THE HIGH COURT

[2011 No. 8979P]

BETWEEN

TICKET GENERATOR LIMITED

PLAINTIFF

AND

DUBLIN AIRPORT AUTHORITY PLC, RYANAIR LIMITED AND RYANAIR HOLDINGS PLC.

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 11th day of May, 2012.

1. The application in the context of the proceedings

1.1 The plenary summons in these proceedings was issued on 7th October, 2011. Originally, there were three defendants in the proceedings. On 29th February, 2012 the plaintiff served notice of discontinuance on the third named defendant, Ryanair Holdings Plc.

1.2 The application now before the Court was initiated by a notice of motion dated 23rd December, 2011, in which both the second and third named defendants sought an order pursuant to Order 29 of the Rules of the Superior Courts 1986 (the Rules) and/or the inherent jurisdiction of the Court requiring sufficient security to be given by the plaintiff for the legal costs of those defendants in the proceedings. In the light of the discontinuance against the third named defendant, the application is being pursued by the second named defendant, which will be referred to as Ryanair, only.

1.3 The statement of claim was delivered by the plaintiff on 19th December, 2011, that is to say, before the notice of motion seeking security for costs was issued by Ryanair. It was delivered subsequent to the judgment of the Court (MacMenamin J.) and the order made on foot of that judgment on 4th November, 2011 refusing an application by the plaintiff for an interlocutory injunction restraining Ryanair and the third named defendant from intimidating, interfering with, or obstructing the plaintiff or the plaintiff's staff in the plaintiff's lawful activity in Dublin Airport as authorised pursuant to the terms of a Licence Agreement entered into between the first named defendant (DAA) and the plaintiff.

1.4 The factual background to the plaintiff's claim, as pleaded in the statement of claim, is that, following a tender process, in July 2011 the DAA granted the plaintiff a non-exclusive licence "to sell train tickets for all flights bound for London in Terminal 1 and 2 of Dublin Airport" on the terms of the Licence Agreement referred to above. What this means is that the plaintiff claims that it has the right to sell transport tickets, for example, tickets to travel on the Stansted Express from Stansted Airport to London in the "Licensed Area", as defined in the Licence Agreement, at Dublin Airport. In the statement of claim, the plaintiff has outlined the alleged unlawful, illegal and unauthorised activities of Ryanair of which it complains. It is alleged that the plaintiff's staff were "continually harassed, intimidated and obstructed by the servants and/or agents" of Ryanair in the sale of tickets and the lawful exercise of the plaintiff's rights under the Licence Agreement by, *inter alia*, seeking to divert passengers away from the plaintiff's kiosk, advising passengers not to purchase rail tickets for the Stansted Express from the plaintiff, advising queuing passengers to purchase tickets for the Stansted Express from Ryanair and not from the "kiosk", and sending e-mails to customers containing false, misleading and inaccurate information regarding the sale of Stansted Express rail tickets at Terminal 1 and in relation to the plaintiff. There follows in the statement of claim particulars of "intentional interference with economic interest/contractual relations" presumably of the plaintiff by Ryanair, including preventing passengers gaining access to the plaintiffs kiosk at Terminal 1 and disseminating false, misleading and inaccurate information regarding the plaintiffs pricing of rail tickets for the Stansted Express. It is alleged that those particulars constitute deliberate interference and/or threats to the performance of the terms of the Licence Agreement by the plaintiff by virtue of the unlawful, illegal and unauthorised activity of Ryanair and that the activities constitute deliberate interference and/or threats to the trade and business of the plaintiff by unlawful means. Further, there is set out particulars of alleged injurious falsehood by Ryanair, for example, that without just cause or excuse it deliberately and maliciously disseminated inaccurate, false and misleading information about the plaintiff. It is pleaded that the plaintiff will rely on the facts and circumstances complained of in support of the application of the doctrines of intentional interference with contractual relations and injurious falsehood.

1.5 The reliefs which the plaintiff claims in the statement of claim against Ryanair are the following:

> (a) damages for deliberate interference and/or threats to the performance of the Licence Agreement by the illegal, unlawful and unauthorised activity of Ryanair;
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> (b) damages for deliberate interference and/or threats to the trade or business of the plaintiff by the illegal, unlawful and unauthorised activity of Ryanair; and
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> (c) damages for injurious falsehood.

