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Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered:

IN THE HIGH COURT OF JUSTICE IN NORTHRN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KINNEGAR RESIDENTS' ACTION GROUP, PARK ROAD AND DISTRICT RESIDENTS' ASSOCIATION, OLD STRANMILLIS RESIDENTS' ASSOCIATION, BELFAST HOLYLAND REGENERATION ASSOCIATION and CULTRA RESIDENTS' ASSOCIATION FOR JUDICIAL REVIEW

and

IN THE MATTER OF A RECOMMENDATION AND REPORT BY W H WALKER CBE CEng FI Stuct E (Chairman), C SWAIN OBE MA Cantab MPHIL FRTPI and S McDOWELL CBE AS MEMBERS OF THE EXAMIANTION IN PUBLIC PANEL (EiP Panel) IN RESPECT OF ISSUES RELATING TO THE BELFAST CITY AIRPORT PLANNING AGREEMENT 1997

and

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF ENVIRONMENT PLANNING SERVICE ON 30 JUNE 2004 PURSUANT TO ARTICLE 41 OF THE PLANNING (NORTHERN IRELAND) ORDER 1991

GIRVAN LJ

Introduction

[1] The applicants are representatives of a number of groups representing local residents in various areas in Belfast and North Down who are concerned about the effects of air traffic travelling in and out of Belfast City Airport ("the Airport"). They bring these judicial proceedings in relation to the recommendations contained in paragraphs 5.6.37 and 7.1.11 of a report prepared by a panel appointed by the Department of the Environment ("the

DOE") to conduct an independent examination in public of the key issues relating to a planning agreement relating to the Airport between Belfast City Airport Limited ("BCA")and the Department. The report bears the title "The EiP Panel Report ." In this judgment I shall refer to it as "the Report".

Background to the application

[2] The Airport was formerly a private aerodrome associated with Short Brothers and became a commercial airport in 1983. During the war years the aerodrome was used in connection with the war effort. Civilian use recommenced in February 1983. It acquired the name Belfast City Airport in 1998. The implications of the future growth of the Airport was considered in the Belfast Harbour Local Plan 1990 to 2005 prepared under the auspices of the Belfast Urban Area Plan 2001. The Planning Appeals Commission ("the PAC") which conducted a public inquiry concluded that the Airport had existing user rights, that intensification of use did not constitute a change of use and that a planning agreement might be an appropriate way to control operations at the airport. Mr Warke, the relevant member of the PAC, in his report considered that control of airport growth in terms of numbers must be assessed within the context of the lawful existing user rights of the airport operator. Controls which would limit the growth of the airport operations below that which represented by the potential of existing facilities would in his view be unreasonable. He saw no need for any restrictions on annual passenger levels as this would largely be dictated by the capacity of the terminal building which could cope with up to 1.5 million passengers per annum. That of course left open the question what should happen if the terminal building itself changed and expanded.

[3] A planning application in 1993 to alter and extend the terminal building created an opportunity to introduce a planning agreement. Such an agreement was entered into under article 40 of the Planning (Northern Ireland) Order 1991 in April 1994. Although the development work to which the planning agreement was attached was not in fact carried out the 1994 planning agreement was not rescinded and remained until superseded by the current planning agreement entered into in January 1997 ("the Planning Agreement").

[4] The Planning Agreement made between BCA, Short Brothers plc and the DOE contains restrictions on hours of operation ("ATMs"), limits the number of aircraft movements to 45,000 air transport movements in any 12 month period and contains a term in relation to seat sales as follows:

> "Not to permit operators using the aerodrome to offer for sale on scheduled flights more than 1,500,000 seats from the aerodrome in any period of 12 months."

[5] In 1999 planning permission was sought and granted for the construction of a new Airport terminal with considerably larger passenger capacity.

[6] Since the commencement of the Planning Agreement activities at the Airport have grown steadily. After 2004 the number of seats for sale has exceeded the permitted maximum although the permitted number of overall aircraft movements has not been exceeded. There have been two significant developments in particular since 1997 namely the opening of the new terminal building in 2001 and the commencement of a BMI service to London Heathrow which increased passenger numbers by 56%. BMI uses larger aircraft than the other airlines using the airport although those other airlines have also upgraded their fleets and introduced somewhat larger aircraft.

