



Neutral Citation Number: [2020] EWHC 79 (Ch)

Claim No: CP-2019-000028

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 January 2020

Before :
STUART ISAACS QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Arora Management Services Limited

Claimant

London Borough of Hillingdon

First Defendant

- and -

Heathrow Airport Limited

Second Defendant

Ms Marie Demetriou QC and Mr Charles Banner QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Claimant.

Mr Michael Humphries QC, Mr Gerry Facenna QC and Mr Hugh Flanagan (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Second Defendant.

Hearing date: 17 January 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Stuart Isaacs QC:

Introduction

1. There are three applications before the court. They arise for determination on an expedited basis pursuant to an order of Zacaroli J made on 9 December 2019. The first is an application by the claimant (“Arora”) made by a notice dated 12 November 2019 for an order pursuant to CPR Part 3.1(2)(b) that the trial of this action, which is currently likely to be heard between April 2021 and July 2021, with a time estimate of between five and 10 days, be brought forward to June 2020. The application is supported by a witness statement dated 8 November 2019 of Shabana Anwar, the Head of Legal and Lands for the Heathrow West Expansion in the group of companies to which Arora belongs. The second is an application by the second defendant (“HAL”) for a stay of the action pending the Court of Appeal’s judgment in R (Heathrow Hub Limited) v Secretary of State for Transport (the “Heathrow Hub Appeal”). The third is an application by HAL, made in the alternative to its application for a stay, for the trial of a preliminary issue. HAL’s applications were made by a notice dated 18 November 2019 and supported by a witness statement of that date of Grace Margaret Boos of HAL’s solicitors which also responds to Ms Anwar’s statement.
2. In addition to that evidence, I have considered the evidence on Arora’s behalf contained in Ms Anwar’s second, third and fourth statements dated 13 December 2019 and 6 and 15 January 2020 respectively and in the witness statement dated 20 December 2019 of Jacqueline Vallat of Arora’s solicitors; and, on HAL’s behalf, in Ms Boos’ second statement dated 4 December 2019 and the witness statement dated 19 December 2019 of Timothy John Smith of HAL’s solicitors.
3. The proceedings concern the car parking arrangements at Heathrow Airport, which is owned and operated by HAL. Condition A85 of the planning permission for the development of Terminal 5 granted by the relevant planning authority, the London Borough of Hillingdon (the “Council”), imposes a cap of 42,000 parking spaces at the airport on land shown as yellow on the relevant plan (the “Yellow Land”) or such substituted land as may from time to time be notified to Council (“Substituted Land”). HAL operates the car parks that are subject to Condition A85. Arora wishes to build a rival nine storey car park comprising 2,077 parking spaces within the boundary of the airport on land which is neither Yellow Land nor Substituted Land. On 14 January 2015, Arora applied for planning permission for the car park. The application is being opposed by HAL and remains undetermined.
4. In the proceedings, Arora claims a declaration that, on the proper interpretation of Condition A85, HAL does not have a monopoly on the power to notify Substituted Land on which to provide further parking spaces and that Arora does have that power, so as to bring the parking spaces at its proposed new car park within the cap, which will not otherwise be the case. The issue is of considerable importance to the parties since planning permission for the new car park will only be granted, if at all, if the new parking spaces would fall within the cap. Arora’s position is that planning permission would have to be refused if the new parking spaces would fall outside the cap. HAL’s position is that planning permission could still be granted even if the new parking spaces fell outside the cap.

5. HAL maintains that the claim is misconceived as a matter of substance and also that declaratory relief is not appropriate because it has not been demonstrated that the issue needs to be resolved in order for the planning application to be determined, because Arora's more appropriate remedy would be to appeal against the Council's failure to determine the planning application and because the planning application has been rendered redundant by the site in question having been developed for an alternative scheme.
6. The Council was originally also a defendant in the proceedings. However, it has stated that it will fully observe and comply with any court ruling as to the proper interpretation of Condition A85. The proceedings against it have been discontinued.