1.6 In the statement of claim the plaintiff also claims against Ryanair an order in the form of the undertaking already given by the second and third defendants, stipulating that breach of the order would "constitute a contempt of court". The circumstances in which the undertaking was given were that by order of the Court (Clarke J) made on 12th October, 2011, on foot of an *ex parte* application by the plaintiff, it was ordered that the second and third defendants were restrained until 14th October, 2011, or until further order in the meantime, from-

> (i) handing out flyers or displaying signs or placards which contain inaccurate or misleading information relating to tickets sold by the plaintiff at their Kiosk situate in Terminal 1 Dublin Airport;
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> (ii) physically blocking or preventing passengers from queuing at or gaining access to the plaintiffs Kiosk at Terminal 1 Dublin Airport;

(iii) using the tannoy or public address system or otherwise verbally communicating incorrect or false information relating to the plaintiffs ticket sales in Terminal 1 Dublin Airport;

(iv) approaching passengers who have purchased tickets from the plaintiff for the purpose of communicating false or inaccurate information in relation to the plaintiffs sale of rail tickets in Terminal 1.

In his judgment following the hearing of the interlocutory application, MacMenamin J. refused the application subject to satisfactory undertakings being given by Ryanair. I agree with the submission made by counsel for the plaintiff on this application that the basis of such refusal was primarily that damages would be an adequate remedy for the plaintiff if it is successful at the substantive hearing. The order of the Court made on 4th November, 2011 records that Ryanair by its counsel gave an undertaking to the Court in the terms of the interim order dated 12th October, 2011 outlined above. While the perfected order does not so indicate, I assume that the intention was that the undertaking would remain in place pending the determination of the substantive case.

1.7 In the order dated 4th November, 2011 it was ordered that Ryanair should recover from the plaintiff 75% of the costs of the interlocutory application. The deduction of 25%, as I understand the position, reflects the fact, as set out in para. 57 of his judgment, that MacMenamin J. deprecated the use by Ryanair of the affidavits "as part of an advertising campaign" and as being replete with "hype".

2. Jurisdiction invoked by Ryanair

2.1 The jurisdiction invoked by Ryanair on this application is the jurisdiction conferred on the Court by Order 29 of the Rules.

2.2 Order 29 provides*, inter alia*, as follows:

"1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish security.

2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.

3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.

4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."

There is a helpful summary of the nature of the jurisdiction exercised by the Court under Order 29 in the judgment of Keane J., as he then was, in *Pitt v. Bolger* [1996] 1 I.R. 108.

2.3 The plaintiff is a private limited company which was incorporated in the United Kingdom on 5th February, 2010. On the evidence before the Court it appears that the central control and management of the plaintiff is in the United Kingdom so that it can be accepted, for present purposes, that the plaintiff is ordinarily resident not in this jurisdiction, but in the United Kingdom.

2.4 In my view, Ryanair has properly invoked the jurisdiction conferred by Order 29, as the alternative jurisdiction of the Court to make an order for security for costs conferred by s. 390 of the Companies Act 1963 (the Act of 1963) has no application, in that, not having been formed and registered under the Act of 1963, the plaintiff is not a "company" as defined in that Act.

2.5 While the plaintiff, as I have found, is, for present purposes, ordinarily resident in the United Kingdom and, as such, EU resident, as is pointed out in Delany and McGrath on *Civil Procedure in the Superior Courts*, 3rd Ed., (at para. 13-64)-

"... where security for costs is granted against a plaintiff company resident in the EU because of its impecunious state, this will not constitute discrimination contrary to Article 18 TFEU as an order would be made against a company resident in the jurisdiction on the same basis, *i.e*. its likely inability to pay the costs of a successful defendant."

3. The law

3.1 Although this application is an application against a corporate litigant for security for costs under Order 29, not under s. 390 of the Act of 1963, I understand it to be common case that the following passage from the judgment of the Supreme Court in *Usk District Residents Association Ltd. v. The Environmental Protection Agency* [2006] 1 ILRM 363 (at p. 368) represents the approach the Court should adopt in identifying the issues which arise on this application:

"The overall approach to security for costs was helpfully summarised by Morris P. in *Interfinance Group Limited v. KPMG*, unreported, High Court, Morris P., 29th June, 1998 as follows:-

'1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:-
(a) that he has a *prima facie* defence to the plaintiffs claim, and

(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful.

