



Neutral Citation No. [2009] EWHC 1462 (Admin)

Case No: CO/6120/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff

Date: 23/06/2009

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

Between :

THE QUEEN	
on the application of	
(1) BIRMINGHAM AND SOLIHULL TAXI ASSOCIATION	<u>Claimants</u>
(2) SAJID BUTT	
- and -	
BIRMINGHAM INTERNATIONAL AIRPORT LIMITED	<u>Defendant</u>
- and -	
PASSENGER TRANSPORT SOLUTIONS UK LIMITED	<u>Interested Party</u>

Miss Joanne Clement (instructed by **Messrs Bearwoods Solicitors**) for the **Claimants**
Mr Neil Calver QC and Mr Gerard Rothschild (instructed by **Messrs Eversheds LLP Solicitors**) for the **Defendant**
Interested Party did not appear and was not represented

Hearing date: 19 June 2009

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.

.....
THE HONOURABLE MR JUSTICE WYN WILLIAMS

Mr Justice Wyn Williams :

1. The First Claimant is a company limited by guarantee. It operates as a non-profit making association to promote the well-being of owners and drivers of hackney carriages within the Birmingham and Solihull areas. All its members are licensed hackney drivers and the First Claimant represents the interests of those drivers in a variety of ways. The First Claimant is funded by annual subscriptions from its members although I do not understand the subscriptions to be its only source of revenue. The Second Claimant is a hackney carriage driver and a member of the First Claimant.
2. The Defendant operates Birmingham International Airport. On 4 October 2004 it entered into a written agreement with the First Claimant (hereinafter referred to as “the licence agreement.”) whereby it agreed to grant to the First Claimant an exclusive licence to provide hackney carriage services for members of the public who were users of the airport. The First Claimant and Defendant agreed that the licence would subsist for a period of five years commencing 1 March 2004.
3. The licence agreement contained many detailed provisions. Clause 12 contained a number of provisions relating to termination of the licence.
4. It is common ground that the licence agreement subsisted for the full period of 5 years from 1 March 2004.
5. In 2008 the Defendant began a tender process relating to the grant of a new licence to provide hackney carriage services from 1 March 2009. On 9 January 2009 the Defendant wrote to the First Claimant in the following terms:-

“Following our invitation for BASTA to tender for the renewal of the above Licence, which as you were aware was due to expire on the 28 February 2009, we are pleased to announce that subject to contract your tender submission has been successful.

The tender process was, as you can imagine, very competitive with eleven companies initially expressing an interest to operate for taxi services at Birmingham International Airport. Subsequently seven companies were invited to tender and thereafter five companies were short listed to present their proposals to us. The tenders provided not only a choice of Hackney Carriage operators but also very strong interest from the Private Hire and taxi management sectors. Each tender was judged not only on their financial offer to Birmingham International Airport to operate the Licence for taxi services but also importantly on the levels of customer service which would be provided to our passengers which your suggestion of a Customer Service Desk within the main terminal building was a contributing factor in our decision.

We are currently now in the process in drafting the new Licence to Operate for taxi services at Birmingham

International Airport which will be forwarded to you for signature in due course.”

