

THE HIGH COURT

[2012 No. 445 M.C.A.]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000/2012 AND IN THE MATTER OF AN APPLICATION PURSUANT TO S. 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

DUBLIN AIRPORT AUTHORITY PLC

APPLICANT

AND

J.D. MOTORLINE LIMITED, ADRIAN STOKES AND SIMON STOKES

RESPONDENTS

AND

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BETWEEN

DUBLIN AIRPORT AUTHORITY PLC

APPLICANT

AND

DANIEL MULVIHILL, JOSEPH CAREY, MAURICE CASSIDY, EDWARD CAREY AND PEARSE FARRELL

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 13th day of November 2013.

1. Both cases involve an application by the plaintiff pursuant to s. 160(1) of the Planning and Development Act 2000, as amended (hereinafter "the Act of 2000"). In each instance the plaintiff as operator of Cork Airport seeks to prevent the operation by the respondents of a private long term car park in the vicinity of Cork Airport. The car parks in question which are in proximity to each other and to Cork Airport are in competition with the public parking facilities provided by the applicant at the airport. The airport which underwent a major redevelopment between 2003 and 2005 provides car parking facilities for both short term and long term parking.

2. The provision of car parking spaces at the airport generates income for the applicant. A number of the issues that arise for consideration are common to both cases and for that reason is it both appropriate and convenient to deal with both cases in the course of one judgment. There are, though some aspects that apply in particular to one or other of the challenged car parks. It is therefore appropriate to deal with the facts and the arguments made in relation thereto in respect of each car park in turn.

3. So far as the case of J.D. Motorline Limited and Adrian and Simon Stokes is concerned the application relates to a premises known as Airport View, which is located approximately 1km southeast of Cork Airport. The premises are owned by the second and third named respondents and the first named respondent has since 2011 carried on and operated a public car park. In addition to the provision of car park spaces, there is also some ancillary activity in the form of a car washing/valeting service. Objection is taken by the applicant to the operation of the car park, to the ancillary activity and to the associated display of signage. It is of some note that at one stage the first named respondent had extended its car parking operation on to an adjacent hockey pitch owned by Cork Harlequins Hockey Club. However, following correspondence between the solicitor for the applicant and solicitor for the Hockey Club, parking of vehicles on the pitch was discontinued and the present proceedings relate only to the lands owned by the second and third named respondents. The lands in question which amount to some 0.36 hectares are for the most part comprised in Folio 47911 of the Register of Freeholds, Co. Cork, while a smaller part of the lands is contained in Folio 84839F.

4. Attention is drawn to the existence of the car park by the erection of signage. For the present the signage indicates that parking is provided at a cost of €5 *per* day, which is significantly less than had been charged by the applicant. Sheds and portacabin type structures had been provided on the site. From the outset the car parking operation has involved the provision of a mini-bus shuttle service ferrying customers to and from the airport terminal.

5. The history of the site prior to the commencement of the car parking operation is of some significance. In that regard it appears that prior to the commencement of the car park, that the area was used for storing scaffolding associated with a scaffolding business and that at one stage a car sales yard operated from there. The longer term history of the site is of interest and potentially of considerable significance. In 1973 planning permission was granted for a horse drawn caravan business to be operated from the site. Then, in 1977 there was a revised permission for the provision of camping and caravan services.

6. By reference to this historical background, the third named respondent has made the case that the current Airport View Car Park, which is the subject matter of these proceedings, has been in use since 1973 for temporary public storage services, including the parking of wheeled vehicles and the collection, delivery and maintenance of horse drawn caravans and for the holiday and vacation use of travellers including tourists and associated complementary uses and that no intensification of use has ever occurred. In particular an assertion to that effect was advanced in the course of a letter dated the 21st February, 2013, sent to Cork County Council in response to warning and enforcement notices issued by Cork County Council. In my view the use of the site as a public car park is materially different to what has gone on before. Insofar as vehicles were parked during the horse drawn caravan phase, the caravan camping phase or the scaffolding storage phase, this was all ancillary to the main activity and is in any event altogether different in character to the operation of a public car park on a commercial basis. In that regard, the scaffolding use would appear to have been itself unauthorised, but insofar as there was an element of cleaning and storing of vehicles this was an ancillary unauthorised use.

7. Insofar as reliance is placed on its former use as a caravan/camping site between 1973 and 1999, that use was one that was associated with leisure/recreational activity or one form or another and is quite different to use as a public car park. A public car park gives rise to quite different planning considerations. Even if one puts to one side that the caravan/camping use ceased and was replaced by the unauthorised scaffolding use, there is no question of leisure recreational activities evolving into what is now occurring.