Expedition

7. Arora's application for expedition arises in the following way. According to Ms Anwar, both another company within the Arora Group and HAL intend to apply to the Secretary of State for Transport under the Planning Act 2008 for a Development Consent Order ("DCO") for the so-called Northwest Runway Scheme for the expansion of the airport endorsed by the Airports National Policy Statement dated June 2018 (the "ANPS"). The ANPS sets out the government's policy on the need for new airport capacity in the south-east of England and provides the primary basis for decision-making on DCO applications for a northwest runway at the airport. It requires applicants to prepare an airport surface access strategy, which must include a car parking strategy, and the assessment and mitigation of the air quality impacts, to which the surface access strategy is plainly relevant. The application must be accompanied by a wide range of supporting information, including an assessment of the effects of airport-related traffic.
8. In *W. L. Gore & Associates GmbH v Geox SpA* [2008] EWCA Civ 622 Lord Neuberger, with whom Rix LJ agreed, stated that, in considering an application for expedition, the court must take four factors into account, namely whether the applicant has shown good grounds for expedition, whether expedition would interfere with the good administration of justice, whether expedition would cause prejudice to the other party and whether there are any other special factors.
9. The legal principles applicable to an application for expedition, which are derived from paragraphs [16] to [20] of Henderson J's judgment in *J. W. Spear & Sons Ltd v Zynga, Inc* [2012] EWHC 1374 (Ch) and the cases there referred to and which were unsurprisingly not in dispute, may be summarised as follows:
 - (1) the question of expedition is essentially one for the court's discretion;
 - (2) the question is partly one of principle and partly one of practice;
 - (3) the court has to have regard to its wider responsibility to other litigants and not just the position of the parties in the case before it;

- (4) the procedural history of the case, including any delay on the part of the applicant, is relevant but any such delay will not necessarily be conclusive against the applicant;
 - (5) the attitude of the respondent is comparatively unimportant unless he can show that he would suffer some real prejudice if expedition were granted;
 - (6) the first threshold question which always has to be answered is whether there is real, objectively viewed urgency and it is only if the answer is yes that it becomes necessary to consider the degree of expedition which is required.
10. On behalf of Arora, it was submitted by Mr Charles Banner QC, who appears with Ms Marie Demetriou QC, that its claim has the potential significantly to affect the assessment of the likely effects of the proposed DCO applications and to influence the extent to which HAL's intended DCO application may affect Arora's private interests. The suggested effect of the court's determination of the interpretation of Condition A85 on the intended DCO applications is the sole basis for the application for expedition. Based on Ms Anwar's evidence, it was submitted that Condition A85 forms a key part of the baseline against which the proposed DCO applications will be assessed and that the measurement of the baseline has an importance not only to Arora and HAL but also to the wider public. It was submitted first, that the court's interpretation of Condition A85 will be determinative of whether Arora's proposed car park can be authorised, which will in turn affect the existing parking spaces at the airport and hence their effects; second, that it will be determinative generally of the extent to which HAL has control over the location and use of parking spaces at the airport and hence the degree to which their effects may be controlled and mitigated; and, third, that it may affect the extent to which HAL may wish under the DCOs to seek the compulsory purchase of Arora's private property rights, which would require HAL to demonstrate a compelling case in the public interest. It was submitted that, in view of the tight time limits for the determination of DCO applications following their submission, the court's interpretation of Condition A85 might not be able to be taken into account in any DCO and that there are strong public and private interests in having the claim expedited in order that the court's interpretation can inform the DCO applications and their subsequent examination.
11. On HAL's behalf, Mr Michael Humphries QC, with whom Mr Gerry Facenna QC and Mr Hugh Flanagan appear, submitted that the claim was not relevant to the DCO applications and that, accordingly, there was no urgency such as to justify an expedited trial of the claim. It was submitted that the claim is concerned not with any DCO application but only with the 14 January 2015 planning application and, specifically, the question, in the context of the cap issue raised by HAL as a consultee, whether HAL has a monopoly on the power to notify Substituted Land. The claim is not directed towards the number or location of the parking spaces to which the cap relates. Arora's proposed DCO application concerns only a western area of the airport around Terminal 5 and does not cover the entirety of the airport.
12. I accept HAL's submissions. It is also clear from Ms Anwar's own evidence that the development of the baseline involves many other complex factors unrelated to the declaratory relief sought. For example, in paragraph 43 of her third statement she refers to the need to review not only the current physical make-up of the relevant site and

surrounding area but also its biological systems, the socio-economic context and cultural status in and around the development site. While she states that the potential for the existence of the nine storey car park which is the subject of the 2015 planning application could have a significant impact over and above the pure numbers laid down by the cap, in my judgment, the likelihood of any such impact is overstated in the light of all the other considerations which come into play and is, in fact, highly speculative. I also do not accept that the planning application must itself necessarily fail if the new parking spaces fell outside the cap.

