[2009] IEHC 387

THE HIGH COURT

COMMERCIAL

2008 2204 P

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

BRAVOFLY LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 31st day of July, 2009

1. Introduction

1.1 On the 14th May last, I gave judgment ("the particulars' judgment") in an application brought by the plaintiff ("Ryanair") seeking to have certain aspects of the defence and counterclaim of the defendant ("Bravofly") struck out on the basis of alleged non-compliance with a previous order requiring further particulars of Bravofly's defence and counterclaim to be delivered.

1.2 As noted at para. 5.6 of the particulars' judgment, I was satisfied that the complaint made by Ryanair as to the adequacy of the particulars concerned was well made out for the reasons addressed in more detail in the course of that judgment.

1.3 However, for the reasons also addressed in the course of the particulars' judgment, I was not satisfied that it was appropriate to make any order striking out part of Bravofly's defence and counterclaim. Rather, I afforded Bravofly an opportunity to mend its hand, by giving Bravofly a further period of five weeks (that is until the 12th June last) to provide the particulars concerned.

1.4 In the light of the fact that Bravofly had, on its own case, experienced difficulty in being in a position to furnish the particulars concerned, I had regard to the possibility that that position might persist and, in the course of the particulars' judgment, indicated that, by the extended time, I would expect Bravofly to have provided particulars conforming with the earlier order for particulars which had been made. However, I went on to say as follows, at para. 5.7:-

> "If it remains the case that it is asserted that it is impossible for Bravofly to provide some or all of those particulars, then I will require that there is clear sworn evidence before the court, deposed to by persons who can speak of their own knowledge (and not deposed to by solicitors speaking from instructions) which will allow an assessment to be made as to the efforts made by Bravofly to put itself in a position to deliver the relevant particulars, the likelihood of any such particulars becoming available in the future and the extent to which it is anticipated that any material evidence concerning the technical issues concerned is likely to be led at the trial."

1.5 On 19th June last, further responses to the particulars concerned were furnished by Bravofly to Ryanair together with an affidavit sworn on the 18th June last, by a Mr. Marco Coradino, who is also a director of Bravofly.

1.6 In some respects, additional particulars are given. However, in some other respects (and in particular in relation to item 10(d)), Bravofly indicated that replies to the relevant request for particulars were not within its knowledge.

1.7 On that basis, Ryanair renews its application to have the relevant portions of the Bravofly defence and counterclaim struck out. The matter came on for hearing again before me on Friday, 17th July. This judgment is directed to the issues raised at that hearing. It is appropriate that I turn, first, to a general description of the particulars in issue.

2. The particulars in issue

2.1 Both in the particulars' judgment and in an earlier judgment dealing with other interlocutory matters given by me on 29th January, 2009, (*Ryanair Limited v. Bravofly Limited & Anor* [2009] IEHC 41), the general background to these proceedings and the issues which arise between the parties is more fully set out. However, insofar as is material to the issues which arise on this application, it is important to understand that a key issue between the parties concerns the manner in which certain software operates to facilitate clients of Bravofly, who access the Bravofly website, in both gaining access to up to date information on the availability and price of Ryanair flights and, if such customer should so choose, to book such flights.

2.2 Those issues arise in the context of the general claims made by Ryanair in these proceedings, which are to the effect that Bravofly's operation contravenes Ryanair's intellectual property and other similar rights. It is to be inferred from the pleadings that, at least to some extent, a significant issue may arise between the parties as to how it is proper to characterise the manner in which the relevant software operates, so as to determine whether it can be said that Bravofly accesses Ryanair's website and uses Ryanair's information, or whether it is more proper to characterise what happens as a facilitation by Bravofly of the customers of Bravofly in being themselves able to access the Ryanair website. It is in that context that a series of questions has been asked by way of particulars, which are designed to elicit the precise manner

in which it is said by Bravofly that the relevant software operates. Those questions arise, in the main, in the context of a positive assertion by Bravofly in the course of its defence and its counterclaim in which Bravofly asserts that it is not proper to characterise the service which it provides to its customers as one in which Bravofly itself can be said to have accessed or used Ryanair's website in any way that might amount to a breach of the intellectual property or other rights which are the subject of these proceedings. The particulars concerned request details of the manner in which Bravofly enables its customers to search for or book flights, how Bravofly's system enables it to carry out its activities and the precise technical mode of the operation of a third party IT system (to which I will refer) which is used. Further details concerning both that third party system and all systems and servers used are also requested. In the course of the hearing before me, three main areas of complaint were raised by Ryanair which give rise to the issues which I have to decide. I, therefore, turn to the issues concerned.