8. There is, in my view, nothing in the former history of the site that provides an authorisation for its current use as a public car park, or to put it somewhat differently, there is nothing in the history of the site that would disentitle the applicant to the orders that it seeks, but in that regard, I note that the question as to whether what has taken place at Airport View is development, or exempt development has been submitted to Cork County Council and to An Bord Pleanála by way of a reference pursuant to s. 5 of the Act of 2000, resulting in a conclusion that the use of the site as a commercial car park was development and was not exempted development.

9. However, it does not follow from the conclusions that I have reached in relation to the history of the site that the orders sought in the notice of motion dated the 17th December, 2012, should follow as a matter of course. The notice of motion had sought orders restraining the operation of a public car park as well as orders requiring that the valeting operations cease and further orders requiring the removal of advertising signage, lighting standards, fencing and a portacabin. But it does not follow these orders should follow as of course at this stage. That is because even if an applicant satisfies a court that an unauthorised development has taken place, the court still retains a residual discretion to be exercised in deciding whether to grant or refuse injunctive relief. In this case the respondents have raised a number of issues which they say are relevant to the exercise of the discretion, and which they contend should result in the court deciding in its discretion not to make the orders sought or certainly not making orders designed to have immediate effect. In the first place, the respondents point to the fact that the applicant is a competitor and it is said that this application is prompted by commercial considerations. Indeed it said when regard is had to other proceedings that have been taken by the applicant, that it is the case that the proceedings are prompted by a desire on the part of the applicant to operate as a monopoly. It is almost unnecessary to state that commercial considerations on the part of the competitor rival are not a bar to seeking relief under section 160. See in that regard the case of *National Federation of Drapers and Allied Trades Limited v. Allied Wholesale Warehouses*, Irish Times, 29th November, 1979, referred to in Simons, *Planning and Development Law*, 2nd Ed. (Dublin, 1997) at para. 7.169. Indeed, in my experience it is not at all unusual for applications to be brought by competitors. In part this may be because of a belief on the part of the complaining party that it is required to operate at a competitive disadvantage if its competitor is permitted to operate without regard to planning restrictions.

10. However, while the presence of a commercial motive is not a bar to relief that is not to say that it is always a wholly irrelevant consideration. I will return to this aspect.

11. The respondents have pointed to certain conduct on the part of the applicant which it is argued should see relief being refused. The conduct in question being the unauthorised erection of a banner advertising cheaper car parking charges, which was unauthorised and gave rise to safety concerns and more directly in point the unauthorised use of part of the airport campus as a overflow car park.

12. The fact that an applicant is in breach of a planning obligation does not, without more serve to disentitle it to relief. See *Fusco v. Aprile* (Unreported, High Court, Morris P., 6th June, 1997). In this case the complaint in relation to the car park does not reveal particularly grave or reprehensible misconduct. The area in question is not now and has not for some time been used as a car park. It is true that the area in question was used for car parking during the course of the construction of the new terminal, but the criticism that is made of the applicant is that when the construction phase concluded, the area was not restored to its original state as ought to have happened. This is not a case of a car park operator seeking to shut down a competitor from operating without planning permission while itself continuing to provide a service without planning permission. Rather, the default is more limited in character and in my view is not such as to justify the withholding of relief to the applicant. However, in the overall assessment that I have to make, I am prepared to have some regard to this, but only to a very limited extent.

13. Arguments have also been advanced in relation to hardship and disproportionality. It is pointed out that the second named respondent is retired and relies on the rental income obtained from the first named respondent to supplement his pension, while the scaffolding business of the third named respondent has fallen victim to the downturn in the construction industry so that his capacity to support his family is dependent on the rental income derived from the first named respondent. On behalf of the first named respondent it is pointed out that a business has been built from scratch which has involved hard work and long hours. The business provides employment and indeed at one stage there were nine employees.

14. These are considerations of some significance. However, if it was clear that the business being carried out was inappropriate in planning terms and that planning permission was unlikely to be ever obtained, they would not be sufficient to result in the orders sought, being refused.

15. A factor to which I place some attention is that it is not clear that the existence of the car park and its location represent a planning mismatch. Car parks are frequently located close to airports. The history of the location might broadly be described as being commercial in character. It is beside the Airport East Business Park and the actual location has seen commercial activity of one sort or another over 35 years, whether as a horse drawn caravan base, camping and caravan site, car sales yard or scaffold storage area. It is likely that its future will involve some form of commercial activity.