13. Contrary to what Mr Banner submitted, I do not consider that the position is altered by the fact that there is a public interest involved. The existence of that interest does not affect the characterisation of the impact on the DCO applications as speculative and in any event of limited relevance. Also, if the determination of the claim was as critical to the proposed DCO applications as Arora submitted that it is, that consideration could have been expected to have been referred to in section III of the particulars of claim dealing with why the court ought to entertain an application for a declaration and, in any event, well before 12 November 2019 when the application for expedition was first made. I do not accept Mr Banner's submission that the proposed DCO applications were not mentioned in the particulars of claim because they were not material or required to be pleaded. It is, in my judgment, a material factor for the court to consider in deciding whether to exercise its discretion to grant the declaration sought.
14. Ms Anwar's evidence is that the DCO applicants need to get their applications right first time since significant changes to the scheme or associated assessments would only be permitted at the discretion of the examining authority. Arora accepts, therefore, that the examining authority empowered under the Planning Act 2008 to examine DCO applications does have discretion to permit changes. It may also request further information before the completion of its investigation. Therefore, in so far as the examining authority were to take the view that the issue in respect of which declaratory relief is sought was material to its examination in the light of all the circumstances, it would be able to pursue the matter further.
15. For the above reasons, I am not satisfied that there exists real, objectively viewed urgency which would justify the expedited hearing of the claim. In those circumstances, it becomes unnecessary to consider the degree of expedition which is required and the factors other than urgency identified in the authorities referred to above.
16. Had I been minded to order expedition, I would not have directed that the trial should take place in June 2020. HAL took the view – and I agree – that the case is appropriate to be determined by a High Court judge and not a deputy. Inquiries of the listing office made by Arora during the hearing indicated that during June 2020 a five day hearing before a High Court judge could be accommodated but HAL took the view - with which I again agree - that a seven day estimate for the length of the hearing is more realistic. There is no doubt, had the court ordered a seven day hearing to take place in June 2020, that the listing office would have accommodated that situation but only at the expense of the position of other litigants whose cases also require and are entitled to be heard at that time. I consider that a November 2020 hearing date would have been more realistic, for the reasons advanced by Mr Facenna.

17. In the result, in the exercise of the court's discretion applying the legal principles referred to above, the application for expedition is refused.

Stay

18. It then becomes necessary to consider HAL's application for a stay of the action pending judgment in the Heathrow Hub Appeal. In *Re Yates' Settlement Trusts* [1954] 1 WLR 564, at 567, Evershed MR observed that, in an important case known to be subject to appeal to the Court of Appeal, a judge might reasonably and properly think it to be in the public interest not to decide another similar case until the result of the case under appeal had become known and that whether he should so decide "*depends very much on all the circumstances of the particular cases*".
19. It was submitted by Mr Facenna that HAL's stay application should be granted because the soon expected judgment in the Heathrow Hub Appeal has the potential to dispose of a large part of the present proceedings and associated case management issues. There would be no point going through any of the steps in preparation for the trial for the sake of a matter of a few weeks before the judgment. It was submitted that the judgment will determine or at least provide guidance and clarification on a critical issue in the present case concerning whether HAL is an undertaking that has been granted special or exclusive rights for the purposes of Article 106 of the Treaty on the Functioning of the European Union ("TFEU") read with Article 102 TFEU.
20. On Arora's behalf, Ms Demetriou submitted that a stay would be wholly inappropriate because the parties are in agreement that the Court of Appeal's judgment is imminent and because HAL has grossly overstated the link between the present case and the Heathrow Hub Appeal. For the reasons which she developed, she submitted that large parts of Arora's claim will be unaffected by the judgment. It will have no bearing on the planning grounds for the claim and it will not dispose of the competition law grounds because the claim raises arguments that are not raised in the Heathrow Hub Appeal.
21. In my judgment, the stay application is without merit. It is clear that the judgment in the Heathrow Hub Appeal will not be determinative of the present claim on planning law grounds and uncertain that it will be determinative on competition law grounds, even if it provides guidance on the Article 106 TFEU issue. The effect of a stay would be to prevent any steps whatever being taken in these proceedings and would, in my judgment, entail a delay for no useful purpose. Given that Arora's application for expedition has been refused, there is even less reason for a stay since the trial of its claim will not take place until next year. The parties will therefore have ample time to consider the judgment and its implications for the present case ahead of the trial. Since the judgment is agreed to be imminent, I see no legitimate reason why the parties' preparations in respect of the issues which may be determined or clarified by it cannot be put off for that short period of time so as to avoid potentially unnecessary costs being incurred. There is no justification for putting off their preparations in respect of all of the other matters arising in the proceedings.
22. Accordingly, the application for a stay is refused.