3. The Issues

3.1 In order to understand the distinction between some of the issues raised it is important to understand that, on the basis of the case as I currently understand it, it would appear that, at the material time when the issues in these proceedings arose, Bravofly made use of the services of a company called Travelfusion Ltd. ("Travelfusion") for the purposes of engaging in its activities. While there may be some dispute about precisely how the various systems operate and interact it would seem that, in general terms, customers of Bravofly access Bravofly's website. It then would appear that those customers are enabled to use Travelfusion's facilities so as to ascertain the necessary information about Ryanair flights and, if desired, to book same. It is the precise interaction between the systems of Bravofly, Travelfusion and Ryanair and the characterisation of that interaction, that is at the root of the issues which arise in these proceedings, which in turn are the subject of these contested particulars.

3.2 In that context, the following issues are raised:-

A. It is said, on behalf of Ryanair that, irregardless of whatever difficulties Bravofly may have in identifying precisely what the Travelfusion software does, Bravofly has insufficiently particularised how its own software interacts with Travelfusion's system in circumstances where, it is said, Bravofly must be aware of how its own systems work.

B. Secondly, it is said that, as Bravofly is unable to identify the manner in which Travelfusion's system operates (and, on the basis of the evidence put forward on behalf of Bravofly at the hearing it is likely that this will remain the position) it follows, it is said, that Bravofly cannot be permitted any longer to rely on those aspects of its defence and counterclaim which make a positive assertion to the effect that a proper characterisation of the way in which the various systems concerned operate does not involve a breach by Bravofly of any of the Ryanair rights asserted.

C. Thirdly, it is said that, in respect of requests 15 and 16, the replies given are not really answers to the questions raised at all. These latter issues involve stand alone questions.

3.3 In addition, and as a general argument, it is said that, in certain respects, identified in the grounding affidavits by reference to expert advice tendered to Ryanair and exhibited in those affidavits, the replies are contradictory. As this latter point is an overarching point, I propose dealing with it first.

4 The allegation that the particulars are contradictory in part

4.1 Under this heading, Ryanair exhibits a report from its technical expert who claims that some of the replies appear to be contradictory. However, it seems to me that this is not an issue which can properly be addressed at this stage. In my view, counsel for Bravofly was correct when he argued, under this heading, that the replies are what they are and that those replies define Bravofly's case. Questions may arise in respect of particulars which are so obviously contradictory that a court should not allow them to stand. Where, however, an argument to the effect that particulars are contradictory or are otherwise inadequate depends on complex expert evidence (and perhaps potentially contested expert evidence) then it seems to me that, ordinarily, the best course of action is to leave such matters over for the trial. Bravofly will be confined to making a case at trial within its particulars as they stand. If it should transpire that the trial judge is satisfied that Ryanair is correct in saying that those particulars are contradictory, then that will obviously have a significant effect on Bravofly's case. However, that is a matter which can only justly be determined at the trial of the action. It does not seem to me, therefore, that it would be appropriate, on the facts of this case, to seek to exclude any particulars on the grounds of an allegation that same are contradictory. Whether they be, or not be, contradictory is a matter which can only be determined at the trial.