16. To state the obvious, this is an application that is brought under a section of the Planning and Development Act 2000, as amended. However, planning considerations that will often arise in such cases such as noise, damage to the environment, traffic, change of character to the area and so on have not featured to any great extent. Instead, what might be described as economic

arguments have been to the fore. The first named respondent in resisting requests that it cease operating the car park has sought unsuccessfully to invoke various provisions of the Competition Acts.

17. It does seem to me that there are important planning questions with an economic and public interest dimension that arise and merit consideration. These issues include whether the applicant should have to face competition from a number of competitor businesses in close proximity to the airport? Whether the public interest is served by offering the travelling public a choice as to where to park? Whether the public interest is served by open competition with prices driven down as a result?

18. It seems to me that it is desirable that the suitability of the site to serve as a car park should be considered by those expert in planning at planning authority level and if necessary at An Bord Pleanála.

19. In a situation where what has occurred is an unauthorised development, I am not prepared to refuse the reliefs sought in an unqualified fashion. However, in a situation where the car park business has been operated according to the present model by the first named respondent in this general location since 2009 and where the notice of motion is dated only the 17th December, 2012, in my view it would be disproportionate and oppressive to make the orders sought at this stage with the result that the business would almost certainly close. If that happened it might be difficult or impossible to re-launch the business even if a favourable view was taken by the planners.

20. In that regard, I note that a number of the cases dealing with how a discretion should be exercised refer to planning and environmental considerations. So, in *Morris v. Garvey* [1983] I.R. 319, Henchy J. remarked at p. 324:-

"When subs. 2 of s. 27 is invoked, [the statutory predecessor of s. 160] the High Court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. In carrying out that function, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission."

21. In this case it has not been established that the environmental and ecological rights and amenities of the public are under threat. By the same token in *Lanigan v. Barry* [2008] IEHC 29 (Unreported, High Court, Charleton J., 15th February, 2008), Charleton J. describes his role in relation to s. 160 as follows at para. 45 of the judgment:-

"... to restrain major breaches of the planning code which have flaunted the legal rights of the community in favour of an unrestrained action that has seriously impacted on the character of a quiet area and the reasonable use by neighbours of their farms and dwellings."

22. I am not making any assumptions that if a decision is taken on planning, environmental and ecological grounds and has regard to economic considerations, to the extent that is permissible, that it would result in planning permission being obtained. However, it is not clear to me that would not be the outcome and it seems to me proper and proportionate to permit an application for planning permission to be processed and to stay the making of orders for a reasonable period to allow this to happen. I will discuss with counsel the mechanics of what I have in mind and what can be done to expedite this process.

23. Turning now to the second case, the case of Mulvihill and Others relates to a car park operation known as Airport Lodge. It is located near the N27 roadway, the -- main Cork to Kinsale road. Again, the car park is aimed primarily at those using Cork Airport with a mini- bus shuttle service carrying customers between the airport and -e car park. Associated with the car park are some ancillary activities such as car valeting and somewhat more unusually tyre sales. While it would be possible for someone to go to Airport Lodge to have a car valeted who is not intending to use the car park this would be very unusual. By a notice of motion dated the 17th December, 2012, the applicant seeks orders prohibiting the use of the site as a public car park. Ancillary orders are sought in relation to car valeting, tyre fitting, signage, lighting standards and the removal of a portacabin. When challenged on its operation of the car park, the respondents submitted an application to Cork County Council and subsequently to An Bord Pleanála pursuant to s. 5 of the Planning and Development Act 2000, which resulted in a determination that the operation of the car park was development and was not exempted development.

24. Against that background, the respondents have conceded that the operation of the car park is an unauthorised development. Indeed, so far as the portion of the site that was being used for car parking purposes is concerned, the respondents have prior to the hearing and indeed during the hearing agreed to discontinue use of that portion of the lands. However, so far as the main area of the site is concerned, the respondents contend that the applicant is precluded from invoking s. 160 because the use has continued for more than seven years. This indeed is the principal issue in this case. However, in addition, the respondents contend that if the activity is not as they suggest, immune from restraint, that the court should in the exercise of its discretion refuse to make the orders sought. Section 160(6)(a)(i) of the Act of 2000, provides as follows:-

"An application to the High Court or Circuit Court for an order under this section shall not be made

(i) in respect of a development where no permission has been granted, after the expiration of a period of 7 years from the date of the commencement of the development."

