

THE HIGH COURT

COMMERCIAL

2011 252 SP

IN THE MATTER OF ARTICLES 4, 5 AND 6 OF DIRECTIVE 2007/36/EC OF 11TH JULY, 2007, ON THE EXERCISE OF CERTAIN RIGHTS OF SHAREHOLDERS AND LISTED COMPANIES AND

IN THE MATTER OF SECTIONS 132A, 133A AND 133B OF THE COMPANIES ACTS 1963 (AS INSERTED BY REGULATIONS 5 AND 7 OF THE SHAREHOLDERS RIGHTS DIRECTIVE 2007/36/EC)

REGULATIONS 2009

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

AER LINGUS GROUP PLC.

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 15th day of April, 2011

1. The plaintiff and the defendants are both airline companies. The plaintiff holds 29.82% of the issued share capital of the defendant, which is in excess of 3% of the total voting rights of all the members who have the right to vote at the Annual General Meeting, scheduled for 6th May, 2011 (herein after referred to as "the AGM").

2. By letter dated 15th March, 2011, the plaintiff wrote to the defendant, relying on s. 133B of the Companies Act 1963 (as inserted by Regulation 7 of the Shareholders Rights Directive 2007/36/EC) (hereinafter referred to as "the Regulations") and confirming that it owned more than 3% of the defendant, expressing its wish to table the following resolutions at the AGM:-

"(1) In view of the company's substantial cash reserves, which have increased by €56.5m during the year to €885m, and the two recent payments of €25m to the ESOT and €30m to the Revenue Commissioners arising from payments made to 715 staff under the 2009 Greenfield Programme, shareholders believe that the company should declare and pay a dividend of €30m for the year ended 31st December, 2010.

(2) In view of the recent €25.3m payment to the ESOT and the €30m payment to the Irish Revenue, and the company's confirmation that its pension schemes operate on a defined contribution basis, shareholders believe that no further payments should be made either to the ESOT, or to any company pension schemes over and above the existing defined contribution rates, without prior shareholder approval."

(ESOT is the Employee Share Ownership Trust).

3. By letter dated 28th March, 2011, the defendant informed the plaintiff that it would not table the said resolutions, asserting, *inter alia*, that s. 133B of the Companies Act 1963, was not an absolute right and was subject to the Articles of Association of the Company, Irish Company law and also national and EU Competition law. The plaintiff claims that the refusal of the defendant to table the draft resolutions is unlawful and in breach of the Companies Act 1963-2009, and in particular, sections 132A and 133B of the Companies Act 1963 as inserted by Regulation 5 and 7, respectively, of the Regulations. The plaintiff seeks various declarations arising out of the defendant's refusal to table the draft resolutions and for orders compelling the defendant to take all necessary steps for the purpose of allowing the plaintiff to table the resolutions and placing them on the defendant's internet site as soon as possible. The plaintiff also seeks, if necessary, an order prohibiting the defendant from holding the AGM without affording the plaintiff the opportunity of tabling the resolutions.

Statutory Provisions

4. Section 132A of the Companies Acts 1963-2010 (as inserted by Regulation 5 of the Regulations) provides:

"A company traded on a regulated market shall ensure equal treatment for all members who are in the same position with regard to the exercise of voting rights and participation in a general meeting."

5. Section 133B of the Companies Acts 1963-2010 (as inserted by Regulation 7 of the Regulations) provides:-

"(1) A member of a company traded on a regulated market, shall have the right, by electronic or postal means, at an address specified by the company to-

(a) Put an item on the agenda of an annual general meeting, provided that each such item is accompanied by stated grounds justifying its inclusion or a draft resolution to be adopted at the general meeting, and

(b) Table a draft resolution for an item on the agenda of a general meeting, subject to the member or members concerned holding 3% of the issued share capital, representing at least 3% of the total voting rights of all the members who have a right to vote at the meeting to which the request for inclusion of the item relates.

(2) A request by a member to put an item on the agenda or to table a draft resolution under sub-section (1)(a) shall be received by the company in hardcopy form or in electronic form, at least 42 days before the meeting to which it relates.