4.2 I now turn to the interaction between Bravofly's systems and those of Travelfusion.

5. The interaction between Bravofly and Travelfusion

5.1 It seems to me that there is a cogent basis, having regard to the expert evidence tendered on behalf of Ryanair, to take the view that the particulars which are the subject of this application are inadequate insofar as they fail to describe adequately the technical way in which Bravofly's systems interact with Travelfusion's. This is a matter within Bravofly's own knowledge as it is its systems which are interacting with those of Travelfusion. To the extent, therefore, that a complaint is put forward by Ryanair to the effect that the replies to particulars are insufficient in that regard, it seems to me that such complaint is well made out. I will deal with the consequences of that finding in due course. However, it is next necessary to turn to the key issue in this application which concerns the assertion on the part of Bravofly that it is unable to ascertain how Travelfusion's systems work and is, therefore, unable to answer those particulars which require Bravofly to give a precise technical description of how Travelfusion's systems operate.

6. The Travelfusion system

6.1 It should be recalled that, of course, Travelfusion was a co-defendant in these proceedings, but was dismissed because of a lack of jurisdiction to entertain the claims as against Travelfusion (the reasons for this are set out in my judgment of 29th January 2009). There is no doubt (and it is indeed conceded) that Bravofly has not answered those aspects of the particulars sought which require it to describe the precise technical manner in which the Travelfusion

system permits Bravofly customers to ascertain flight availability and price and, if appropriate, to book flights with Ryanair. The question is as to what the consequences of that fact should be.

6.2 It should be remembered, of course, that Ryanair is the plaintiff in these proceedings. It is for Ryanair to prove its case. The fact that the operation of the practice of the Commercial Court does not permit a defendant to simply enter into a bland traverse of a plaintiff's claim and allow its case to "emerge" in the course of the hearing does not, of course, have the effect of altering the onus of proof which rests on a plaintiff. Thus, the fact remains that Ryanair will need to establish on the balance of probabilities that whatever happens in the complex interaction between the systems of Bravofly, Travelfusion, and its own website, same amounts to an infringement of the various rights asserted. However, it may well be that Ryanair will be in a position to put forward expert evidence which would allow a reasonable inference to be drawn that the operation of such systems does amount to a breach of some or all of the rights asserted. It is in that context that the positive plea contained in the Bravofly defence and counterclaim, to the effect that the operation of the systems concerned should not be characterised in a way which would lead to a potential breach of Ryanair's rights, needs to be seen. It is one thing for Bravofly to defend these proceedings on the basis of an assertion that Ryanair has not been able to establish that what happens amounts to a breach of any of Ryanair's rights. It is quite another thing altogether for Bravofly to wish to put forward a positive case, based on evidence, from which it might be sought to be asserted that the proper technical characterisation of what happens is such as should lead to no breach of rights occurring.

6.3 It is in that context that it is necessary to view the stated inability of Bravofly to provide particulars of the precise technical way in which the Travelfusion system operates. I should also note that it was in the context of ensuring fair procedures that I directed that, amongst other things, Bravofly should specify whether it believed it was ever going to be in a position to provide such particulars. If Bravofly indicated that it was going to be in a position to provide such particulars, then it would have been necessary to consider the timeframe within which such particulars might be provided in the context of a reasonable timeframe for these proceedings coming on for hearing so as to ascertain whether it would, in all the circumstances, be fair to give Bravofly more time. However, that did not happen. What did happen was that Bravofly have indicated that it is unlikely that it will ever be in a position to provide the relevant information.

6.4 It seems to me that, in those circumstances, it cannot be permissible to allow Bravofly to seek to make the positive case now contained within the pleadings. Bravofly is, of course, entitled to require Ryanair to prove Ryanair's case. It is entitled to make any points concerning any absence of adequate proof in that regard. However, it would be unfair to now allow Bravofly to make a positive case to the effect that the proper characterisation of the interaction of the various systems involved does not amount to such as could give rise to the alleged breaches of Ryanair's rights.