25. Insofar as the respondents are contending that an unauthorised use enjoys immunity, the onus is on them to establish that the use commenced more than seven years ago and has continued. The contention by the respondents that the unauthorised use of the site as a car park is immune from restraint is based on the fact that it was used in the past by car rental companies for car parking/car storage and the fact that rental cars were cleaned and valeted on the site.

26. On behalf of the applicant it is said that the use of the site as a commercial car park is different in character to what went before. In any event, it is said that even if one views the use as a car park as representing a degree of continuity with the car rental activity that there has in any event been a major intensification amounting to a material change of use, for which planning permission would be required.

27. If one looks at the car parking operation and the car rental operation, it must be said that there are significant similarities in some areas. At its most basic, each involves the placing of vehicles on the site. A passer by looking over the boundary fence would see cars parked or vacant parking spaces whether the cars there were rental cars or cars parked by owners. Both businesses will at least to an extent be seasonal in nature with the greatest level of activity during the summer months and at times such as Christmas and Easter. Activity on site in the case of both businesses will be linked to activity at the airport and the number of flights landing and taking off at particular times. Both businesses require mini - bus shuttle services to link the site with the airport terminal to mention

just some of the similarities. However, equally it must be recognised that there are differences. During the rental car period it seems that it was not unusual for cars to be moved up by the operators from where they were stored and brought to the customer at a location nearer the terminal. In the case of car parking the entire commercial transaction takes place on site, while in the case of car rental the transaction will take place in advance or at the car hire desk in the airport terminal. The business model differs most significantly in this respect in that a successful day for the car park business will see the car park full or nearly full while a successful day for the car rental companies will see few cars on site as the rental cars will be out on the roads of Cork and Kerry being driven by those who have hired them. Having had regard to the similarities of the operation and the differences and trying to form a view in the round as to how a car park and car rental business operates, I have come to the view that a commercial public car park is a use of significantly different character to the parking or storage of cars as part of the operation of a car rental business. If the issue is considered in terms of the intensification of use a similar conclusion is reached. It is of course the case that not every intensification amounts to a material change of use. However, it seems to me that a public car park is bound to generate a considerable level of activity with implications for traffic, noise and so on and that the activity level associated with a car park will be very appreciably greater.

28. A further indication that there has been an expansion and intensification is to be found if one compares photos taken in 2003, 2006/07 and 2012. The 2003 photos showed 30 cars, the 2006/07 showed between 60 and 70 and the 2012 photo, showed approximately 120 cars. I do of course appreciate that the photos are quite literally snapshots in time. I accept, too that an increase from 30 to 120 cars over this period would probably not of itself amount to a change in use, but taken in conjunction with the change in the nature and intensity of activity, the increase in numbers is of some significance. I would add that in concluding as I have, that the use as a car park is use of a different character, that I have taken into account that an airport car park operates somewhat differently than say a multi-storey car park in an urban area where constant comings and goings are the norm. Airport parking provided at a distance from the terminal is normally longer term parking and so the environmental impact will be less because the number of comings and goings would be less. However, while conscious of that I have nonetheless reached the conclusion that I have indicated. Accordingly, in my view, the applicants are not precluded from invoking the provisions of section 160 of the Act of 2000.

29. There remains for consideration, whether the court in the exercise of its discretion should make the order sought.

30. The arguments advanced on this topic echoed the arguments that were made in the J.D. Motorline case and I have reached similar conclusions, so I confirm that in my view the applicant is not precluded from seeking the reliefs that it does by reason of the fact that it is a commercial competitor of the respondent, though as I have indicated I do not regard the motivation of the applicant as entirely irrelevant. Neither, am I of the view that the applicants' conduct has been such as to disentitle it to relief. Insofar as these respondents have emphasised that there was a failure to disclose relevant planning history on the part of the applicant and insofar as they contend that this is indicative of a lack of candour, I do not believe that this is a criticism that is justified.

However, as I indicated in the earlier part of this judgment, dealing with the Airport View Car Park, I believe that there are significant planning issues with an economic/public policy dimension that merit consideration. As in the case of J.D. Motorline I am prepared to stay the orders sought and which I am disposed to make in order to facilitate the respondents making an application to the planning authority and if necessary to An Bord Pleanála. In that regard, I should explain that in this case, that in concluding that it is not one where orders taking immediate effect are appropriate that I have been influenced by the history of the site and the fact that there has been car parking on the site for many years associated with the car rental business, but also with the provision of a car park associated with a guesthouse. Even if the history of the site is not such as to render the operation of the car park immune from restraint, it is still in my view a relevant consideration in determining how a discretion should be exercised and in particular relevant to the question of whether orders need have immediate effect.