(3) Where the exercise of the right conferred by sub-section (1)(a) involves a modification of the agenda for the Annual General Meeting, in situations where the agenda has already been communicated to the members, and only in such situations, the company shall make available a revised agenda in the same manner as the previous agenda in advance of the applicable record dated (as defined in s. 134A) of share-ownership for the purposes of entitlement to vote, or, if no such record date applies, sufficiently in advance of the date of the annual general meeting so as to enable other members to appoint a proxy or, where applicable, to vote by correspondence.

(4) In order to facilitate a member to avail of sub-section (1)(a), the company shall ensure that the date of the next annual general meeting is placed on its internet site by -

(a) the end of the previous financial year, or

(b) not later than seventy days prior to the annual general meeting whichever is the earlier."

The Defendant's Refusal

6. After receiving the plaintiff's request of 15th March, 2011, the defendant replied on 28th March, 2011, stating, *inter alia*:-

"Both of the resolutions in your letter attempt to subvert the authority which is expressly conferred upon the Directors of Aer Lingus under the Articles of Association. The power to declare and pay a dividend is conferred on the Directors of the company under Articles 111 and 112 of the Articles of Association and the restriction which you seek to impose on the Directors under the second resolution would limit the powers expressly conferred on the Directors under the Articles of Association (in particular, Articles 84 and 99) with regard to the remuneration of employees.

Furthermore, as our largest competitor, it is not appropriate for the Directors of Aer Lingus Group plc. to cooperate in any way with any attempt by Ryanair to restrain the Company's unfettered freedom to conduct its business, including as to the use of its financial resources and as to the remuneration paid to employees. Your resolutions, if passed by the general meeting and acted upon by the Board, mean that Aer Lingus would de facto be implementing a strategy proposed by Ryanair and agreed by the Company. Both Agreements and concerted practices among competitors are unlawful and, indeed, constitute criminal offences under Irish law."

7. Articles 111 and 112 of the defendant's Articles of Association read as follows:-

"111. Declaration of Dividends

Subject to the provisions of the Acts, the Company, by ordinary resolution, may declare dividends in accordance with the respective rights of the members, but no dividend shall exceed the amount recommended by the Directors.

112. Interim and Fixed Dividends

Subject to the provisions of the Acts, the Directors may declare and pay interim dividends if it appears to them that they are justified by the profits of the Company available for distribution. If the share capital is divided into different classes, the Directors may declare and pay interim dividends on shares which confer deferred or non-preferred rights with regard to dividend as well as on shares which confer preferential rights with regard to dividend, but subject always to any restrictions for the time being in force (whether under these Articles, under the terms of issue of any shares or under any agreement to which the Company, is a party, or otherwise) relating to the application, or the priority of application, of the Company's profits available for distribution or to the declaration or, as the case may be, the payment of dividends by the Company. Subject, as aforesaid, the Directors may also pay at intervals settled by them any dividend payable at a fixed rate if it appears to them that the profits available for distribution justify the payment. Provided the Directors act in good faith, they shall not incur any liability to the Holders of shares conferring preferred rights for any loss they may suffer for the lawful payment of an interim dividend on any shares having deferred or non-preferred rights."

8. In the context of this application, it is also important to consider the wording of Article 84. It reads as follows:-

"84. Directors' Powers

Subject to the provisions of the Acts, the Memorandum of Association of the Company and these Articles and to any directions by the members given by ordinary resolution, not being inconsistent with these Articles or with the Acts, the business of the Company shall be managed by the Directors who may do all such acts and things and exercise all powers of the Company as are not by the Acts or by these Articles required to be done or exercised by the Company in general meetings. No alteration of the Memorandum of Association of the Company or of these Articles and no such direction shall invalidate any prior act of the Directors which would have been valid if that alteration had not been made or that direction had not been given. The powers given by this Article shall not be limited by any special power given to the Directors by these Articles and a meeting of Directors at which a quorum is present may exercise all powers exercisable by the Directors."

Submissions

9. The plaintiff submits that the resolutions do not and could not affect or "subvert" the authority that is expressly conferred upon the Directors under the Articles of Association. The plaintiff says that the defendant's letter of 28th March, 2011, acknowledges expressly that if the resolutions were passed, they would have to be ". . . acted upon by the Board". The plaintiff refers to s. 25(1) of the Companies Act 1963, which provides:

"Subject to the provisions of this Act, the Memorandum and Articles shall, when registered, bind the Company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants by each member to observe all the provisions of the Memorandum and of the Articles."