[7] In its 2003 White Paper "The Future of Air Transport" in the chapter dealing with Northern Ireland the Department of Transport suggested that the DOE in Northern Ireland should review the Planning Agreement if requested to do by the Airport operator. In July 2004 BCA made such a request. In October 2005 the Minister announced that the next step in the process should be an examination in public conducted by an independent panel. When announcing the setting up of the panel the Minister stated that his officials believed that passenger numbers were not an appropriate measure to control the operations at the airport. The EiP Panel was appointed in late January 2006. Its terms of reference were to conduct an independent examination in public of the key issues relating to the existing planning agreement. In exercising its functions the Panel were to have regard to the existing planning agreement, the submissions from the Airport in relation to the basis for the request for a review of the agreement, representations made in respect of the public consultation exercise, the DOE's position as outlined by the Minister in his announcement about the EiP, the legislation governing the control of noise at airports together with the ongoing work by the Department of Regional Development in relation to such noise and the relevant planning legislation and published policy guidance in Northern Ireland.

[8] The Report in section 7 sets out a range of recommendations dealing with air approaches to the Airport, aircraft types, hours of operation, aircraft movements, noise contour monitoring and the seats for sale condition. It made recommendations for immediate improvements in ways of working and made suggestions for longer term improvements.

The impugned provisions of the Report

[9] The applicants' challenge focuses in the Report on the recommendations made in relation to the seats for sale restrictions in the Planning Agreement. In paragraph 5.6.37 the Panel stated:

"We therefore recommend amending the numerical level of restriction 3 from 1.5 to 2 million seats for sale from the airport, subject to –

(c) setting up a proper forecasting and scrutiny system; and

(d) the airport operator committing to instal noise and track keeping equipment in association with their new primary and secondary radar (see paragraphs 5.7.23 and 24)."

The summation at the end of the Report repeats the same recommendation. Paragraph 5.6.37 must be read together with the rest of the Report and in particular together with 5.6.38 to 5.6.41.

[10] The applicants refer in particular to the contents of paragraph 5.6.31 of the Report which, they contend shows that the recommendation in paragraph 5.6.37 is based on a false premise. Paragraph 5.6.31 reads as follows:

> "In seeking to establish a sensible numerical level, we have started from the assumption that if the airport operator had requested an increase in seats for sale at the time of the planning application for the new passenger terminal in 1997 then it would probably have been capable of being negotiated through a new planning agreement. This will probably have used the previous method of calculation linked to the estimated capacity of the new terminal and an assumed occupancy factor (see paragraph 5.6.2). In 1999, the estimated terminal capacity was 2 million passengers, as assumed in the EIS. Allowing for an occupancy factor of 6% would give 3.3 million seats for sale, or divided by two 1.67 million seats from the airport. This compares with the 1.7 million seats for sale that were actually offered in 2005".

The Article 41 determination

[11] On 3 March 2003 BAC applied to the DOE under article 41 of the Planning (Northern Ireland) Order 1991 (which was the then applicable statutory provision) for determination of the question whether the carrying out of the operations or the making of the change of use described in the application would constitute or involve development requiring planning permission. The operation proposed was described as "the permitting of operators using the aerodrome to offer for sale on air transport movements

programmed to use the aerodrome up to 2.5 million seats from the aerodrome in any period of 12 months." In a letter dated 30 June 2003 the DOE replied stating that it was not considered that an application for permission was required in relation to the proposal. That determination was made on the consideration that the increased offer for sale did not constitute development for the purposes of the planning legislation. The letter went on to state:

> "The Department would also draw your attention to observing the covenant in the current planning agreement dated 27 January 1997 restricting the offer for sale on scheduled flights to 1,500,000 seats from the aerodrome in any period of 12 months."