2. In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus rests upon the party resisting the order.

The most common examples of such special circumstances include cases where a plaintiffs inability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.

The list of special circumstances referred to is not, of course, exhaustive.'"

3.2 While I propose considering each of the tests identified in that passage in turn, the reality of the situation is that the plaintiffs

resistance at the hearing of the application to an order for security for costs being made was founded on the contention that a special circumstance exists in this case, which is outside the category of the "most common examples" of special circumstances identified in the passage from the judgement in the *Interfinance Group* case quoted above, on the basis of which, it was argued, the Court should refuse to exercise its discretion to make an order for security for costs. I will consider the authorities relied on by counsel for the plaintiff in support of that proposition later.

4. Prima facie defence to plaintiff's claim?
4.1 Ryanair's defence to the plaintiffs case as pleaded was addressed by Ryanair not only in the affidavits filed on its behalf on this application, but also in the affidavits filed on its behalf in response to the application for the interlocutory injunction. Counsel for the plaintiff conceded at the hearing of this application that Ryanair has a *prima facie* defence to the plaintiff's case as pleaded in the statement of claim. However, he submitted that there has been a development since the statement of claim was delivered, which has given rise to a special circumstance which justifies the Court in not making an order for security. I will consider that submission later.

4.2 On the basis of the plaintiff's case as pleaded in the statement of claim, I am satisfied that Ryanair has demonstrated that it has a *prima facie* defence to the plaintiff's claim:

5. Plaintiff unable to pay the costs of Ryanair if successful?
5.1 Counsel for the plaintiff accepted that there was an obligation on the plaintiff to show that it will be able to pay Ryanair's costs if Ryanair is successful once its ability to do so was put in issue by Ryanair.

5.2 In Ryanair's grounding affidavit sworn by its Head of Retail, Kate Sherry, on 22nd December, 2011, the following facts were averred to:

> (a) that Peter Fitzpatrick & Co., Legal Costs Accountants, had estimated the likely costs of Ryanair of defending the proceedings as being between €125,000 and €150,000 excluding VAT;
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> (b) that Peter Fitzpatrick & Co. had produced a statement of the costs of the second and third defendants in defending the plaintiffs application for the interlocutory injunction, on the basis that the statement was "without prejudice to taxation", in which the total costs and outlay inclusive of VAT were measured at €124,046.26, for €93,034.70 (i.e. 75%) of which the plaintiff is liable pursuant to the order of MacMenamin J. made on 4th November, 2011, which has not been appealed; and
>
> (c) although the plaintiff had been incorporated since 5th February, 2010, no accounts had been filed on behalf of the plaintiff with Companies House in England, and the filing of such accounts was overdue from 5th November, 2011.

5.3 The first replying affidavit filed on behalf of the plaintiff was sworn by John Costello, a director of the plaintiff, on 29th February, 2012. In that affidavit Mr. Costello averred that the accounts of the plaintiff had been prepared in draft form and were ready for delivery to Companies House but had not been delivered because the plaintiff has "a *bona fide* issue with the United Kingdom Revenue Authority as to whether VAT should be charged on rail tickets". Mr. Costello exhibited a so-called "declaration of solvency" furnished by the plaintiffs auditors, Sarah Place, Accountants, which was dated 23rd February, 2012 and stated that, based on the information in the plaintiffs accounts to 28th February, 2011, which were then in draft form and would be completed in the near future, the plaintiff "is solvent and able to meet its liabilities as they fall due". Mr. Costello also averred to the plaintiff's actual turnover and actual net profit before corporation tax for the period ended 28th February, 2011 and projected corresponding figures for the year ended 29th February, 2012, and he also furnished a printout of the plaintiff's current account with Lloyds TSB for the period from 12th February, 2012 to 27th February, 2012, which showed a credit balance of £142,670.20 Sterling (equivalent to €168,250 at the rate of exchange on the day of the swearing of the affidavit). Mr. Costello did not exhibit the draft accounts. However, in the second of two affidavits sworn by him on 8th March, 2012 he did exhibit what are described as "Abbreviated Unaudited Accounts" of the plaintiff for the period from 5th February, 2010 to 28th February, 2011, which merely contain an Abbreviated Balance Sheet as at 28th February, 2011 and notes on it.

