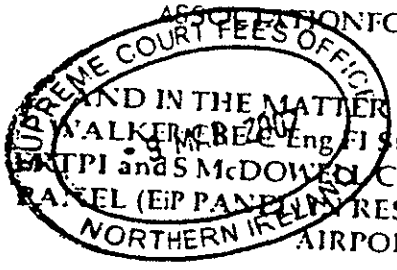


2007 No.

IN THE HIGH COURT OF JUSTICE IN NORTHERN 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 LEAVE TO APPLY FOR JUDICIAL REVIEW



AND IN THE MATTER OF A RECOMMENDATION AND REPORT BY W H  
WALKER CBE Eng FI Struct E (Chairman), C SWAIN OBE MA (Cantab) MPhil  
EIP PI and S McDOWELL CBE AS MEMBERS OF THE EXAMINATION IN PUBLIC  
RESPECT OF ISSUES RELATING TO THE BELFAST CITY  
AIRPORT PLANNING AGREEMENT 1997

I, HERBERT LOWRY McCracken, of Johnson House, 50-56 Wellington Place,  
Belfast, make oath and say as follows:-

1. I am a former partner in Johnsons and have carriage of the above entitled proceedings on behalf of the applicants and I am duly authorised by each of the applicants and by Johnsons to make this affidavit on behalf of the applicants.
2. I refer to an indexed and paginated bundle of the documents and correspondence referred to in this Affidavit which is exhibited hereto and upon which "H.L.McC1" I have signed my name at the time of swearing.
3. I refer to the report of the Examination in Public Panel ("The EiP Panel") which, although dated the 31<sup>st</sup> August 2006, was published by the Department of the Environment Planning Service ("the Department") on the 12<sup>th</sup> December 2006 which is to be found at pages 1-125 of the Exhibited bundle "H.L.McC1".
4. The EiP Panel reported following Preliminary Meetings in March and May 2006 and a substantive hearing on the 14<sup>th</sup> and 15<sup>th</sup> June 2006. All the applicants attended and made representations during the various hearings in public.

5. The terms of reference for the Panel were set by the Department and, in summary, were to conduct an independent Examination in Public of the key issues relating to the existing Belfast City Airport ("BCA") Planning Agreement 1997 ("The 1997 Agreement") which is set out at Appendix A of the EiP Report (see pages 100 and 195- 208 of the Exhibited bundle "H.L.McCI"). Key features of the 1997 Planning Agreement include a restriction on the number of seats for sale from BCA, a restriction on flights after 9.30pm and before 6.30am and a restriction on air traffic movements per annum. There has been a perceived widespread breach of the 9.30pm curfew. Further it has been shown that BCA has been in breach of the seats for sale limit which prevents BCA from offering for sale more than 1.5 million seats per annum from the Airport. The Review of the 1997 Agreement followed on from the publication of a Government White Paper entitled "*The Future of Air Transport*" which had called for "...the Northern Ireland authorities to review the form of Planning Agreement at Belfast City Airport if so requested". A request for such a review was subsequently made by BCA on the 16<sup>th</sup> January 2004. I refer to the terms of reference of the EiP Panel which are included in the EiP Panel Report at Appendix B.
6. It is fair to say that the applicants have been concerned for some time that BCA have not properly complied with the terms of the 1997 Planning Agreement. As the airport terminal has now been completely replaced with substantially increased capacity for passenger numbers, the applicants have been in constant correspondence with both the Department and the Department for Regional Development about development at the airport. The applicants were extremely concerned that the Minister had decided against a public inquiry and in favour of an Examination in Public. Consideration was given in March 2006 to a challenge to the Minister's decision to hold an EiP but, on the advice of counsel, it was agreed that the EiP should be allowed to complete its deliberations and make its recommendations before the overall position could be assessed. All of the applicants made written submissions to the EiP Panel. Additionally, I refer to memoranda and letters delivered to the EiP Panel by Cultra Residents Association and Kinnegar Residents Action Group entitled:
- a. Summary of Matters which will be raised by the Cultra Residents Association at the EiP Panel dated 9<sup>th</sup> March 2006.
  - b. Comments by the Cultra Residents Association after the first preliminary meeting of the EiP on 9<sup>th</sup> March 2000

1 B

- c. Letter from Kinnegar Residents Action Group to the Planning Service dated 2 November 2005.
- d. Letter from Roger Watts to the Planning Service dated 16 January 2006.