6. At or about the end of January 2009 a draft licence agreement was provided by the Defendant to the First Claimant. As was to be expected, the First Claimant wished to negotiate in relation to some of the terms contained within the draft.
7. A meeting took place at or about the end of January 2009 between representatives of the First Claimant and Defendant. I understand that one of the representatives of the First Claimant was Mr Irfaan Ahmed, the chairman of the First Claimant. I say that since he has made a witness statement describing what occurred at the meeting. In summary, according to him, the representatives of the Defendant made criticisms about some aspects of the First Claimant's service. A point was also raised about the fact that the First Claimant had not filed its accounts for the year 2007 at Companies House. According to Mr Ahmed, the Defendant's representatives were told that the filing of the accounts had been delayed because the First Claimant had needed to deal with losses which had been incurred in the relevant accounting year.
8. One of the Defendant's representatives at this meeting was Mr Richard Gill, its head of market development. Although Mr Gill has made a witness statement in these proceedings he has not either confirmed or contradicted the account of the meeting put forward by Mr Irfaan Ahmed.
9. Apparently another meeting took place between representatives of the First Claimant and the Defendant in the middle of February. A number of issues were discussed and, in the main, they centred upon the terms and implementation of the new licence agreement. There was a discussion about when the licence would be executed and the First Claimant's representatives indicated that this would occur shortly after an annual general meeting of the First Claimant which was due to take place.
10. On 8 April 2009 the First Claimant held its annual general meeting. New directors were appointed. On 10 April 2009 a meeting took place between representatives of the First Claimant and Mr Johal on behalf of the Defendant. Mr Johal made various complaints about some of the services which had been provided by the First Claimant's members. According to Mr Irfaan Ahmed, Mr Johal asked, specifically, when the new licence would be signed and he was told that this would occur once the new directors and/or committee of the First Claimant had discussed it in detail.
11. On 13 May 2009 a further meeting took place between representatives of the First Claimant and Mr Johal and Mr Gill. It is common ground that the First Claimant's financial position was discussed in detail at this meeting. It is also common ground that by 13 May 2009 the First Claimant had filed its accounts for the year ending December 2007. The accounts showed that it had made a loss of £289,952 in that financial year. This position was to be contrasted with the fact that in the previous financial year the First Claimant had made a profit of £216,836.
12. In his witness statement on behalf of the Defendant, Mr Gill says that he first became aware of the accounts for the year ending December 2007 on 8 May 2009. He also asserts that the meeting on 13 May 2009 was called because of the Defendant's disquiet about the First Claimant's financial position. Mr Irfaan Ahmed's witness statement contains no information about when the Defendant first became aware of

the accounts for the year 2007. Upon instructions, however, Miss Clement for the Claimants, told me that a draft of the accounts had been provided to the Defendant in February 2009.

13. At the conclusion of the meeting the Defendant's representatives handed a letter to the representatives of the First Claimant. The letter was in the following terms:-

“Dear Irfaan

Re: Variation to the Licence to Operate between Birmingham International Airport Limited ('BIA') and Birmingham and Solihull Taxi Association ('BASTA') dated 4th October 2004.

We refer to the standard Licence to Operate made between Birmingham International Airport Limited and Birmingham and Solihull Taxi Association dated 4th October 2004 (hereinafter referred to as “the Licence”).

As you are aware from previous discussions we have been reviewing the provision of the services. This review has led BIA to the opinion that there has been a substantial deterioration in BASTA's financial position and we hereby formally write to notify you of our intention to terminate the Licence in accordance with the provision of clause 12.3.6. Whilst clause 12.3.6 gives BIA the right to terminate on 7 days notice it has been decided that termination will take effect from Sunday 31st May 2009.

..... ”

14. According to Mr Ahmed, the first indication the First Claimant was given that the Defendant intended to terminate the licence was when it received that letter. Mr Ahmed says that the First Claimant's representatives asked for two weeks to show that its financial situation had been resolved but the Defendant refused such a request.
15. On 20 May 2009 the Defendant entered into a licence agreement with the Interested Party. The Defendant granted to the Interested Party an exclusive licence. The licence was specified to commence at 00.01a.m. on 1 June 2009.
16. As I understand it the Interested Party began providing hackney carriage services from the time and date specified in the licence agreement into which it had entered. It has continued so to do.
17. These proceedings were commenced by a Claim Form issued on 16 June 2009. The Claim Form specified (section 3) that the decision to be judicially reviewed was the decision taken by the Defendant to terminate the licence agreement as contained in the letter of 13 May 2009.
18. The Claimants sought urgent interim relief. His Honour Judge McKenna, sitting as a Deputy High Court Judge in the Administrative Court in the Birmingham District Registry ordered:-

“2. Interim relief granted allowing BASTA drivers (with taxi and driver permits) to provide services at the Airport until the claim is determined. Liberty is granted to the Defendant and/or Interested Party to apply to vary or discharge this order on 24 hours written notice to the Claimant.

.....

6. A rolled-up (permission and substantive) hearing to be listed in the trial window 13-17 July with a time estimate of 1 day.”

19. His Honour Judge McKenna made that order on 17 June 2009. On 18 June 2009 the Defendant issued an application to discharge the interim relief granted by the Learned Judge. I heard the application the next day. Very substantial material was provided to me in a very short space of time. Due to the constraints of time relating to pre-reading and also the time available for the hearing I decided to reserve my judgment over the week-end.
20. In support of his application for the discharge of the injunction granted by His Honour Judge McKenna Mr Calver QC relied, principally, on two submissions. First, he argued that there was no realistic prospect that the Claimants could succeed in this claim. Accordingly, it was inappropriate to grant any kind of interim relief. Second, in any event, he submitted that as a matter of discretion the order should not have been granted by His Honour Judge McKenna but, in any event, it was now appropriate to discharge the order made by the judge. I turn to deal with each of those submissions in turn.

