

THE HIGH COURT

[2019 No. 2944 P]

BETWEEN

ER TRAVEL LIMITED

PLAINTIFF

– AND –

DUBLIN AIRPORT AUTHORITY AKA DAA PLC

DEFENDANT

JUDGMENT of Mr. Justice Max Barrett delivered on 18th February 2020.

1. ER Travel Ltd. (“ER”), an Irish-registered company, provides car rental services in Ireland. Car rental services at Dublin Airport typically operate as an *on*-Airport concession which is allocated by way of a competitive tendering process that is run by the DAA. ER’s business model is different: it offers internet booking facilities to customers who are transferred, following their arrival at Dublin Airport, to an *off*-Airport parking area, culminating, ER claims, in a better-value car rental service.
2. Issues arose between ER and the DAA in 2015/2016, after it came to the attention of the DAA that ER was sending shuttle buses to the airport to collect ER’s customers and transfer them to ER’s *off*-Airport car park. The DAA considered that this constituted a breach of its bye-laws which provide that permission is required from the DAA to conduct business activities at Dublin Airport. There was an ongoing dispute between the parties between March 2016 and April 2019. In April 2019, ER issued proceedings seeking, *inter alia*, declarations that: -
 - (1) the DAA has acted *ultra vires* and in breach of the airport bye-laws;
 - (2) the DAA has acted *ultra vires* and/or deliberately and consciously in its own self-interest, contrary to law and/or disproportionately in making bye-laws which prohibit the use of Dublin Airport for, *inter alia*, business purposes;
 - (3) the DAA is seeking to prevent, restrict or distort competition contrary to the Competition Act 2002, through its agreement/s with such car rental companies as are licensed to operate from Dublin Airport’s premises;
 - (4) the DAA, in restricting or otherwise interfering with ER in seeking to enter, park on, and collect members of the public from Dublin Airport, is unlawfully abusing a dominant position in breach of the Competition Act 2002; and
 - (5) the DAA is infringing the rights of passengers by restricting their use of Dublin Airport facilities, including the facility of being collected by third parties with whom such passengers wish to transact business other than on Dublin Airport lands.
3. This judgment is concerned with an application for security for costs brought by the DAA pursuant to s.52 of the Companies Act 2014 seeking that ER provide security for the costs of the DAA in relation to its defence of the within proceedings. It is accepted by ER that the DAA meets the well-established test for the granting of security for costs (see, *e.g.*,

Usk District Residents Association Ltd. v. The Environmental Protection Agency [2006] 1 ILRM 363 in this regard). Thus, the DAA has established a *prima facie* defence and ER acknowledges that it will be unable to discharge the DAA's costs if these proceedings are unsuccessful. However, ER claims that there are, to borrow from the judgment of Morris P. in *Interfinance Group Ltd. v. KPMG* (Unreported, High Court, 29 June 1998), as referenced in *Usk* (at p. 368), "*specific circumstances...which ought to cause the court to exercise its discretion not to make the order sought*".

4. ER maintains that, if it is successful in these proceedings, this will rebound to the benefit of consumers who will then be able to avail freely of cheaper online/off-Airport car rental facilities. In essence, what is being claimed in this regard is not so much, to borrow from the wording of Charleton J. in *Oltech (Systems) Ltd. v. Olivetti UK Ltd.* [2012] 3 IR 396, at p. 409, that "*a point of law [arises for decision in these proceedings that is]...so important that the process of the case should not be interrupted*", but more, to borrow from the same judgment, at p. 412, that "[a] *point of fact of national importance [has arisen in these proceedings]...that is inescapably central to [this]...case and...will settle a concern of great public moment*". The court accepts that a positive decision for ER following the trial of action (if such were to be the ultimate thrust of that eventual decision) could conceivably result in a financial benefit to people seeking in the future to avail of cheaper car rental facilities following their arrival at Dublin Airport, the principal airport of our island nation. Nonetheless, (a) these are proceedings brought by ER at its election and for its private benefit, (b) many cases brought out of self-interest can yield a more general benefit depending on how they are decided but not all (in truth, few) such cases thereby come within the categories of case contemplated by Charleton J., and (c) the court respectfully does not see that the potential provision of cheaper car rental facilities to those travelling to Dublin Airport could at this time be described properly as involving a "*point of fact of national importance*" or a "*concern of great public moment*". In passing, the court notes too that, as was noted in *Dublin Waterworld Ltd. v. National Sports Campus Development Authority* [2014] IEHC 518, at para. 34, although all proceedings brought against public and semi-state bodies "*are likely to be of interest to the public...that does not make their resolution a matter of public interest [of the type contemplated by case-law applicable to applications for security for costs]*".
5. A second specific circumstance raised by ER concerns the conduct of the DAA, though not, as one might instinctively expect, in the conduct of the within proceedings. Two points were made in this regard, *viz*:
 - (A) the DAA initially sought, and could now continue to seek, to prosecute ER for breach of its bye-laws; its 'failure' to pursue this prosecution means that issues which ER has sought to agitate in the within proceedings could have been agitated at a much lower cost in the District Court;
 - (B) a third-party licensed bus provider has been found to transfer ER customers from the airport, ER has sought confirmation from the DAA that the DAA considers this to

be compliant with Dublin Airport bye-laws and, as yet, no confirmation has been forthcoming.

6. As to (A), this is a novel contention and presents with numerous difficulties, viz. (a) ER has freely elected to bring these proceedings and to make what are serious allegations, (b) there is no sense in which ER has been 'forced' to bring the within proceedings, e.g., the imposition of any fixed penalty notices could be challenged in the District Court, actions of the airport police are open to judicial review, (c) the District Court has no power to decide whether the impugned bye-laws are *ultra vires* or not, and (d) the competition law dimension of these proceedings (which is being assiduously pursued by ER) could not be determined by the District Court.
7. As to (B): whether ER considers that its current arrangement with the licensed bus provider works for ER and is compliant with applicable law is a matter for ER to decide for itself in the first instance, the making of such decision is not something that can be outsourced to, or offloaded upon, a State or semi-State body; whether any illegality arises can be tested in a suitable forum when and if alleged.
8. It should be clear from the above that the court considers that this is a case in which security for costs should be ordered. As to the quantum of security to be ordered, the court:
 - (I) notes the binding judgment of Costello J. for the Court of Appeal in *Hedgecroft Ltd. T/A Beary Capital Partners v. Htremfta Ltd.* [2018] IECA 364, especially the observations at paras. 62-68 of that judgment;
 - (II) is mindful of the need touched upon, by reference to earlier case-law, in *Thalle v. Soares* [1957] IR 182, at p. 194, that an order for security for costs should not be an indemnity against all costs nor (an observation which, in truth, would seem to cut both ways) an encouragement to luxurious litigation; and
 - (III) has been furnished with unchallenged affidavit evidence from a legal costs accountant that seeks to estimate the DAA's costs if the within proceedings go to full hearing, which estimate comes to the striking sum of €507,400, allowing for a circa. seven-day trial, a significant level of discovery, and an estimated €300,000 for solicitor fees, €99,500 for senior counsel fees, €68,650 for junior counsel fees, and a comparatively smaller €20,000 sum for the advisory work, reporting and court attendance expected of the intended expert economist-witness.
9. Having regard to the foregoing, the court will order security for costs in the amount of €170,000, being roughly one-third of €507,400.