THE COURT OF APPEAL

Appeal Nos. 2015/528

Finlay Geoghegan J.
Irvine J.
Hogan J.
BETWEEN/

RYANAIR LIMITED

PLAINTIFF/APPELLANT

AND

PETER JOHN FLEMING

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of October 2016

1. The respondent in these proceedings, Mr. Fleming, is an Australian pilot who is domiciled in New South Wales. He lives there with his wife and family and he has no connections with Ireland.

2. The plaintiff is the well-known Irish airline which is now one of the biggest airlines in the world, even if its operations are almost exclusively confined to the European continent.

3. In these proceedings Ryanair sues Mr. Fleming for what it says are defamatory comments made by him (under a pseudonym) on an internet website forum entitled "Professional Pilots Rumour Network" ("PPRune"). This forum is operated by a company known as Internet Brands Inc. and is based in California, USA. It appears that the PPRune forum is principally used as a discussion vehicle by pilots in relation to aviation matters, including aviation safety. This internet forum can be casually accessed by members of the public who are interested in such matters, although participation in the forum requires prior registration. Issues raised by forum participants are, on occasion, subsequently picked up by the mainstream media.

4. The comments were made by Mr. Fleming on PPRune on 29th September 2012. The comments themselves were made as a part of a series of lengthy posts concerning aviation safety generally. All of this arose from an initial post which stated that four Ryanair aircraft flying to Spain from different destinations on a particular evening had declared fuel emergencies. This had followed a heavy thunderstorm in Madrid which had required the diversion of the aircraft to Valencia. The initial post suggested that this incident highlighted unacceptable problems with minimum fuel policies practised by certain airlines.

5. This post then generated a lively debate among forum participants, with some posters coming to the defence of Ryanair and dismissing any suggestion that aviation safety had been jeopardised. Others asserted that these incidents highlighted the difficulties associated with minimum fuel policies and complained that these events showed that pilot airmanship had been lacking. This was the background to Mr. Fleming's own post where he challenged both the experience of the Ryanair pilots and the wisdom of the minimum fuel policies which he maintained were practised by Ryanair.

6. It was this post which prompted the present defamation proceedings. Ryanair says that these comments seriously jeopardised its reputation and that it is entitled to have these issues determined by the courts of the place where the defamatory post had been published. Central to this contention, of course, is the claim that the defamatory post had in fact been published in this jurisdiction.

7. The defendant denies that these comments were defamatory. He further maintains that the plaintiff has sought to ground these Irish defamation proceedings on a slender and technical jurisdictional basis (namely, that the tort was committed in Ireland) when the effect of this would be to deprive him of his right to be sued in the courts where he is domiciled.

8. As it happens, Mr. Fleming has never even been to Ireland. The un-contradicted evidence is that any judgment given by an Irish court in this matter would not be enforced by the Australian courts in the absence of proof that the foreign defendant was either present or domiciled in Ireland at the time the proceedings were commenced: see the affidavit of law sworn on 3rd December 2014 by Mr. Adrian Maroya, a member of New South Wales Bar.

9. Mr. Fleming's identity came to light after Ryanair obtained orders from the Californian courts directed against Internet Brands requiring it to identify Mr. Fleming and certain other posters. Mr. Fleming then agreed to remove the offending post. While he further agreed not to reproduce the offending publication, he was not prepared to give the additional undertakings which Ryanair had sought. The present action for defamation was then commenced by Ryanair.

10. At that stage it was necessary for Ryanair to obtain an order pursuant to s. 11(2)(c)(iii) of the Statute of Limitations 1957 (as inserted by s. 38 of the Defamation Act 2009)("the 2009 Act")) to extend time within which to bring proceedings for defamation. On 4th November 2013 the High Court (Peart J.) made an order ex parte granting the plaintiff liberty to seek such an order extending time. An order extending time was made by Ryan J. on 12th May 2014 for the purposes of the Statute of Limitations 1957 for a two year period up to 28th September 2014 (i.e., two years from the date of publication of the post). He made a further order authorising the service of the proceedings on the defendant in Australia. The defendant did not appear or otherwise oppose the making of any such order extending time.

11. The proceedings were then issued by Ryanair on 15th May 2014 and served upon the defendant. On 19th September 2014 the defendant then entered a conditional appearance to these proceedings and sought to set the order of Ryan J. which had authorised such service. In this context Ryanair have argued that the failure on the part of the defendant to raise the jurisdiction and the forum conveniens issue at the time when the application for an extension of time in respect of the defamation proceedings was first aired precludes him from applying to set aside the order authorising service of the jurisdiction.