5.4 In an affidavit sworn on 15th March, 2012 and filed on behalf of Ryanair, John Harding, Chartered Accountant, exhibited his report which contains his analysis of the so-called declaration of solvency exhibited by Mr. Costello, Mr. Costello's averments as to the actual net profit for the period ended 28th February, 2011 and the projected net profit for the year ended 29th February, 2012 in the context of the draft accounts for the period ended 28th February, 2011, the objective of which was to express an opinion as to whether, if Ryanair was successful in the proceedings, the plaintiff would be in a position to discharge the costs estimated by Peter Fitzpatrick & Co. of the proceedings. Having commented as to the deficiencies in the only accounts of the plaintiff which were available to him, namely, the unsigned and unaudited abbreviated accounts for the period ended 28th February, 2011, and, in particular, to the fact that no profit and loss account or profit and loss appropriation account has been presented, Mr. Harding conducted a comprehensive and thorough analysis of what was available to him and he concluded that as of 28th February, 2011 the plaintiff "was operating well outside the margins of safety that would be considered prudent and advisable" to ensure that the plaintiff would be able to continue as a going concern. Moreover, he analysed the figures given for projected turnover and net profit before corporation tax for the year ended 29th February, 2012 given in a letter dated 7th March, 2012 from Sarah Place Accountants, which had been exhibited by Mr. Costello in his first affidavit of 8th March, 2012. Mr. Harding, having made what he considered the appropriate adjustments to the figures, which included factoring in the estimated costs (€93,034.70) which have already been awarded against the plaintiff under the order of MacMenamin J. made on 4th November, 2011, concluded that "any incremental profit retained by the plaintiff for the year ended 29th February, 2012 will be minimal". The opinion expressed by Mr. Harding at the end of his report, on the basis of the information available, was that the plaintiff "will have insufficient collateral within its resources and under its control to secure a payment of costs of the magnitude of €125,000 to €150,000" in the event of such award being made in favour of Ryanair.

5.5 Despite the fact that a further affidavit was filed on behalf of the plaintiff to which I will refer later, the plaintiff has not furnished any evidence whatsoever which would contradict the conclusions reached by Mr. Harding in his report. Moreover, at no stage has the plaintiff questioned either -

> (a) the statement of the costs of the second and third named defendants of defending the interlocutory injunction or the quantification of the proportion of those costs awarded against the plaintiff by Peter Fitzpatrick & Co., or
>
> (b) the estimation of the cost to the defendant of defending the proceedings made by Peter Fitzpatrick & Co.

Counsel for the plaintiff obliquely referred to the fact that there may be some good reason for the plaintiff not addressing Mr. Harding's report, which I surmise was intended to suggest that there would be some commercial sensitivity surrounding any further

information the plaintiff furnished. There is no evidence before the Court of any circumstance which absolves the plaintiff from refuting the expert evidence adduced on behalf of Ryanair, if it is refutable.

5.6 Counsel for the plaintiff did, however, accept that the relevant principles which the Court has to apply in addressing the issue of inability to pay costs are those set out by Clarke J. in his judgment in *Parolen Ltd. v. Patrick Doherty & Anor*. [2010] IEHC 71, which were relied on by counsel for Ryanair. In that case, Clarke J. stated (at para. 2.7):

> "It is important to emphasise that what a defendant is required to establish is that the plaintiff would not be in a position to pay costs should the litigation be successful. Where the costs would be significant, it is insufficient for the plaintiff concerned to say that it is not insolvent, if it is clear that it would not have available resources to meet those costs should it lose. A plaintiff, for example, which only had available to it a sum of €50,000 would manifestly not be able to pay €250,000 costs in the event that significant litigation mounted by it, where the relevant defendant was likely to incur costs of that order, was under consideration. Such a plaintiff company would undoubtedly be solvent. However, its solvency would not prevent it being properly described as being in a position where it would be unable to pay the likely costs of a successful defence to its litigation."

On the evidence before the Court and, in particular, the evidence of Mr. Harding, I must conclude that, as a matter of probability, the plaintiff will not be able to pay Ryanair's costs of defending the proceedings, if Ryanair is successful.