The applicant's challenge to the Article 41 determination

[12] Mr Lockhart QC on behalf of the applicants contended that the article 41 determination was wrong in law. Intensification of existing use could constitute a material change in the use of the land. It was a question of fact and degree. In this instance the increase of 66% in seats for sale would amount to a material change of use. The existence of the article 41 determination did not become public until 2006 when it was referred to in a submission made to the EiP by MAP Associates. Counsel referred to a letter dated 14 November 2002 from the acting Chief Executive of the DOE Planning Service sent to the applicants' solicitors telling them they would be kept informed if Planning Service should be approached to change or relax the current planning constraints at the Airport. He also referred to a letter of 13 May 2003 post dating the article 41 application in which the Department stated that no formal approach had been made to the Planning Service seeking to change operations at the Airport. Counsel contended that BCA had by its article 41 application avoided the need for a public inquiry and emboldened by the Department's response it could now request a formal review. Counsel argued that the recommendation from the EiP panel must be read in the context of the legal effect of the article 41 determination. Further, it was argued that the relevant ministers had not been aware of the article 41 determination. Had they been so aware it would have made the case for a public inquiry unanswerable. Counsel argued that given that there must be at the very least a doubt as to whether increase in seats for sale was development in the terms of the provisions the planning legislation it was bizarre that the Department would have been willing to make such a determination without giving those most affected the chance to know and respond to a determination that affected their interests. The determination was accordingly procedurally unfair as well as being unlawful.

[13] The article 41 application was not strictly an application to change or relax the current planning constraints. An application to review the 1997 agreement would have been such an application. Accordingly, as Mr

McCloskey QC on behalf of the DOE argued, the Department did not in fact breach the representation that it would keep the applicants informed of any application to change or relax the current planning restraints. Article 41 contained no statutory procedural requirements such as neighbourhood notification. The letter relied on by the applicants did not contain a clear or unambiguous representation that the applicant would be consulted in the event of an application under article 41 being received.

[14] In relation to the article 41 request by BCA it is necessary to bear in mind that a landowner's right to carry out steps on his land will depend on the nature and extent of the actual or deemed planning permission attaching to the land. The permission may be a permission or deemed permission which is unconditional or conditional or subject to restraints arising from a planning agreement between the landowner and the planning authority. If a permission is conditional a variation of the condition will normally attract the need for permission to vary and an article 41 determination could not waive the requirement. If the permission is unconditional then the question whether an intensification of use will give rise to development requiring planning permission will be a mixed question of fact and law. It may require the exercise of a planning judgment. Where the use of the land is subject to agreed restraints contained in a planning agreement the landowner can only act outside the agreed restraints if the agreement is varied in accordance with the prescribed statutory procedures. In this instance the DOE in its response to the article 41 request chose to answer the question in two ways. Firstly it concluded that taking the request in the abstract what was proposed would not be development requiring planning permission. Secondly, it drew the Airport's attention to the fact that the question was a hypothetical one because there was, in fact a planning agreement which contained a restraint. Until varied that restraint continued to apply. While the DOE might legitimately have declined to answer the hypothetical question of the ground that it was indeed hypothetical it purported to give a decision on the application. The decision, however, does not determine how it should decide the question whether and how the planning agreement should be varied in relation to the sale of seats condition.

[15] There is nothing to show that the DOE in fact erred in law in coming to the conclusion that it did on the hypothetical question posed. The PAC had, in fact, concluded at the public inquiry in 2001 that the Airport had existing user rights and intensification of use did not constitute a change of use. The context in which the question of an increase in the sale of seats arose was that of an Airport subject to a planning agreement which placed a limit on the number of ATMs which it was not proposed to exceed. Even if, contrary to the view I have reached, the proposed increase in the sale of seat as a matter of law was something that required planning permission the DOE's conclusion has led to no prejudice to the applicants since the Department has to decide a different question, namely whether the planning agreement should be varied. The

applicants have been able to make their views known on that issue and will continue to be able to do so until the Department reaches its decision. Accordingly, if the article 41 decision were wrong in law I accept Mr McCloskey's contention that it would serve no useful purpose to quash to the determination either on the ground of procedural irregularity or on the ground that it is legally flawed.