Each memorandum made it clear that while the Cultra Residents Association would assist the EiP Panel in its deliberations the Cultra Association did not consider the convening of the EiP Panel to be an appropriate means of determining the way forward on development at BCA. At all times the Cultra Association was of the view that there was a legal necessity for a planning application to deal with the intensification of use at Belfast City Airport. Further, they considered that there was a clear need for a public inquiry, so that all the detailed issues involved would receive proper public consultation and debate. The letters from Kinnegar Residents Group and Roger Watts are strongly in favour of a public inquiry. I refer to the said memoranda and letters which are to be found at pages 126-139 of the Exhibited bundle "HLMcC1".

7. It came as a major shock to the applicants to discover for the first time on the 24<sup>th</sup> May 2006, following receipt of the written submission of MAP Architects, that BCA had made a formal application in March 2003 under Article 41 of the Planning (Northern Ireland) Order 1991 ("The Planning Order") to the Department for a ruling that the increase in the seats for sale limit from 1.5 million to 2.5 million did not constitute "development" for the purposes of The Planning Order. I believe it is significant that neither the Application nor the Determination of the Department dated 30<sup>th</sup> June 2003 were placed in the EiP library until the existence of the Determination was uncovered. The Applicants had no prior knowledge of this application for an Article 41 determination. In fact the Department in correspondence of the 14<sup>th</sup> March 2003 and 13<sup>th</sup> May 2003 (in response to letters from Johnsons Solicitors dated 14<sup>th</sup> February 2003 and 7<sup>th</sup> April 2003) had stated that "To date no formal approach has been made to the Planning Service seeking to change operations at the Airport" I refer to copies of the said correspondence which are to be found at pages 140-148 of the Exhibited bundle "H.L.McC1".

1C

8. The applicants were also unaware that the Department had determined on the 30<sup>th</sup> June 2003 that such intensification of use did not, in fact, constitute "development". It is not known whether this decision was reached on the basis of legal advice but I am advised by senior counsel and believe that the argument that development is confined merely to a change in buildings and not to intensification of use is contrary to established case law. Further, such a determination flies in the face of the Department's previous view. For instance in a letter of the 12<sup>th</sup> June 1995 to Peter Robinson MP, G.F. Worthington, the Divisional Planning Officer stated:

*"The Department was relying on legal precedent that, in certain circumstances, intensification of authorised operations can amount to a material change of use for which planning permission is required"*

I refer to a copy of the said letter which is to be found at pages 149-152 of the Exhibited bundle "H.L.Mc.C1". It seems quite bizarre that the Department would not regard an increase of 1 million passengers (66%) to the 2.5 million quoted in the Determination at an airport site within a city as constituting a material development within the rubric of existing case law.

9. As pointed out to the Department on the 2<sup>nd</sup> October 2006 by Roger Watts on behalf of the Kinnegar Residents Association:-

*"The effect of the Article 41 declaration was to remove any possibility that Belfast City Airport would have to make a new planning application when the continuing intensification of its operations brought it over the existing 1.5 million seats for sale limit. As that limit is contained in the 1997 Planning Agreement, its removal would be primarily a matter of negotiation between it and the Airport. Accordingly, this intensification of use is not subject to normal planning processes, including any possible scrutiny by a local public enquiry under Article 31."*

I refer to a copy of the said letter which is to be found at pages 153-157 of the Exhibited bundle "H.L.Mc.C1".

1 D

10. In response to Mr Watts's correspondence, Mr C H Baird of Planning Service pointed out that there was no requirement under the legislation to advertise, neighbour notify or consult with local Councils or interested third parties and further, that in undertaking the assessment under Article 41 the Department would first consider the proposal against the definition of development as assigned to it under Article 11 of the Planning Order. It is also, I believe, significant that Mr Baird gives an absolute assurance that the Statement by Minister Angela Smith setting up the EiP in October 2005 was not in any way linked to the Article 41 Determination nor was the Minister aware of the Determination. The Deponent has been waiting since 10<sup>th</sup> November 2006 for detailed clarification on this point which seems extraordinary. In a Press Release on the 19<sup>th</sup> November 2004 the Minister referred to the views of all parties being considered so that a decision could be taken on the need for a Public Inquiry. If the Minister had been aware of the Article 41 Determination and the previous views of the Planning Service (outlined below at paragraph 14) then I believe that a proper Public Inquiry would not only have been required but been deemed inevitable. I refer to a copy of Mr Baird's letter of the 1<sup>st</sup> November which is to be found at pages 158-164 of the Exhibited bundle "H.L.Mc.C1".
11. The effect of the decision of the Department was to undermine the efficacy of the 1999 Planning Permission and the Environmental Impact Statement which accompanied it, and permit the BCA to engage in intensification of use with significant public and environmental impact without planning permission, public scrutiny or environmental impact statement.
12. It was, in fact, the seats for sale provision which prompted the current review of the 1997 Planning Agreement following the request by BCA in January 2004. A decision was taken in October 2005 by the then Minister for the Department, Lord Rooker, to have an Examination in Public conducted by an independent panel rather than a Public Inquiry. I believe in light of the correspondence from Mr Baird to Mr Watts that the Minister may not have been informed prior to the setting up of the EiP Panel that BCA already had the comfort of the Department's view that proposed intensification of use did not require planning permission as it did not constitute "development".