The Merits of the Claim.

21. Mr Calver QC submitted that the correct legal analysis is as follows. The licence agreement between the First Claimant and the Defendant expired on 28 February 2009. Before the licence expired the First Claimant had been informed that the Defendant was willing to enter into a new licence but no such licence had in fact been concluded by 28 February 2009. Accordingly, when the First Claimant continued to provide services at the airport following that date it did so subject to the terms and conditions of the licence agreement to the extent that such terms were consistent with a continuation of the provision of services. Mr Calver QC submitted that clause 12.3.6 of the licence agreement was one such term and that it continued to have effect. That term provided that the Defendant was entitled to terminate the licence if in its “*absolute opinion*” there had been a substantial deterioration in the financial circumstances of the First Claimant. In summary, argued Mr Calver QC, all that had happened on 13 May 2009 was that the Defendant lawfully relied upon that provision to terminate the licence between the First Claimant and the Defendant since self-evidently there had been a substantial deterioration in the financial circumstances of the First Claimant. The accounts spoke for themselves.
22. In relying upon this contractual term, submitted Mr Calver QC, the Defendant was doing no more and no less than exercising a right conferred upon it by contract. Accordingly the Defendant’s decision to terminate the licence was not susceptible to judicial review. The Defendant had committed no illegal act in the public law sense.

23. Miss Clement, on behalf of the Claimants, was not disposed to accept, necessarily, that the First Claimant and the Defendant were bound by any of the terms of the licence agreement. She submitted that it was at least properly arguable that the licence had simply come to an end on 28 February 2009 and that none of its terms bound the parties thereafter. She accepted, however, that if that was the correct analysis the Claimants were providing taxi services at the airport under a “licence at will”. Such a licence, of course, is normally terminable by either party on the giving of reasonable notice. She did not submit that a notice given on 13 May 2009 to expire on 31 May 2009 was not reasonable in all the circumstances.
24. Miss Clement submitted (as is the case at least arguably) that the Defendant is a public authority as well as a limited company. Accordingly, its decisions or actions might be susceptible to judicial review, notwithstanding the fact that it was exercising a power conferred upon it by a commercial contract. She submitted that judicial review would be available if the Defendant was abusing its power when apparently or actually exercising contractual powers under a licence and, for that proposition, she relied upon **R (Molinaro) v Kensington and Chelsea RLBC [2002] LGR 336**.
25. I accept the principle set out in **Molinaro**. In my judgment it is unaffected by the subsequent decision of the Court of Appeal in **Hampshire County Council v Supportways Community Services Limited** [2006] EWCA Civ 1035.
26. As I see it the real issue in the instant case is not whether, as a matter of legal principle, the decision of the Defendant taken on 13 May 2009 could be the subject of an application for judicial review; but rather, whether the factual circumstances in this case are such that it would be appropriate to conclude that the Defendant abused its power or, indeed, committed any other wrong in the public law sense when making its decision of 13 May 2009.
27. Mr Calver QC submits that there is no evidential basis for a finding that the Defendant abused its power or committed any other kind of wrong. As the evidence now stands I have to say that I have considerable sympathy with that submission. I am conscious, however, that these proceedings have been in being for no more than 5 days and, accordingly, and not without some hesitation, it may be precipitous to reach a conclusion that there is no realistic prospect that the First Claimant can establish a public law wrong. To repeat, as the evidence stands I regard it as unlikely, at the very least, that the First Claimant can establish any public law wrong on the part of the Defendant. However, I do not think it appropriate to go further and say that there is no realistic possibility that such a wrong can be established.
28. In my judgment it is unlikely that the Second Claimant can be in a stronger position than the First Claimant. I content myself, however, with observing that he, too, may face significant difficulties in establishing that the Defendant has made a decision which is susceptible to judicial review at his behest.
29. I should add for completeness that the Claimants also wish to challenge the decision of the Defendant to enter into the new licence agreement with the Interested Party. I content myself with saying that this decision, too, must be impugned, if impugned at all, on public law grounds. There may be significant difficulties in establishing such grounds.