5.7 In arriving at that conclusion I have attached no weight to the speculation contained in Ms. Sherry's second affidavit sworn on 5th March, 2012 that, because a Dutch company, Abellio, has replaced National Express as a franchisee to operate the Greater Anglia rail franchise, which includes the Stansted Express, from 5th February, 2012, the plaintiff no longer has an entitlement to sell tickets for the Stansted Express at Dublin Airport. As a matter of fact, it appears from Ms. Sherry's final affidavit sworn on 1st May, 2012 that the plaintiff has continued to sell Stansted Express rail tickets at Dublin Airport up to the present time.

6. Special circumstance?
6.1 The special circumstance relied on by the plaintiff as an answer to Ryanair's claim for security for costs arises from an affidavit sworn by Fred Gross, a director of the plaintiff, on 2nd May, 2012. In that affidavit Mr. Gross exhibited two letters from Howard Millar, Chief Financial Officer of Ryanair to Andrew Chivers, Managing Director of Stansted Express.

6.2 The first letter was dated 30th August, 2011. In the letter Ryanair complained that the sale by Stansted Express of tickets at Dublin Airport was frustrating Ryanair's ability to perform under the terms and conditions of its contract, which I take to mean, its contract with Stansted Express to sell rail tickets online and on board its aircraft. Ryanair insisted that Stansted Express immediately cease selling tickets at Dublin Airport and warned that, in the absence of an agreement or undertaking to that effect, it would consider all options available to it including legal redress. The letter continued:

> "As outlined in our phone call and previous letter this will be up to and including, the cessation of onboard and web sales, the issue of a press release confirming this, the promotion of alternative transport at Stansted, announcements on board to confirm same, and the issue of e-mails to this effect to our 75 million passengers."

It was indicated that, pending the resolution of the matter, Ryanair would continue to issue an invoice of £1,000 per day for each day of the lost sales.

6.3 The second letter was dated 30th September, 2011 and referred to a letter of 20th September, 2011 from Stansted Express, which has not been put in evidence. In that letter, Mr. Millar stated:

> "Whilst your agent in Dublin may be licensed by the airport it is clearly your agent and therefore Stansted Express determines how your agent operates. Please confirm that the deliberate targeting of our passengers on Stansted flights at Ryanair boarding gate queues at Dublin airport will cease forthwith and Stansted Express will not engage in this type of targeting without prior agreement with Ryanair. We would not object to Stansted Express opening a rail ticket sales desk (not a mobile booth) landside in the main terminal at Dublin Airport, which does not interfere or target Ryanair's boarding queues or our airside gate queues."

It was stated that, if Stansted Express confirmed agreement and ceased the targeting of passengers, Ryanair would reduce the amount of the invoice for losses by 50%.

6.4 In his affidavit, Mr. Gross has asserted that the letters exhibited constitute clear evidence of Ryanair engaging in activity designed to undermine the plaintiff and to engage in a concerted campaign to undermine and interfere with business activities of the plaintiff in circumstances where it had no right to do so. The letters are characterised as constituting "clear evidence of interference by [Ryanair] in the contractual relations of the plaintiff with its suppliers". Mr. Gross has further asserted that-

> (a) Ryanair has actually engaged in the activity complained of in the proceedings;
>
> (b) there has been a "complete lack of candour" with the Court on the part of Ryanair;
>
> (c) it is in the public interest that the proceedings be litigated "without the impediment of a security for costs order" being made against the plaintiff;
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> (d) Ryanair has interfered in a market place in which it has no direct interest and has sought to use its dominance in its own market place (the London-Stansted air route) to manipulate, coerce and threaten the Stansted Express;
>
> (e) such activity is wrong, incorrect and unlawful; and
>
> (f) an inquiry into the unlawful behaviour of Ryanair is in the public interest.

6.5 On the hearing of the application, the basis on which it was contended that there was a special circumstance which the Court should have regard to in determining whether to grant security for costs to Ryanair was that the two letters, in the context of what has happened in the proceedings to date, are evidence of conduct on the part of Ryanair which disentitles it to the remedy it seeks. In support of that contention, counsel for the plaintiff referred to one aspect of the conduct of the application for an interlocutory injunction. In the replying affidavit sworn by Ms. Sherry on 17th October, 2011 she averred to the circumstances in which Ryanair discovered it was the plaintiff which was selling Stansted Express tickets in Terminal 1 and she averred that, in order to address the

