Neutral Citation [2015] IEHC 875

THE HIGH COURT

[2014 No 4488P]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

PETER JOHN FLEMING

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 14th day of October, 2015.

Introduction

1. This is an application by the defendant, an airline pilot domiciled in New South Wales, Australia to set aside the order of Ryan J. made on 12th May 2014, pursuant to O. 12 (26) of the Rules of the Superior Courts ("**RSC**") which provides that a defendant, before appearing, may serve a Notice of Motion to set aside the service of a Notice of Summons (as arose in this case) or to discharge the order authorising service.

2. The order of Ryan J. on 12th May 2014, was made following an ex-parte application in proceedings with the same title as the present proceedings but having Record Number 2013/132 IA for liberty to serve Notice of Summons on the defendant outside the jurisdiction. That same order also extended the time within which to bring defamation proceedings for a period not exceeding two years from 29th September 2012. These proceedings with Record Number 2014/4488P were then issued on 15th May 2014.

3. The defendant also seeks to set aside the purported service of the proceedings on the defendant by reason of the fact that the Notice of Summons was only served on the defendant's wife on 11th July 2014, without having obtained any order for substituted service.

4. An appearance was entered on 19th September 2014, solely to contest the jurisdiction of the Court in these proceedings. The Notice of Motion for the hearing of this application was then issued and served. A replying affidavit was sworn as authorised by the Plaintiff airline on 21st January 2015.

The Relevant Facts

5. A comment made under the name "Squawk 7600" on a website called Professional Pilots Rumour Network ("**PPRune**") which was online from 29th September 2012, to 3rd November 2012, is the subject of the plaintiff 's claim.

6. Although the plaintiff's Legal and Regulatory Affairs advisor alleged a concealment of identity by the defendant, it has emerged that the plaintiff did not request the plaintiff through PPRune to identify himself or to take the posting down. Rather, the plaintiff instructed a law firm in Los Angeles to procure by subpoena information which allowed it to get the IP address for the defendant in mid January 2013.

7. The plaintiff's then Legal and Regulatory Affairs counsel, according to his affidavit sworn on 24th October 2013, took preliminary advice from an Australian law firm on defamation and identity seeking applications. Following a Melbourne court order made on 13th August 2013, an affidavit of discovery disclosed the name and address of the defendant.

8. Solicitors for the plaintiff airline based in Dublin sent a letter dated 3rd September 2013, by registered post to the defendant's home address in New South Wales, wherein they sought an apology, a retraction to be published on the PPRune website for a year, an undertaking not to publish any defamatory allegations, payment of a sum of money to a charity to be nominated by the plaintiff and the plaintiff's legal costs.

9. Following that letter the plaintiff obtained the ex-parte orders (described earlier) which extended the time to bring defamation proceedings to 28th September 2014, and gave liberty to serve Notice of the Summons intended to be issued on the defendant at his home in New South Wales.

The Cause of Action

10. The draft summons and the draft Statement of Claim as disclosed to the Court now set out the alleged meaning and innuendo which the plaintiff relied upon and sought in particular an injunction to restrain the defendant from publishing the alleged or similar defamatory words in addition to damages.

The PPRune posting.

11. Following receipt of the Notice of Summons by the defendant's wife in New South Wales, the defendant confirmed *inter alia* that the impugned PPRune posting had been taken down on 3rd November 2012, and he expressed the view that if common sense did not prevail, the plaintiff airline should at least issue proceedings in Australia where the defendant will be better able to defend himself.

12. Suffice to say that the plaintiff airline has pressed on and the defendant was obliged to engage Irish solicitors and counsel to advise and represent him in this jurisdiction.

Order 11 (1) (f) of the RSC.

13. Mr. John Kerr, counsel for the plaintiff, submitted that the plaintiff has the right to pursue the defendant in this jurisdiction because O. 11 (1) (f) of the RSC (upon which the plaintiff now relies solely) permits the Court to assume jurisdiction where it can infer that a tort has been committed in Ireland.

14. Apart from the Court's concern that it is only the averment of the plaintiff's Legal and Regulatory Affairs advisor (para. 3 of the affidavit sworn on 16th January 2015) which suggests that a tort has been committed in Ireland, the Court emphasises its discretion in making an order.

15. The judgment of Kelly J. in *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK* [2014] IEHC 115 succinctly summarises the law in relation to this type of application. The interests of both parties and the aims of justice are the cornerstone of the *forum non*

conveniens doctrine.

Australian Law
16. The uncontradicted affidavit of Mr. Maroia sworn on 3rd December 2014 outlining Australian law, has satisfied the Court that there is little if no merit for the parties to have the plaintiff's claim determined in this jurisdiction. The submissions of counsel for the plaintiff that:-

> 1. The application should have been made following service of the Notice of Motion seeking a direction extending the time within which to bring the proceedings and for leave to serve a Notice of Motion on the plaintiff in New South Wales for that application does not assist the plaintiff. The relevant Irish defamation proceedings were only issued on 15th May 2014, and it is those proceedings in which a conditional appearance was entered.
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> 2. The further submission of counsel for the plaintiff that the Court should not have regard to the inability to enforce any judgment of the Court omits to take account of the care and circumspection which the Court exercises having regard to the international comity of courts.

17. Over and above all of the issues raised by the various legal advisors to the plaintiff, is the requirement for the Court to determine the forum in which it is just and reasonable for the defendant to answer for his alleged wrongdoing. The plaintiff is a successful commercial airline operating throughout Europe with vast resources and interests. The defendant is an airline pilot with a wife and two children who has never visited Ireland.

18. Order 11 (2) of the RSC provides for the Court to *"have regard to the amount or value of the claim …. and to the comparative cost and convenience of proceedings in Ireland or in the place of the defendant's residence"*. There is nothing but a tenuous connection by way of a suggested inference between the plaintiff's alleged cause of action in Ireland and the defendant. There is no evidence to suggest that Ireland compared to Australia would be more convenient or less costly for the parties to litigate the issue raised by the plaintiff.

Conclusion
19. In view of the Court's reasoning and determination, the Court considers that it need only make an order in the terms of para. 1 of the Notice of Motion issued on the 17th November, 2014, which sought "An order setting aside the Order of this Honourable Court authorising service outside of the jurisdiction of the instant proceedings upon the Defendant" together with any order in relation to costs which may be sought.