The applicant's challenge to the EiP report

[16] Mr Lockhart took the court through the contents of an internal departmental memorandum dated 15 June 1999 from Mr McMinn to Mr Morrison within the DOE. This minute indicated Mr McMinn's strong view that the granting of permission for the building of the new terminal should not be seen as a green light for an increase in the permitted seats for sale under the planning agreement. He pointed out that the submitted application for a new terminal was accompanied by an assurance that the Airport would continue to operate within the terms of the extant Planning Agreement. He concluded:

> "Before permitting the extension of the terminal, the Department therefore sought and obtained assurances that honoured the undertakings given at the Harbour Local Plan Inquiry – no night flying, bias over the Lough, etc but the Department also sought and obtained assurance that the notional capacity of the then existing terminal – agreed to be 1.5 million passengers would not be significantly exceeded."

In a letter of 7 September 1999 to the DOE the Airport director reiterated his stance in relation to the Planning Agreement that the Airport would work within its terms in submitting the planning application in relation to the new terminal. He addressed the DOE's concerns about the monitoring of obligations in relation to passenger numbers by agreeing to submit information on a quarterly basis. The environmental statement accompanying the Airport's planning application at paragraph 4.3.7 stated:

> "The proposed development will operate within the terms of the Planning Agreement."

[17] Mr Lockhart contended that if all the relevant evidence had been available to and considered by the Panel it would have been extremely difficult for the Panel, without being irrational in the legal sense, to have concluded as it did that if an increase in seats for sale had been requested in 1999 it would have been capable of being renegotiated through a revised planning agreement at the time of the 1999 planning application relating to the construction of the new terminal. The Airport was proposing to construct a terminal with a capacity greatly in excess of the existing seats for sale requirement. Counsel argued that

the attitude of the planning authorities towards the planning application appears to have been materially influenced by the assurance that was given by BCA in respect of its approach to the Planning Agreement. If it had been otherwise, given the increase in capacity there would have been the need for a public inquiry and an environmental impact statement which dealt with the consequences of the actual capacity of the proposed terminal as opposed to the limits contained in the seats for sale requirement in the planning agreement.

[18] Counsel further argued that in the absence of a seats for sale covenant the ability of the DOE to restrict airport growth was radically curtailed. Whilst the planning agreement introduced an increased air traffic movements covenant of 45,000 ATMs in the absence of a seats for sale covenant restriction of ATMs on its own led to the potential for the Airport to use larger aircraft and place the Airport along side Belfast International Airport in terms of passenger numbers.

The justiciability of the panel's recommendation

[19] Mr McCloskey contended that the recommendations of the Panel have no legal effect or consequences. They are not binding on the DOE. The status of the Report is that of a consideration which the DOE may take into account and to which the Department may ascribe such weight as it considers appropriate in its role as the final decision-making authority. Furthermore, the Panel's Report is simply one aspect of a wider, more elaborate consultation process which has involved a broad range of interested stakeholders. There will be further consultation with local councils and others. The applicants are at liberty to make representations to the DOE in the decision making process about the content and quality of the Panel's Report. The Department is obliged to take such representations into account and the Department has treated and will treat the affidavits and exhibits filed in the present application as representations of this kind. Counsel, however, strongly argued that the court is not the appropriate forum for the ventilation of the applicants' complaints and representations at this point. The Planning Agreement is being reviewed in accordance with the statutory framework. The Department by its actions has considerably exceeded its legal obligations. If some flagrant and incurable illegality has been or is about to be committed that might in theory provide justification for judicial intervention at this stage but, absent such contaminating factor, he submitted that the application was ill-founded.

[20] Mr Lockhart countered Mr McCloskey's argument contending that it was open to the court to grant declaratory relief as to the invalidity of the recommendation in respect of the seats for sale condition. He accepted that certiorari would not lie but declaratory relief was appropriate. In this instance he contended that the recommendation was based on a palpably false premise. He said that the matter has moved on because in fact the Minister in his most recent statement has accepted the "soundness" of the Panel's Report.

