



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 135

High Court Record Number: 2013/3816P

Court of Appeal Record No. 2019/534

Haughton J.

Power J.

Binchy J.

BETWEEN/

RYANAIR LIMITED

PLAINTIFF/APPELLANT

- AND -

ERICK BESANCON

DEFENDANT/RESPONDENT

Ruling of the Court on Stay Application delivered electronically on the 7th day of May, 2021

1. By its judgment dated 15 April 2021 this court dismissed the appeal from the High Court directing the production/inspection by Ryanair of a less redacted B.I. Report, and indicated its intention to order that Ryanair pay the costs of the appeal to the respondent, and afforded the parties 14 days in which to notify the Court of Appeal Office if they wished to seek a different order in respect of costs.
2. By letter dated 27 April 2021 Gateley Tweed solicitors for Ryanair indicated that they were not opposing the grant of costs of the appeal to the respondent, or the adjudication of those costs, but they sought a stay on the execution. Simon McAleese solicitors for the respondent replied on 28 April 2021 opposing the granting of a stay on execution, noting that Ryanair has a stay on the benefit of the costs order against it in the High Court which "in all the circumstances, is more than enough for them."
3. Further, or in the alternative, Ryanair seeks a stay on the Order of the High and this court for inspection, and on execution of the costs of the appeal, for 21 days from the perfection of this court's order, and in the event that an application for leave to appeal to the Supreme Court is lodged, the continuation of such stays pending the determination of the leave application, and, in the event that leave is granted, continuation of the stays pending further order of the Supreme Court.

4. The ground upon which the appeal costs stay is sought is that if Ryanair succeeds in its action for defamation it will be entitled to its costs which it is reasonable to suppose will exceed the costs of this appeal which would then be a set-off against the overall costs. It is said that the respondent resides in St. Barts in the West Indies, a French Overseas Country and Territory that is not a Member State of the EU, and that "recovery of costs would be more difficult, in the circumstances."
5. This court has a wide discretion to grant a stay, and may postpone enforcement of a costs order. As Ryanair's solicitors point out in their letter the decision will depend on the circumstances of the case, and where the order is interlocutory in nature the court should have regard to the possibility of the *status quo* being reversed, whether at trial or on appeal (*In re Permanent TSB* [2020] IECA 152, paras. 54-57).
6. The court accepts that production/inspection order made by the High Court is interlocutory in nature.
7. The court accepts that the costs of trial – if Ryanair is successful – are likely to exceed costs of the instant appeal, even when combined with the costs awarded to the respondent in the High Court. However on the information before it this court is not in a position to gauge the prospect of Ryanair recovering costs from the respondent if they succeed in the action, or whether it would be more difficult than if the respondent resided within the EU area. It is worth observing that if Ryanair succeeds in its claim for damages for defamation it will face precisely the same difficulty, if difficulty there be, in executing an award of damages.
8. This was a weak appeal, and two passages from the judgment (Haughton J.) bear this out. At para.66, it is stated:

"66. For these reasons I am satisfied that the trial judge did not err in fact or in law in the conclusions that he reached at paragraphs 67 and 68 of his judgment. In my view an issue estoppel arose such that Ryanair, having agreed to make discovery of the B.I. Report, could not thereafter challenge an application for inspection or seek to justify complete or extensive redaction on the same grounds on grounds of relevance, or of necessity, provided always that this did not prevent Ryanair contesting the inspection application on grounds of confidentiality or grounds arising under the provisions of the aviation investigation legislation. *In so far as Ryanair has attempted to go beyond this and relitigate these issues on this appeal it has in my view engaged in an abuse of the process and wasted valuable court time both in the High Court and in this court.* The only real issue that arises on this appeal is the question of whether, in the light of the confidential nature of the B.I. Report and/or the aviation investigation legislation, the report should be disclosed."

[Emphasis added]

Then, having analysed the exercise by the High Court of the statutory discretion to order inspection of the confidential B.I. Report, Haughton J. concluded:

"85. I am satisfied that no valid or persuasive criticism is made of the trial judge's approach to the balancing exercise, whether in identifying the relevant domestic and aviation law, or in applying that to the facts and the pleaded case. Further, the balancing exercise is one that falls within the discretion of the trial judge, and this court, whose function as an appellate court is limited to review rather than a re-hearing, must afford a reasonable margin of appreciation to the trial judge. It would not be appropriate for this court to interfere with the exercise of the trial judge's discretion unless there was a clear error of law or fact, or clear misapplication of legal principle to the facts. *Nothing approaching anything of that nature has been demonstrated by Ryanair*, and I would reject this ground of appeal." [Emphasis added]

These passages speak for themselves.

9. The court also cannot ignore the fact that Ryanair is a well-resourced corporate entity that is suing an individual – a pilot who was a former employee of Ryanair. The respondent was represented by solicitor and counsel in the High Court, and again in this court. Those legal advisors are entitled to be paid for their successful defence of this appeal, which, for the reasons highlighted above, was in part an abuse of the process and in other respects a weak appeal. It is of course possible that the respondent has discharged those fees himself already, but in that event he is in no different a position to unpaid legal advisors- i.e. he too, as an ordinary individual litigant should not be out of pocket for such expenses any longer than is necessary.
10. The court also takes into account that the blog the subject matter of the proceedings was published in 2012, and these proceedings are now continuing more than 8 years on. The reasons for this are unclear, but what can be said is that the production of an overly redacted B.I Report which obliged the respondent to issue the inspection motion, and the appeal from the High Court, have added 2 ½ years. While this may not be of particular concern to Ryanair (notwithstanding that the claim is one in which it seeks to vindicate its reputation for safety), it is very unsatisfactory for the respondent that the proceedings continue to hang over him, with the prospect now of further delay in the event that Ryanair decides to apply for leave to further appeal to the Supreme Court. In view of the disparity in resources and position, and this delay, it cannot be said that Ryanair will suffer any real prejudice if it is required to pay the appeal court costs now, whereas the same cannot be said with any confidence for the respondent. The court should be astute to avoid a situation where a litigant in the respondent's position suffers litigation fatigue or is faced with stay after stay on costs, and must at some point be at risk of being disadvantaged when it comes to continuing to engage a legal team in defence of the proceedings.
11. The court is of the view that these considerations also apply to the alternative stay sought on the inspection order and appeal costs by Ryanair. It is perhaps surprising that almost two weeks after this court issued its decision Ryanair's solicitors should state that their client wants "time to consider its position in relation to an appeal." Given this court's unanimous view that the appeal was in part an abuse of process and in other respects

weak, it will be for Ryanair, should it apply to the Supreme Court, and should leave be granted, to persuade that court that there should be such stays.

12. Accordingly the court confirms the order that Ryanair pay the respondent's costs of the appeal, and in the exercise of its discretion refuses the application for a stay on execution of the appeal costs order. It further refuses to grant the alternative stay sought in respect of the inspection order and the execution of appeal costs in the event that leave to appeal is sought.
13. As the respondent has not incurred additional costs (other than writing a letter of opposition) in respect of the stay application the court makes no order as to the costs attendant on this ruling.

Mr. Justice Robert Haughton

Ms. Justice Ann Power

Mr. Justice Donald Binchy