issue, Ryanair initially took the matter up with Stansted Express. In relation to the interaction with Stansted Express she merely exhibited an e-mail from the sales manager of National Express East Anglia and Stansted Express to an official in Ryanair dated 23rd August, 2011 in which it was asserted that the agent, namely, the plaintiff, had authorisation from the DAA and was "legitimately selling tickets to customers for travel on Stansted Express", but with the added rider that the plaintiff had been asked to immediately stop advising customers that rail tickets would not be available in-flight. As I understand it, the conduct on the part of Ryanair complained of by the plaintiff is that, while it knew from 23rd August, 2011 that the plaintiff was licensed to sell Stansted Express tickets on the ground at Dublin Airport, nonetheless, Ryanair sought to stop Stansted Express supplying tickets to the plaintiff on the threat that it would wreak financial havoc on Stansted Express. It was contended that the conduct of Ryanair amounted to an inducement of breach of contract and an interference with the contractual relations of the plaintiff with Stansted Express. However, it was acknowledged by counsel for the plaintiff that the plaintiff was not contending that the conduct of Ryanair raised a "public interest" issue and that the remedy which it was contended it was open to the plaintiff to pursue arising from the alleged wrongful conduct on the part of Ryanair was a private law remedy in tort.

6.6 The primary purpose of outlining as comprehensively as I have done in paragraphs 1.4 to 1.6 above the plaintiffs case as pleaded against Ryanair is to demonstrate that there is not pleaded in the statement of claim any factual or legal basis to support a claim by the plaintiff against Ryanair for inducement of breach of, or interference with, its contractual relationship with Stansted Express. It was acknowledged by counsel for the plaintiff that the plaintiff may have to apply to court for leave to amend its statement of claim to include such a claim. Until it does so, the Court, on this application, can only determine the issues between the parties on the case as pleaded.

6.7 There is no evidence before the Court of any breach by Ryanair of the undertaking given to the Court and recorded in the order of 4th November, 2011. Ms. Sherry, in an affidavit sworn on 1st May, 2012, in response to an unsworn copy of the affidavit of Mr. Gross, has averred that Ryanair has not breached that undertaking.

6.8 In advancing the argument that the Court should have regard to what it was alleged was improper conduct on the part of Ryanair, counsel for the plaintiff relied on two authorities: the decision of the High Court (Costello J) in *Comhlucht Paipear Riomhaireachta Teo (In voluntary liquidation) v. Udaras na Gaeltachta* [1987] I.R. 684; and the decision of the High Court (Costello J.) in *Irish Commercial Society Ltd. (in liquidation) v. Plunkett* [1988] I.R.

6.9 In the *Comhlucht Paipear Riomhaireachta Teo* case the liquidator of the plaintiff company was claiming the return of monies paid by the plaintiff company on the grounds that the payment was a fraudulent preference. The monies in question had been borrowed by the plaintiff company in January 1982 from the second defendant, G.T. Carpets Ltd., and had been repaid in June 1982 at a time when the plaintiff company was clearly insolvent. G.T. Carpets Ltd., which was a wholly owned subsidiary of the first defendant, Udanis na Gaeltachta, had gone into liquidation in August 1982. As the headnote records, in an attempt to clarify the circumstances surrounding the loan and, in particular, the original source of the monies, the liquidator of the plaintiff company had raised a number of queries with each of the defendants. The first and second defendants answered some of those queries but there was a conflict between the answers given by various officers. Other queries were evaded or ignored. The third defendant, an accountant, who was the first defendant's agent in relation to the loan, gave some general information but refused to deal with a series of specific queries until he was paid a sum of money for fees for cooperating with the liquidator. The passage from the judgment of Costello J. on which counsel for the plaintiff relied is the following passage (at p. 694):

> "There is another factor to be taken into account in the particular circumstances of this case-namely, the conduct of each of the defendants in the light of the requests made to them for information concerning this transaction. I am entitled to look behind the corporate facade presented by the two defendants to the realities of this case. It will then be seen that the officials of Údarás na Gaeltachta acting as its officers have proffered one version of this transaction whilst other officials of Údarás na Gaeltachta acting as officers of its subsidiary have proffered a conflicting version. Neither defendant has explained how this conflict arose and indeed, on this motion, have simply ignored its existence. When, perfectly reasonably, the liquidator sought further elucidation the request made to an tÚdarás was ignored and when made to an tÚdarás's subsidiary was evaded. This conduct, in my view, constitutes special circumstances justifying the refusal of the present application. The liquidator acted reasonably in requesting these defendants to elucidate the discrepancy and to give him further information concerning the. transaction. An tÚdarás unreasonably ignored it. It was reasonable to institute proceedings against them in the light of the information the liquidator had. The strength of the plaintiffs case combined with the defendant's conduct justifies me in refusing this application."

