plaintiff required to meet the probability of success at plenary trial test because the injunction sought is mandatory in nature by seeking to compel DAA to facilitate the scenario (iii) which the plaintiff has operated since 2016, with revenues going from nearly €1.5m in 2016 to nearly €2.9m in 2017, to about €4.5m in 2018, albeit with tight net profits.
>
> (ii) Will damages be an adequate remedy for the plaintiff if it succeeds?
>
> (iii) Would damages be an adequate remedy for the DAA if the injunction was granted and DAA was successful at the plenary hearing?
>
> (iv) What is the *status quo* and should it be maintained?

28. The original application, whatever way one looks at it, requires the defendant to give an interpretation and an application of its bye-laws which the DAA has adamantly refused to do because of its mantra that it is fulfilling its duty and mandate from the Oireachtas and the Regulator to maximise revenue from the management of Dublin Airport in order to reduce the *per capita* charge for passengers using the airport.

29. Mr. O'Keeffe SC, counsel for the plaintiff, cogently submitted that the Court need not decide that issue if the Court accepts that the *Campus Oil* principles apply to the claim based on an abuse of a dominant position.

30. As attractive as that argument might be to save the Court time and the parties more trauma, this Court must have regard to the law as more recently summarised and applied by Ní Raifeartaigh J. in *Fitzpatrick* from paras. 63-67, which I will not quote in this judgment.

31. It behoves the applicant in an application directing the State, a State authority, and in this case a company established with statutory obligations and duties to, in the words of Clarke J. in *Okunade* at para. 80, *"put forward, in a straightforward way, a case which meets the higher threshold".*

32. On an interlocutory injunction application where facts are disputed on affidavits and where there will be an expedited and rather imminent plenary hearing, it is somewhat invidious for the Court to determine whether the plaintiff will probably succeed in its claim on the public law issue or the competition law issue.

33. I listened attentively to Mr. O'Keeffe's submission that the judgment in *Fitzpatrick* can be distinguished because there it was sought to compel the State to do something in a very particular way. Active verbs occurred in that case whereas the plaintiff submits that it can live with the *status quo* which has existed from 2016 until the most recent cease and desist letter.

34. Although there may be reservations about the generality of the bye-laws introduced, interpreted and sought to be applied by the DAA, it remains for this Court or another division of this Court to determine at a plenary hearing if the DAA has introduced or continues to apply bye-laws with a *prima facie* validity in an unlawful, unconstitutional manner or contrary to the provisions of the Competition Act 2002. The submission that there is a fair issue to be tried about a breach of s. 5 of the Competition Act 2002 is rather compelling despite Mr. Doherty's robust defence based on the effect of the tendering process on the market.

Will damages be an adequate remedy for the plaintiff?
35. The Court facilitated the plaintiff by giving liberty for a further affidavit to be filed yesterday after the opening of this application last Friday. The judgment of Finlay J. in Curust and the last paragraph thereof at p. 471 is particularly apposite.

36. Mr. Hanley avers in his first affidavit that the plaintiff will inevitably have to cease trading. With all due respect to Mr. Hanley's fears, this does not withstand the scrutiny and scepticism cast by the DAA and its legal representatives on the way it has been portrayed.

37. I have not been persuaded on the balance of probabilities that this will occur. The plaintiff has survived and, in fact, thrived (at

least in turnover terms) in the limbo-like scenario. However, I do think that it would be fair to the plaintiff to be given an opportunity to apply at a later stage for a more refined order which will allow the tenuous *status quo* to be maintained if there is significant new evidence of irreparable damage actually being caused by virtue of the alleged abuse of a dominant position by the DAA.

38. Since I pose the question and as this application may be refined in another court or by way of further application, I determine on the facts presently available that damages could be ascertained and would be an adequate remedy for both parties, however this application for an interlocutory restraint order was determined.

39. Given that it is the intention of the Court, the parties and the indication given by the competition division of the High Court to progress these proceedings to an early hearing and determination, the months and sums of lost revenue and custom are capable of assessment. If the parties require directions about maintaining records for that eventuality, I can hear such an application in early course.

What is the *status quo*?
40. Scenario (iii) continues to operate; the plaintiff may be prosecuted in the District Court by the DAA. There is no injunction preventing the plaintiff from using the short-term car park or from giving directions to its customers on how to get to its premises.

41. The DAA's priority of maintaining secure access into and around the airport has not been threatened by the plaintiff's activities. The sole issue concerns the power of officers of the DAA to interpret and apply the bye-laws in the manner which is sought on behalf of the DAA according to the cease and desist letters.

42. The plaintiff is entitled to keep account of all complaints and payments made by, to or on behalf of its customers or partners to access the airport before or after hiring the plaintiff's vehicles on its premises outside the airport. The opportunity remains for the plaintiff to refine its application further if matters escalate before the plenary hearing. In those circumstances, I respectively decline to grant the interlocutory injunction actually sought in the notice of motion but will give the following directions to facilitate an early hearing and to grant certainty to the commercial activities involving the parties and parties related to these proceedings:-

(i) By 5pm Friday, 24th May, 2019, the statement of claim to be delivered;

(ii) By 5pm on Thursday, 30th May, 2019, the defendant's solicitor to furnish requests for particulars and a preliminary identification of accepted facts such as whether the DAA has a dominant position or not in the relevant market to be identified in the statement of claim;

(iii) By Friday, 31st May, a joint application will be made to the judge in charge of the Competition List to admit these proceedings to that List;

(iv) By 5pm on Thursday, 6th June, 2019, which is the last day of this term, replies to particulars with notice to admit documents and facts to be served on behalf of the plaintiff;

(v) By 4pm on Wednesday, 19th June, 2019, which is the beginning of term, defence and proposed list of core documents for the trial and replies to notices to admit documents and facts to be delivered;

(vi) By 5pm on Wednesday, 26th June, the reply to the defence to be delivered by the plaintiff and each party to furnish all outstanding requests whether for discovery, admissions and lists of witnesses (with an outline scope of the evidence) intended to be called at the plenary trial;

(vii) By 5pm on Tuesday, 2nd July, 2019, the solicitors for the parties to have met with or without counsel, and replies to all outstanding requests duly served with a view to preparing for a further case management hearing before this Court or the Competition Court, if the Competition Court adopts these proceedings, and to set a date for the hearing of any interlocutory application by the end of July 2019, and the objective to secure a date in Michaelmas Term 2019 for the plenary hearing of these proceedings.