10. In *Clarke v. Workman* [1920] 1 I.R. 107, Ross J. at p. 112, described the Articles of Association of a company as constituting a contract between every shareholder and the company. He said:-

"It is a contract of the most sacred character, and it is on the faith of it that each shareholder advances his money . . ."

It can only be varied by a special resolution.

11. The plaintiff argues that s. 25 is subject to the provisions of s. 133B which provides that the plaintiff shall have the right to table a resolution and that this right is not subject to any statutory contract pursuant to section 25. The plaintiff argues that there is no ambiguity in sections 132A, 133A and 133B, and that the statutory scheme is clearly designed to permit shareholders to table resolutions so as to protect their interests, subject only to a requirement that a particular percentage shareholding be held by a shareholder or group of shareholders.

12. The plaintiff relies also on the preamble to the Directive, and in particular, paragraphs (3) and (7). They read as follows:

"(3) Holders of shares carrying voting rights should be able to exercise those rights given that they are reflected in the price that has to be paid at the acquisition of the shares. Furthermore, effective shareholder control is a pre-requisite to sound corporate governance and should, therefore, be facilitated and encouraged. It is therefore necessary to adopt measures to approximate the laws of the Member States to this end. Obstacles which deter shareholders from voting, such as making the exercise of voting rights subject to the blocking of shares during a certain period before the general meeting, should be removed . . .

(7) Shareholders should, in principle, have the possibility to put items on the agenda of the general meeting and to table draft resolutions for items on the agenda. Without prejudice to different time-frames and modalities which are currently in use across the Community, the exercise of those rights should be made subject to two basic rules, namely, that any threshold required for the exercise of those rights should not exceed 5% of the company's share capital and that all shareholders should, in every case, receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda."

13. The defendant argues that the proceedings raise a net point which is as follows: can Aer Lingus be compelled to table resolutions which, if passed in general meeting, it could not lawfully implement? It argues that no question of unequal treatment among shareholders arises. It has refused to table the draft resolutions because they are bad in law and therefore no issue under s. 132A arises. It also asserts that there is nothing in s. 133B which allows a member to table a resolution which is bad in law. The Directors have indicated that they do not propose the payment of dividends in respect of the year ended 31st December, 2010. This appears in the Directors' Report presented to shareholders. Some argument took place between counsel as to whether this amounted to a proposal or a recommendation. Article 111 prohibits the Company by ordinary resolution declaring dividends exceeding the amount recommended by the Directors. The defendant says that the first resolution proposed by the plaintiff seeks to do precisely that. The Articles of Association are binding on the members and can only be altered by passing a special resolution passed by at least 75% of the members of the Company entitled to vote at a general meeting of which due notice has been given. Article 84 of the Articles of Association is, in the relevant part, materially identical to Article 80 of the model Articles of Association contained in Table A of the First Schedule to the 1963 Act. The court has been referred to commentary on the model Article 80 by Thomas V. Courtney in his book, *'The Law of Private Companies'*, where he says:

"The result of the use of the word 'directions' can be said to be as follows: that members can direct the Directors to do or refrain from doing certain acts, only where to do so was not inconsistent with the Articles of that Company. Hence, where the Articles themselves (apart from model reg. 80) expressly give the Directors certain powers, the members cannot act in disregard of those powers by directing the Directors as to how such powers should be exercised."

In commenting on the same model Article 80, Usher, in his book, *'Company Law in Ireland'* stated:

". . . the general meeting could not force the Directors to pay an interim dividend (Article 117) or to recommend a final dividend (Article 116) . . ."

14. Article 84 of the defendant's Articles of Association confers power on the Directors to manage the business of the Company and the defendant asserts that these powers are subject to such directions given by the Company in general meeting that are not inconsistent with the Articles of Association or the provisions of the Act.

15. Specifically, with regard to the first resolution proposed by the plaintiff, the defendant says that the Directors have recommended that no dividend be paid for the year ended 31st December, 2010, and that, accordingly, the provisions of Article 111 of the Articles of Association apply, so that the members in general meeting cannot, by resolution, override that recommendation. The first proposed resolution seeks to override the recommendation of the Board and, as such, it could not be lawfully implemented by the Board if it is bound in law. In *Scott v. Scott* [1943] 1 All E.R. 582, an ordinary resolution tabled and passed by members in general meeting was held to be invalid where it purported to resolve the payment of instalments of a preference dividend before the dividend had been declared by the Board. Clauson L.J. held that the payment of an interim dividend was a matter which, under the Articles of Association, was placed within the exclusive power of the Directors, and that the resolution passed by members in general meeting was invalid because it impinged upon the sphere of activity which, in the most express terms, was confined to the Directors.