1 E

13. The seats for sale limit has already been breached with seats for sale totalling just over 1.5 million passengers in 2004 and 1.71 million passengers in 2005. BCA were clearly aware that there was going to be a breach of the 1.5 million requirement well before the actual breach occurred and in view of the Department's decision in June 2003, had the reassurance that they did not need to apply for planning permission with the consequent danger of a Public Inquiry.
14. Despite the Article 41 determination by the Department, it remains the Department's responsibility to enforce the 1997 Planning Agreement. It is the applicants' contention that the Department have singularly failed to do so and that the Article 41 determination combined with various recommendations in the review now makes it a relatively simple exercise for the Department to permit an increase in the seats for sale restriction without a Public Inquiry, Planning Permission or a new Environmental Impact Statement.
15. The Department did not always consider that such latitude should be afforded to BCA. Paragraph 5.6.31 of the EiP Panel Report states 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 would probably have used the previous method of calculation linked to the estimated capacity of the new terminal and an assumed occupancy factor (see para 5.6.2). In 1999, the estimated terminal capacity was 2 million passengers, as assumed in the ES. Allowing for an occupancy factor of 60% would give 3.33 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."*

16. The assumption that if the BCA had requested an increase in seats for sale at the time of the planning application for a replacement passenger terminal, it would probably have been capable of being negotiated through a new Planning Agreement is based upon an entirely false premise. From a perusal of some of the documentation I have obtained through examination of the relevant planning files it is quite clear that planning permission would not have been granted (in the absence of a new or re-opened Public Inquiry) without obtaining from BCA undertakings that they would abide by the conditions of the 1997 Planning Agreement, accompanying the 1999 Planning Application, including the limit of 1.5 million seats for sale. The Environmental Impact Statement, accompanying the 1999 Planning Application, was also based on the existence of the BCA undertaking and tested only those scenarios possible inside the 1997 Agreement. I refer, in particular, to a memo from J W O Morrison, the then Divisional Planning Officer in the Planning Department, to Robin McMinnis dated 15<sup>th</sup> June 1999 and to a letter of the 7<sup>th</sup> September 1999 from John Doran, BCA Director to J W O Morrison, which are to be found at pages 165-168 of the Exhibited bundle "H.L.Mc.C1". This correspondence was at that stage the culmination of extensive correspondence within the Planning Service, which makes it clear beyond peradventure that planning permission for the replacement terminal building would not have been granted without the undertakings in relation to the seats for sale requirement being honoured by BCA. The point is summarised pithily by Mr Morrison in his memo:-

*"The point for me in all this is that the Planning Agreement is the effective control that we are dealing with here. It is in play now and remains so even if the existing terminal is no longer in use. It means, in fact, that it really doesn't matter what size of terminal is built. That is basically why I have had no worries about the current application progressing to an approval - given the assurance that BCA were content to operate within the terms of the extant Agreement."*

17. Interestingly the submission by Mr Morrison at the hearing of the EIP in June 2006 reinforces his concern about the relaxation of the seats for sale requirement. I refer to a copy of the said submission which is to be found at pages 169-174 of the Exhibited bundle "H.L.Mc.C1".