Preliminary issue

23. If, as I have held, the stay application is refused, HAL seeks to have the question whether the court should exercise its discretionary jurisdiction to grant the declaration sought by Arora determined as a preliminary issue pursuant to CPR Part 3.1(2)(i). It was submitted on HAL's behalf that this was a discrete issue which is potentially decisive of the claim and which, if decided in HAL's favour, would avoid the need for a costly and lengthy trial.
24. The principles on which a court will approach the question whether or not to direct a preliminary issue are well known. Guidance is to be found in particular in *McLoughlin v Jones* [2001] EWCA Civ 1743 at paragraph [66] and *Steele v Steele* [2001] C P Rep. 106, where Neuberger J identified 10 questions which the court should ask itself when considering whether to order the determination of a preliminary issue. The court should be cautious when deciding whether to order the trial of a preliminary issue, in particular in order to guard against the risk that doing so may actually increase the time and cost of resolving the underlying dispute. In *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2013] Bus LR 543, at 548B-C, Lord Neuberger commented that:

“(i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are none the less to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated, and (iii) once formulated, the issues should be answered in a clear and precise way.”

Even preliminary points of law – the usual but not invariable kind of preliminary issue – “*are too often treacherous shortcuts*”: *Tilling v Whiteman* [1980] AC 1, at 25C per Lord Scarman.

25. HAL submitted that the hearing of the proposed preliminary issue would likely occupy the court's time for two days and could take place by about June 2020. If the issue were decided in HAL's favour, it would dispose of Arora's claim altogether. It would require no disclosure or expert evidence and no substantial factual evidence was likely to be needed. It submitted that the claim is academic because (i) the 2015 planning application had been superseded by a successful application one year later for a five storey car park on the same site which led to the construction of that car park, (ii) the declaration claimed is unnecessary in order for the 2015 planning application or a further planning application made in May 2018 to extend the constructed car park to conform to that which is the subject of the 2015 planning application to be determined in Arora's favour and (iii) HAL is in the advanced pre-application stages of a DCO application which, if granted, would render Condition A85 redundant. It further submitted that the court should not entertain the claim given the existence of the alternative and more appropriate remedy of a planning appeal to the Secretary of State.
26. The fact that the proposed preliminary issue is not one of law is not determinative of the application against HAL. However, in order to be in a position to determine whether, in the exercise of its discretionary jurisdiction, the declaratory relief sought should be granted, the court needs to be in possession of all the material circumstances to be taken into account and needs to ensure that it does not take into account

circumstances which are not material. In my judgment, the court is not going to be able to be in such a position until after the hearing of the substantive issues. As Ms Demetriou emphasised in her oral submissions, this is not a case where there are no contested issues of fact and expert opinion or where it is clear that the grant of the declaration sought would be academic. For example, Arora contests the allegation that the 2015 planning application is redundant and disputes the existence of any alternative remedy. It is also impossible to conclude that HAL's DCO application, which remains in the pre-application stages, will be granted and, if granted, will render Condition A85 redundant. Whereas the substantive issues in the claim can be determined independently of the determination whether a declaration is appropriate, whether a declaration is appropriate cannot be determined independently of the court's conclusions on the substantive issues.

27. I am also not persuaded that the hearing of the proposed preliminary issue will lead to a saving of time and costs. It cannot be concluded with any confidence that HAL would succeed on the issue. I express no view on its prospects of success. If HAL were to lose the issue, it would mean that witnesses would potentially have to appear to give evidence twice over, once at the preliminary issue hearing and then at the trial. If the preliminary issue hearing took place in June 2020, it would divert attention from and potentially delay the trial preparation on the substantive issues. Any appeal against the court's determination of the preliminary issue would delay matters further by many months.
28. Taking all these considerations into account, in my judgment it would not be just to direct the determination of the proposed preliminary issue and the application is therefore refused.