16. On the issue of the proposed second resolution concerning the pension scheme, the defendant points to Article 99 of the Articles of Association which set out the Board's powers as to the payments to the Company's pension scheme. The defendant argues that the power to determine what (if any) pension benefits the Company will provide and to determine what payments are to be made to the Company's pension scheme has been entrusted by the Articles of Association to the Directors, and that the provisions of Article 84 apply so that the members in general meeting cannot, by ordinary resolution, seek to override or fetter that exclusive power. The defendant says that the plaintiff seeks to argue that, as Article 99 of the Articles of Association confers a discretion on the Directors in relation to pension benefits, it does not restrict the right of shareholders to pass a resolution concerning pension payments. For their part, the defendant says this argument is misconceived because Article 99 confers on the Board, exclusively, the discretion to make decisions concerning pension benefits, pension payments and pension schemes. There is nothing in Article 99 to suggest that the members in general meeting are given any parallel powers to those conferred upon the Directors. The defendant submits that the plaintiff is seeking, through this second proposed resolution, to deprive the Board of their exclusive power to deal with such matters and is thereby seeking to override the clear terms of Article 99 and is therefore an invalid resolution.

Conclusions

17. The balance sheet which goes before an Annual General Meeting should contain the Profit and Loss Account, a report by the Directors and the Auditor's Report. Section 158 of the Principal Act requires that the Directors' report must state the amount (if any) which they recommend should be paid by way of dividend. The Directors' report for the year ended 31st December, 2010, states:

"The Directors do not propose the payment of dividends in respect of the year ended 31st December, 2010."

When these words are considered in the light of s. 158, it seems clear to me that they are a recommendation by the Board to the Annual General Meeting that no dividends be paid in respect of that year. A dividend does not become payable unless it is declared by one of the organs of the company. While the Act does not specify which organ of the company should declare a dividend, it is usual for the Articles of Association to provide that it is to be declared by the company in general meeting, and it is not to exceed such amount as is recommended by the Directors. That is precisely what is provided for in Article 111 of the Articles of Association. I accept the submissions of the defendant that the Directors have recommended to the members that no dividend be paid and that the first of the proposed resolutions by the plaintiff seeks to circumvent Article 111. This is not permissible. The Company was entitled to refuse to put this resolution before the Annual General Meeting since it was not within the power of the members by ordinary resolution to declare a dividend which exceeded the amount recommended by the Directors. In this case, the Directors were recommending no dividend.

18. I also accept the submissions of the defendant concerning the second proposed resolution on the pension scheme. In the first place, it is an unsatisfactory resolution because it appears to be merely aspirational. I reach this conclusion because of the use of the words "... shareholders believe that no further payments should be made . . . without prior shareholder approval". However, there is a more fundamental objection to the resolution. The Board has been given power to determine what (if any) pension benefits the Company will provide and to determine what payments are to be made to the Company's pension scheme. Since this power is given to the Directors under the Articles of Association, the members, in general meeting, cannot, by ordinary resolution, seek to override or fetter that exclusive power. If the Directors cannot or will not exercise a power vested in them, then the general meeting may do so. But that has not happened here. The Court of Appeal in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* [1906] 2 Ch. 34, stated clearly that the division of powers between the board of directors and the company in general meeting depended, in the case of registered companies, entirely on the construction of the Articles of Association, and that, where powers had been vested in the board, the general meeting could not interfere with their exercise. The Articles were held to constitute a contract by which the members had agreed that the directors should manage certain aspects of the company's affairs. In *Scott v. Scott* [1943] 1 All. E.R. 582, it was held that resolutions of a general meeting which might be interpreted either as directions to pay an interim dividend or as instructions to make loans were nullities in circumstances where the relevant powers have been delegated to the directors. The second resolution proposed by the plaintiff also offends against this principle, since it seeks to usurp or override the powers of the Directors specifically given to them under the Articles of Association.

19. I therefore refuse the reliefs sought by the plaintiff.