[21] The press release of 12 December 2006 to which counsel referred contains the following:

> "The next stage in the review of the George Best Belfast City Airport (GBBCA) planning agreement has been announced today following publication of the panel report.
>
> The publication of the panel report follows an extensive public consultation exercise to consider the way forward including an Examination in Public (EiP) which was held in June 2006 representations were received from all key interested parties including Belfast City and Belfast International airports, local councils, airline operators, residents' groups and the general public.
>
> Environment Minister, David Cairns, said, **"My officials have carefully considered the independent panel report following the EiP and believes that it forms a sound basis for the next stage of the review, which will be to enter into discussions with George Best Belfast City Airport with a view to reaching agreement on a revised planning agreement."**
>
> Officials will be meeting shortly with representatives from the Airport and other key interested parties, including local council, probably early in the New Year, to consider the various recommendations from the Panel and to put in place a revised planning agreement between the Department and the Airport. The GGBCA Forum Group which comprises all the key interested parties will be kept advised of progress."

[22] This document only emerged in the course of the hearing and should clearly have been exhibited by the parties in the original proceedings. Its late introduction into the proceedings caused an adjournment to enable an affidavit to be sworn exhibiting it. As has been frequently stated by the court parties have a duty to lay before the court all material documents. In the welter of documentation in the application neither party noted that it had been omitted. In the event the document is not, in fact, determinative of the matter.

[23] The Ministerial statement records that the Department's officials consider that the report forms a "sound basis for the next stage". That is a

statement which reflects current thinking on the part of officials. This does not detract from the duty lying on the Minister to make the ultimate decision in the light of all the circumstances which will include the Report recommendations, the Panel's analysis, officials' views and advices on the Report and generally, the views expressed by local councils and the views expressed by other interested parties including the applicants. He will have to take account of the submissions made on behalf of the local residents which will include all the legal and evidential matters which have arisen in the current proceedings. There is nothing to indicate that the Minister has trammelled the exercise of his powers and duties on the question of the variation of the terms of the planning agreement.

[24] I accept Mr McCloskey's submission that the Report must be read in its proper context. It is a very material consideration to be taken into account in the ultimate decision. The weight to be put upon its contents and the recommendations therein will ultimately be a matter for the judgment of the Minister taking account of all the arguments made in favour and against the recommendations and the contents of the Panel's Report. It would be inappropriate in an ongoing and incomplete process which has not reached the stage of a decision for the court to be drawn into the process of analysing arguments and evidence which is going to be taken into account in the decision making process. The Minister has the responsibility of weighing the evidence and the arguments including those put forward by the applicants in the present challenge. If he were to conclude in the light of all the evidence including the memoranda and documents referred to by the applicants that the Panel's assumption in paragraph 6.6.31 was misconceived he would then have to consider what difference, if any that would make to the weight he should attach to recommendation on the seats for sale term when read with all the other recommendations. He may or may not conclude that the force of the overall recommendations taken as a whole including the seats for sale recommendation remains persuasive notwithstanding the premise in paragraph 5.6.31.

[25] In R v. ITC (ex parte S W Broadcasting Limited) [1996] EMLR 291 the House of Lords stressed that judicial review should not be used as a mechanism to attack the contents of papers and advices laid before a statutory decision maker for consideration. Lord Goff stated in that case:

> "The complaint is misconceived in that it fails to focus attention on the relevant decision which is the decision of the Commission itself. Of course if a decision maker has misdirected himself in some way and as a result has, for example, taken into account some matter which he ought not to have taken into account then a briefing paper for his staff may explain

> why he has fallen into error in that way particularly if the paper comprised the only material before him."

In that case the impugned paper (Paper 179/91) was an assessment by the staff of the relevant bid at the end of which a conclusion was expressed. By the date of the meeting at which the bid was considered by the Commission not only the chairman and the vice chairman but all the other members of the Commission were, in the House's view, capable of forming their own independent judgment. Lord Templeman concluded that the criticism of individual paragraphs of Paper 179/91 amounted to an ingenious but impermissible invitation to the court to substitute its own views for that of the Commission and to quash or refer back the decision of the Commission with an indication that the court was impressed with the criticisms and took a more favourable view of the application by TSW than the Commission had taken. In these proceedings the applicants are inviting the court to do the very thing which was condemned by the House of Lords in R v ITC, that is to say they are inviting the court to indicate that it is impressed by the applicants' criticism of the EiP report and the recommendation on the issue of the seats for sale condition.

[26] For these reasons I dismiss the application.