6.5 It seems to me that, at the level of principle, it is now necessary to direct that Bravofly cannot make such a positive case. This is not a situation where there is simply a delay in providing particulars. While it is, of course, the case that, in the event of delay, a court retains a discretion to strike out any relevant pleading where the delay becomes unacceptable, cases where the party indicates an inability to provide the particulars concerned really fall in to a different category. It is clear that Bravofly do not believe that they will ever be able to provide the relevant particulars. On that basis, it has to be accepted that Bravofly cannot be permitted to make a positive case where it is unable to provide particulars of that case. It is hard, indeed, to see how any prejudice could be caused by any such direction because it seems clear that Bravofly will not be able to present any evidence as to the Travelfusion system's technical operation at trial, for Bravofly does not anticipate having the necessary information. It seems to me, therefore, that Bravofly must now be prevented from making any positive case concerning the issues to which I have referred. That should not prevent Bravofly from being entitled to argue that Ryanair has failed to discharge the onus of proof on any issues where that onus of proof rests on Ryanair.

7. Requests 15 and 16

7.1 It is next necessary to turn to the two specific discreet areas in respect of which, it is said, that Bravofly have failed to deliver proper particulars, that is to say, requests 15 and 16.

7.2 It seems to me that the latest replies to particulars do not, in fact, answer the questions asked. It seems to me, therefore, that in those two respects, also, there has been an undoubted failure on the part of Bravofly to respond to the particulars requested. There does not seem to be any basis for suggesting that Bravofly cannot provide the information sought.

8. The consequences

8.1 I have already dealt with what seems to me to be the consequences, in general terms, of the inability of Bravofly to provide particulars of the precise technical manner in which the Travelfusion system operates. So far as the other two matters are concerned, it seems to me that it would be disproportionate, even at this late stage, not to afford Bravofly one brief further opportunity to supply the particulars concerned. Therefore, in respect of those areas which involve particulars of the way in which Bravofly's own system operates so as to interact with the Travelfusion system, and so far as requests 15 and 16 are concerned, I will afford Bravofly one final opportunity to answer those requests not later than three weeks from today's date. No further extension of time will be given and any failure to adequately respond to the requests concerned will be treated in the same manner as a breach of an "unless" order.

8.2 So far as the issues concerning the precise technical details of the Travelfusion system is concerned, I have already indicated that it will be necessary to strike out any aspect of Bravofly's defence and counterclaim which involves a positive assertion based on how it is said that Travelfusion's system operates. Any such action will, of course, be without prejudice to the undoubted entitlement of Bravofly to assert, at the trial, that Ryanair has failed to discharge the onus of proof on it.

8.3 In this latter context, I should also note that mention was made, on behalf of Bravofly, at the hearing before me, of the possibility that, contrary to Bravofly's current understanding, evidence might at some stage in the future, and prior to trial, become available relevant to the issue concerned. It seems to me that I should not rule out the possibility that Bravofly might be able to persuade the court to allow it to reactivate its assertion in those circumstances. However, it seems to me that, in fairness to Ryanair, those aspects of the defence and counterclaim which amount to a positive defence under this heading should be struck out at this stage. Therefore, if it should transpire that Bravofly, in the future, feels that it is in a position to seek to reactivate those matters, then Bravofly will be required to bring an application

before the court seeking to amend the proceedings by the reinstatement of those pleas. Whether, and if so on what terms, it might be appropriate to allow such an application would, of course, depend, amongst other things, on the stage to which the proceedings had progressed at that point in time. If, for example, Ryanair had filed witness statements (including expert witness statements), which were directed towards the case as it then stood (that is, a case without a positive assertion in respect of the relevant matters from the Bravofly side), then a point might be reached where it would become disproportionate to allow Bravofly to reassert the matters now being directed to be dropped or, at an absolute minimum, it might be disproportionate to allow any such course of action to be adopted without a significant cost penalty. Those are, however, matters that can be addressed if they arise.

9. Conclusions

9.1 In conclusion, therefore, I propose giving Bravofly a final, "unless", three week opportunity to remedy the failure of particularisation which I have identified. I will also direct that the aspects of Bravofly's defence and counterclaim which make a positive assertion concerning the manner in which the Travelfusion system operates must be deleted. In this latter regard, I propose giving the parties an opportunity to attempt to agree the precise text of any such deletion. In the event of any absence of agreement, the matter will be listed for mention, in any event, on the 6th October next, at which stage any dispute can be resolved, as can any alleged failure to provide additional particulars within the three week period to which I have referred.