Neutral Citation Number [2009] IEHC 386

THE HIGH COURT

COMMERCIAL

2008 2204 P

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

BRAVOFLY LIMITED AND

TRAVELFUSION LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 30th day of July, 2009

The Issue
Should the plaintiff (Ryanair) be permitted to join an additional defendant called Bravofly S.A. (S.A.) to these proceedings? The first defendant (Bravofly) believes that it should not and argues accordingly.

The Proceedings
In this action, Ryanair claims, *inter alia*, a declaration that the terms and conditions of use of its website are lawful, valid and binding on Bravofly. It alleges that a contract was entered into between it and Bravofly as a result of Bravofly accessing and using Ryanair's website. Ryanair seeks injunctive relief against Bravofly from infringing the rights of Ryanair which are alleged to subsist in its database of flight information contained on its website. Ryanair also seeks injunctive relief restraining Bravofly from infringing its community registered trademark and also from using data and/or information extracted from Ryanair's website regarding services provided by that entity. Damages for breach of contract and wrongful interference with Ryanair's economic interests and infringement of its trademark are also sought.

In its statement of claim, Ryanair alleges that its website plays a central part in the conduct of its business. It contends that it has spent large sums of money in designing, organising, operating and maintaining the website so as to ensure its efficient operation. It alleges that admission to the website is subject to Ryanair's terms and conditions. Those conditions make permission to use the website conditional upon such use being non-commercial in nature and furthermore prohibit use of any automated system to extract data from the site.

Ryanair contends that in October 2007, it became aware that Bravofly was breaching the aforesaid terms and conditions by, *inter alia*, using the system to extract information from the website for commercial purposes and by establishing unauthorised links into the website. This practice is known in the airline business as "*screen scraping*".

Amongst the items alleged in Bravofly's defence and counterclaim is a plea that Ryanair is in a dominant position in respect of low cost online booked air travel and is allegedly attempting to stymie competition in the relevant market contrary to both domestic legislation and European law.

The Present Application
Ryanair seeks leave to join S.A., a Swiss Company, as a co-defendant in the proceedings in circumstances where the plaintiff claims S.A. was conducting the screen-scraping activities complained of, and to amend the summons and statement of claim to reflect that. At para. 15 of the grounding affidavit of Michael Cawley, the deponent avers that S.A. have admitted their involvement in the screen-scraping activity in certain Swiss proceedings (which I will deal with later) and have further admitted to having taken over the key management and operational role in respect of the websites in question at the relevant dates. On that basis, the plaintiff says S.A. should be joined in the present proceedings. It also seeks leave to serve S.A. out of the jurisdiction pursuant to O. 11B of the Rules of the Superior Courts. Bravofly objects to this course on the basis that such an exercise would be fruitless. If joined, it is argued that the proceedings between Bravofly and S.A. would be subject to an immediate mandatory stay by the court of its own motion pursuant to Article 21 of the Lugano Convention (the Convention). The reason for this is the existence of the Swiss proceedings brought by S.A. against Ryanair in the District Magistrates Court of Lugano. Those proceedings were commenced on the 10th June, 2008. Even if S.A. is joined, it is argued that this Court would ultimately have to decline jurisdiction in favour of the Swiss Court thus making the joinder of S.A. a futile and unnecessary step causing delay and additional costs.

The Convention
The Convention is set forth in the 7th Schedule to the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (the Act). The Act provides that the Convention shall have the force of law in this State and stipulates that judicial notice shall be taken of it.

Article 21 is contained in s. 8 of the Convention under the heading "Lis Pendens – Related Actions".

Article 21 provides:-

> "*Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own*

motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

Article 22 of the Convention is also relevant. It reads:-

"*Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.*

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

The Swiss Proceedings

The instant proceedings were commenced on 14th March, 2008.

On 10th June 2008, S.A. commenced two sets of proceedings in Switzerland. S.A. is a company with its seat in Switzerland and consequently this Court's jurisdiction over it is governed by the Convention as both Switzerland and Ireland are contracting parties to the Convention.

One set of proceedings in the Swiss Court seeks declarations that S.A. is not infringing Ryanair's website terms and conditions nor its database rights (the infringement action). The other proceedings seek a declaration that certain assertions allegedly made by Ryanair regarding breach of its website terms and conditions and infringement of its database rights are unfair pursuant to certain specific provisions of unfair competition law in Switzerland (the competition action).

Ryanair accepts that the infringement action in Lugano can be regarded as concerning the same cause of action as the claims of Ryanair in the present proceedings and that therefore as of the date of the swearing of its grounding affidavit, namely 23rd July, 2008, there were overlapping pending proceedings in Switzerland. However, the deponent of that affidavit contends that as the application to join S.A. is brought in these proceedings which were commenced on 14th March, 2008, then it follows that this Court is the court first seised.

Given that it is accepted that there are overlapping claims in the two jurisdictions, it is necessary to decide which of them is first in time.

Which is First?

The answer to this question is to be found in the provisions of O. 15, r. 13 of the Rules of the Superior Courts.

That rule insofar as it is relevant provides as follows:-

"*…The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just,…order that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added… Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party.*" (My emphasis)

This rule has generally come to be considered judicially in the context of an application to join a party to an action in circumstances where that party, if joined, could successfully plead that the claim against him was statute barred. It is not necessary to consider these cases since they are not relevant to the issues in the present case. It is sufficient to note that they were all considered by Clarke J. in his judgment in *Hynes v. Western Health Board* [2006] IEHC 55. What is of interest from a consideration of these cases is that nowhere do they suggest that O. 15, r. 13 does not mean what it says when its speaks of the proceedings against the newly joined party being "*deemed to have begun only on the making of the order adding such party*".