30. It is against this appraisal of the likelihood of the claim succeeding that I turn to consider whether or not the order for interim relief made by His Honour Judge McKenna should have been made or should now be discharged.

The making of the Interim Injunction and the application to discharge

31. His Honour Judge McKenna made his Order on 17 June 2009. He would have had before him documentation which specified that the Defendant had been served with the Claim Form and the application for interim relief at 3.10pm on 16 June 2009. The Learned Judge, obviously, was entitled to assume that the Defendant had been served as indicated by the Claimants' Solicitors and, he may well have thought that if the Defendant wished to oppose the grant of interim relief it would have indicated as much very quickly and certainly before 17 June.
32. In fact, as is now apparent from the evidence of Mr Rhys-Jones, the Defendant's solicitors were not aware of the Claim Form and application until the morning of 17 June 2009; further, before they had sufficient time that morning to respond, His Honour Judge McKenna had made the Order for interim relief.
33. In my judgment it is very doubtful whether it was appropriate for the Claimants to seek interim relief on an urgent basis given the following undisputed facts. Notice of termination of the licence agreement was given on 13 May 2009; termination of the licence took effect at midnight on 31 May 2009. Sixteen days elapsed before the Claimants issued proceedings. In that period of time the Interested Party provided services at the airport and the Claimants must have known that the services were being provided under an agreement which conferred exclusivity on the Interested Party. In those circumstances it is very difficult to see the basis upon which the Claimants could be justified in seeking urgent interim relief with such little notice, on any view, to the Defendant. The Judge was invited, in effect, to consider the issue of interim relief immediately. No justification for such a course of action is put forward in the papers or is contained within the Skeleton Argument of Miss Clement.
34. It is also to be observed that the interim relief sought on behalf of the Claimants constituted a mandatory order. In the context of a case such as the present it is comparatively rare for such an order to be granted.
35. The Claimants offered no undertaking in damages when they made their application for interim relief. While I accept that there are cases where it is not appropriate for such an undertaking to be offered or given, I do not think it was appropriate to make an order for interim relief in the absence of such an undertaking in favour of Claimants who, in these proceedings, are essentially seeking to protect their own commercial interests.
36. In summary, I have considerable doubt, at the very least, about whether it was appropriate to grant interim relief without giving the Defendant a much greater opportunity to respond to the application than was afforded.
37. Ultimately, however, the question for me is should the injunction now be discharged. I am not persuaded that there is such a risk of public disorder by having two rival enterprises providing services at the airport that it should be discharged for that reason. In reaching that decision I rely principally upon the evidence of Chief

Inspector Wharmby. Nonetheless, I have reached the clear conclusion that the interim injunction should be discharged. My reasons are as follows. First, I regard the Claimants' case as comparatively weak. Second, and consequently, it does not seem to me to be appropriate that a mandatory injunction should remain in place compelling the Defendant to permit a state of affairs to continue which it does not wish to continue. Third, there was no suggestion at the hearing that the Claimants would offer an undertaking in damages. I appreciate that I did not ask, in terms, whether such an undertaking would be proffered but it is worth noting that in her Skeleton Argument Miss Clement sought to justify there being no undertaking in damages on the part of the Claimants. Fourth, and finally, I accept the submission of Mr Calver QC that the preservation of the status quo is a material consideration. The status quo in this case, prior to the issue of the proceedings and the grant of the injunction, was that the Interested Party was providing hackney carriage services, exclusively, at the airport. In my judgment that is a state of affairs which should be permitted to continue until this dispute has been finally resolved.

38. I appreciate that the Skeleton Arguments on each side have ranged somewhat further and wider than this judgment. However, I have sought to distil the main points, as I see them, with a view to providing a judgment within the time scale that I promised the parties.
39. I propose to make an order discharging the interim order made by His Honour Judge McKenna in so far as it grants injunctive relief to the Claimants. So that appropriate arrangements can be made for the orderly conduct of business at the airport, I propose to say (unless I receive written submissions from the Defendant of the contrary) that the discharge of the order for interim relief shall take place at midnight on 23 June 2009.
40. As I indicated to the parties I would be happy to receive written submissions on the issue of the appropriate order for costs. Any application for permission to appeal should be made in writing. I specify that not to encourage any such application but, rather, to lay down an appropriate mechanism.
41. Finally, I would like to record my gratitude to all counsel for preparing such detailed and cogent submissions in such a short space of time.