6.10 On an appeal against the decision of the High Court by the plaintiff company, the Supreme Court dismissed the appeal and confirmed the order of the High Court but on different grounds. The Supreme Court, in the judgment of McCarthy J. reported at [1990] 1 I.R. 320, held that the costs of a successful defendant in an action brought after liquidation would rank in priority to all other claims in the liquidation of the plaintiff company and that, as there were sufficient funds available to pay the costs of a successful defendant, the application for security, which was an application under s. 390 of the Act of 1963, failed *in limine*. However, what is significant for present purposes is that the Supreme Court held that neither the apparent contradictions in the explanations given by the first and second defendants nor the evasiveness of the third defendant in answering the liquidator's questions were special circumstances that would justify refusing an order for security for costs. It was pointed out that the liquidator could have invoked the powers of the Court under ss. 245 and 298 of the Act of 1963 to deal with the problem. Although not an issue raised by the plaintiff in this case, the Supreme Court also held that the strength or otherwise of the parties' cases was not an appropriate consideration in an application for security for costs.

6.11 In addition to relying on the averment contained in Ms. Sherry's affidavit in response to the application for the interlocutory injunction and the e-mail from Stansted Express exhibited therein, counsel for the plaintiff also relied on correspondence which passed between Ryanair's solicitors and the plaintiff's solicitors in early October 2011. By letter dated 7th October, 2011 Ryanair's solicitors sought clarification of the relationship, if any, which existed between the plaintiff and Stansted Express entitling the plaintiff to distribute Stansted Express rail tickets, stating that Ryanair had already received threatening correspondence from Stansted Express in relation to the sale of Stansted Express rail tickets at Dublin Airport. The plaintiffs solicitors' response was in a letter dated 10th October, 2011 in which it was stated that the plaintiff had a contractual relationship with the supplier of tickets for the scheduled rail passenger service between Stansted Airport and London, London Eastern Railway Ltd., whereby it was entitled to distribute tickets for the Stansted Express rail service. In the same letter the plaintiff's solicitors sought sight of the "threatening correspondence" from Stansted Express which had been referred to in Ryanair solicitors' letter of 7th October, 2011. Counsel for the defendant pointed out that there had been no response to that request. Quite frankly, I can see no basis whatsoever for concluding that the conduct of Ryanair, in keeping its cards close to its chest in circumstances where plenary proceedings had been initiated by the plaintiff against it, was improper to the extent that it should constitute a special circumstance to justify refusing an order for security for costs.

6.12 Having considered the judgment of Costello J. in the *Irish Commercial Society Ltd.* case, I have come to the conclusion that it

does not assist the plaintiff either. Indeed, as is pointed out in Delany and McGrath op. cit. (at para. 13 -71), the approach adopted by the Supreme Court in the *Comhlucht Paipear Riomhaireachta Teo* case is slightly difficult to reconcile with the view expressed by Costello J. in the *Irish Commercial Society Ltd*. case that he could take "all the circumstances of the case into consideration" and these would include, in his opinion, "the strength of the plaintiffs claim and the conduct of the applicant for security". It is suggested there that the approach of the Supreme Court, which endorsed the position adopted by Murphy J. in *Bula Ltd. v. Tara Mines Ltd. (No. 3)* [1987] I.R. 494 is the better one and has met with a greater degree of approval.

6.13 Accordingly, I find that no special circumstance has been established in this case, which would justify the Court in refusing an order for security for costs.

7. Order

7.1 There will be an order pursuant to Order 29 of the Rules that the plaintiff to furnish security for costs to Ryanair.

7.2 As regards the consequences which follow from that order the following considerations remain:

> (a) whether at this juncture the plaintiff should be allowed challenge the estimate of the costs put before the Court by Ryanair;
>
> (b) whether the quantification of the amount of the security should be referred to the Master; and
>
> (c) more importantly, whether, given that the order for security is made under Order 29, the amount of security ordered should be one-third of the estimated costs, in accordance with the decision in *Thalle v. Soares* [1957] I.R. 182.

I will hear further submissions on those issues.