In these circumstances, I reject the contention of Ryanair that these proceedings predate the Lugano proceedings insofar as S.A. is concerned.

The Corporate Veil

Ryanair argues that I ought to treat Bravofly and S.A. as the same economic entity and that therefore to all intents and purposes the proceedings in this jurisdiction which commenced on 14th March, 2008, can be regarded as the first in time against both Bravofly and S.A. even though S.A. has not yet been joined in the proceedings.

I have little difficulty in rejecting this contention. Ryanair effectively invites me to treat both companies as a single economic entity. Apart from the fact that there is no evidence to support that proposition, it is one which is the polar opposite to what Ryanair asserted before the Lugano Court. In its submission to that court dated 31st July, 2008, Ryanair said:-

> "It is self evident that Article 21 (of the Convention) cannot be applied, given the lack of coincidence between the parties and considering how the two companies Bravofly Limited and S.A. respectively are two separate legal entities, domiciled in two different countries, even if they belonged to the same group."

Ryanair cannot have it both ways. It cannot argue before this Court that it should treat Bravofly Limited and S.A., as in effect the same entity whilst arguing the direct opposite before the Swiss Court. In any event, there is no evidence here which would justify the lifting of the corporate veil between Bravofly Limited and S.A. and consequently I reject Ryanair's submission.

The Stay Application in Lugano
I have already pointed out that S.A. commenced two sets of proceedings against Ryanair in the Lugano Court. Ryanair has accepted that the infringement action can be regarded as involving the same cause of action as the claims made by Ryanair in the present proceedings. Notwithstanding that, Ryanair argues that there are different matters to be decided by the Irish Court to those being tried in Switzerland. In fact, the differences between the two were sought to be demonstrated by the production of a table identifying the causes of action in the Irish proceedings as contrasted with those in the Swiss proceedings.

It is rather ironic that Ryanair sought to stay the Swiss proceedings on the grounds that "*related actions*" had been brought in Ireland whilst in this jurisdiction it now claims that they are different. Ryanair urged the Lugano Court to accept that the matters before the Irish Courts were sufficiently similar to the Swiss proceedings to warrant the granting of a stay there. It argued before this Court that the matters in dispute are sufficiently different to warrant adding S.A. as a co-defendant in these proceedings.

It is less than impressive that Ryanair should argue in support of a stay on the Swiss proceedings the exact opposite of what it argues before this Court in an effort to have S.A. joined as a co-defendant.

Not merely was the stay application of Ryanair unsuccessful before the Lugano Court but so also was its attempt to have that decision reviewed. On 8th April, 2009, the Swiss Court rejected Ryanair's application for a stay in respect of both actions brought against it by S.A. in that jurisdiction.

The reasons given by the Lugano Court for refusing to grant the stay were five in number. They are of interest and of some relevance to the application before me. That court held as follows:-

> (1) That it was open to Ryanair to avoid the risk of irreconcilable judgments resulting from separate proceedings by having "*recourse to the passive joinder of litigants pursuant to Article 6.1 of the Convention rather than to Article 22*". In this way, the court held Ryanair "*consciously opted to run the risk of contradictory rulings and cannot now claim to defend itself from that risk to the detriment of S.A.*".
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> (2) Article 22 of the Convention is concerned, inter alia, with practicality and economy and as Ryanair failed to show how a stay on the Swiss proceedings would be more procedurally economical, the stay should not be granted. Also of relevance was the fact that the Irish proceedings involved multiple parties whereas in the Swiss case, there were only two parties.
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> (3) While the issues in the Swiss and Irish proceedings were related, they were not the same:"*…it is true that the issues are related, but the applicable legislation is different and the nature of the evidence will not necessarily be the same either…*".
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> (4) The risk of contradictory rulings has already been incurred as there are similar proceedings in other courts throughout Europe. In those circumstances, the granting of the stay by the Swiss Court would not alleviate the risk of contradictory rulings.
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> (5) There were two related actions before the Swiss Court arising out of this dispute:-
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> > (i) The infringement action and the competition action.
> >
> > (ii) The competition action had little or nothing in common with the Irish proceedings and so a stay of the Swiss proceedings could not be granted.

Effect of the Swiss Court Rulings
It is clear that the Lugano Court has decided that both actions before it should proceed to trial. Ryanair's application to stay those proceedings has been unsuccessful both at first instance and on review.

Related actions involving Ryanair and S.A. are in existence and going on in another jurisdiction.

Whilst the Swiss Court took the view that the Irish proceedings and the competition action before it did not involve the same cause of action, the infringement proceedings before it did involve related actions. It declined to stay any of the proceedings before it.

On a consideration of the action before this Court and those before the Swiss Courts, I am satisfied that they can be regarded as related actions and for the reasons which I have already given, the Swiss Courts are first seised of them. The Swiss Court has determined to proceed to hear both sets of proceedings before it. That being so, there is little point in permitting S.A. to be joined to the proceedings before this Court since, in my view, if such were to occur, this Court would as a matter of discretion make an order pursuant to Article 22 of the Convention. The Swiss Court has seisin of the infringement issues between Ryanair and S.A. It is the court seised first in time and it would make no sense to allow S.A. to be joined to this litigation to rehearse what is already before the Lugano Court.

The application is refused.