18. The importance of the incorrect assumption made cannot be over-estimated. It provides the basis upon which the EiP Panel came to a conclusion that there should be an increase in the seats for sale requirement to 2 million in paragraphs 5.6.36 and 7.1.11 of the EiP Panel Report.
19. It is matter of concern to the applicants that within a matter of months of the Article 41 determination John McConnell, who had been acting Chief Executive of the Planning Service from November 2002 to July 2003 was appointed a Director of BCA on the 1<sup>st</sup> March 2004. From my perusal of the relevant planning files it is apparent that Mr McConnell had a significant involvement with planning matters in the City Airport at or about the time of the application by BCA pursuant to Article 41 of the Planning Order. I have outstanding letters of the 27<sup>th</sup> July 2006 and the 10<sup>th</sup> November 2006 (with follow up letters duly acknowledged by the Planning Service) which are to be found at pages 175-190 of the Exhibited bundle "H.L.Mc.C1".
20. I gather from information given by the Planning Service that a new Planning Agreement is not likely to be in force for some time. Given the commercial and other pressures on BCA to accommodate increased passenger levels, and the previous attitude of government who, in a press release of 25<sup>th</sup> October 2005 from Lord Rooker, stated that his officials believe that passenger numbers are not an appropriate measure to control the operation of Belfast City Airport, it seems highly likely that there will be significant pressure for an increase in the seats for sale permitted in any revised Planning Agreement. The applicants, however, believe that insofar as the Department rely upon the recommendations contained in the EiP Panel Report, they are doing so on the basis of an assumption which is entirely incorrect. Further it is the applicants belief that the EiP would not have been set up by the Minister had the Minister known that an article 41 determination had been made in June 2003 or indeed had the Minister been advised of the implication of making such a determination.



21. I am aware of the requirement to act promptly in relation to any possible public law challenge. I have sought for some time to obtain answers to the questions which arise out of the unpublicised Article 41 determination by the Department. I wrote to the Department on the 27<sup>th</sup> July 2006 setting out a list of questions. I received a response from the Department on the 18<sup>th</sup> August 2006 stating, in terms, that it would be inappropriate to enter into correspondence on the matter raised before the publication of the EiP Panel Report. I wrote again on the 10<sup>th</sup> November 2006 and on the 26<sup>th</sup> February 2007 but despite receiving acknowledgements and an assurance that the matters raised would be investigated no substantive response has ever been forthcoming from the Department on the issues raised. I refer to the said correspondence which can be found at pages 175-194 of the Exhibited bundle "H.L.Mc.C1".
22. Senior Counsel was consulted in November 2006. No action was taken at that stage as the EiP Panel Report had still not been published and it was decided that any action should await publication of the EiP Panel Report. The Report was duly published on the 12<sup>th</sup> December 2006 shortly prior to the Christmas break. Senior Counsel was asked to advise following publication of the Report. I was in Australia until the 21<sup>st</sup> January 2007 and advices from Senior Counsel were received on the 23<sup>rd</sup> January 2007. Certain matters required clarification and following a meeting with various representatives of the Residents Associations on the 5<sup>th</sup> February 2007 further advice was received from Senior Counsel on the 12<sup>th</sup> February 2007. It was noted at this stage that no responses had ever been forthcoming from the Department arising out of my letter of the 27<sup>th</sup> July 2006. A further meeting of various representatives of the Residents Associations was held on the 2<sup>nd</sup> March 2007 and authority was given on the 4<sup>th</sup> March 2007 to initiate judicial review proceedings.
23. I believe that the combination of the recommendation made in the EiP Panel Report and the decision pursuant to Article 41 of the Planning (Northern Ireland) Order 1991 by the Department has essentially allowed a material change to the Planning Permission given in 1999 and made it a relatively simple matter for the Department to change the seats for sale limit without the need for a planning application, new Environmental Impact Statement or public inquiry.

11

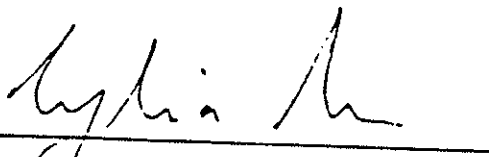
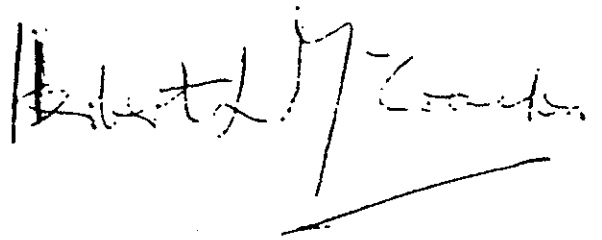
1<sup>st</sup> Affidavit: H I McCracken on behalf of Applicants. Sworn on the 8<sup>th</sup> March 2007

Save as hereinbefore stated I depose to the foregoing from facts within my own knowledge.

SWORN at 34, Upper Queen St. Belfast

this 8<sup>th</sup> day of March. 2007

before me a Solicitor of the Supreme  
Court of Judicature in Northern Ireland.



Solicitor

This affidavit is filed by Messrs Johnsons, Johnson House, 50-56 Wellington Place, Belfast, solicitors for the Applicants.

15