12. For my part, I cannot agree: the defendant was fully entitled to wait until notice of the substantive proceedings were served on him pursuant to the order of Ryan J. before raising the jurisdictional and *forum conveniens* issue. Ord. 12, r. 26 of the Rule of the Superior Courts provides that a defendant before appearing:

> "shall be at liberty to service notice of motion to set aside the service upon him of the summons or of notice of the summons or to discharge the order authorising service,"

13. It is necessarily implicit in the language of Ord. 12, r. 26 that a defendant is entitled to wait until he is served before issuing a motion seeking to have the order of the High Court authorising such set aside. This is precisely what happened here and I would therefore reject the argument that the defendant is in some way now precluded from raising these jurisdictional and *forum conveniens* questions.

14. The jurisdictional and *forum conveniens* issues were then dealt with by the High Court (O'Connor J.) in October 2015. In *his ex tempore* judgment delivered on 14th October 2015, O'Connor J. made an order setting aside previous orders of the High Court made *ex parte* authorising service outside the jurisdiction of these proceedings upon Mr. Fleming in New South Wales. The reason why O'Connor J. arrived at this conclusion to set aside the orders authorising service was in essence because that he took the view that even if the Irish Courts technically had jurisdiction in respect of these proceedings it would be appropriate on *forum conveniens* ground to have the proceedings dismissed. In the course of delivering his *ex tempore* ruling O'Connor J. summarised his reasoning thus:

> "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 resides in Australia having no connection with Ireland. Order 11(2) of the Rules of the Superior Courts provides for the court to have regard to the amount of value of the claim …… and to the comparative costs and convenience of proceedings in Ireland and 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 and Ireland. 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."

15. Ryanair has accordingly appealed to this Court against this decision.

16. In my view, there are two fundamental reasons why the decision of the High Court should be affirmed. First, there is no evidence of actual publication (in the sense of the post having been accessed or downloaded by a third party) of this post in Ireland, so that the Irish courts in any event lack jurisdiction. Second, even if the technical requirements of jurisdiction were satisfied, I agree with the conclusions of O'Connor J. that there is at most a tenuous connection between the alleged tort of defamation and this jurisdiction, so that in these circumstances one must agree with him that the natural forum for the hearing of this dispute remains that of the defendant's domicile, namely, the Australian courts.

Conflict of laws, foreseeability and internet defamation

17. Before considering the particular issues of jurisdiction and *forum conveniens*, it should be noted that a fundamental principle of our conflict of laws rules is that, absent special circumstances, a defendant should normally be sued in the place where he or she is domiciled. The basis for this principle is obvious, since a defendant should not be forced to defend in a foreign jurisdiction – and be thereby deprived of the legal system with which he or she is most familiar, not to speak of the attendant costs and expense of defending proceedings in a foreign jurisdiction – unless there are some special circumstances which justify the attribution of jurisdiction to the courts of the forum selected by the plaintiff. This general principle must, accordingly, inform any consideration of whether the plaintiff can satisfy the Court that the High Court had jurisdiction in the matter and, even if it had, whether it would be appropriate to exercise that jurisdiction on *forum conveniens* grounds.

18. It would, of course, be manifestly unfair if a defendant were forced to defend in a foreign jurisdiction in circumstances where he could not reasonably have foreseen that his conduct would expose him to the real risk that he might properly be sued in that foreign jurisdiction. An underlying purpose, therefore, of our conflict of law rules should, therefore, be to promote the orderly administration of international justice so that potential defendants can arrange their affairs in such a manner as will enable them to predict where such conduct will (or, as the case may be) will not render them liable to suit.

19. Different considerations apply, of course, where the defendant has engaged in conduct in the foreign jurisdiction in question or where the wrongful act at issue occurred in that jurisdiction. If, for example, the defendant has in the course of business targeted consumers in a particular jurisdiction through internet advertising aimed at consumers in that jurisdiction, it is not considered unfair or otherwise inappropriate that it should be liable to be sued in respect of wrongful conduct in that jurisdiction, precisely because this such a state of affairs is predictable and foreseeable: see, e.g., in the context of Brussels Convention the decision of the Court of Justice to this effect in Case C-144/09 *Hotel Alpenhof* [2010] E.C.R. I-12527.

20. In those type of circumstances that jurisdiction will also of necessity have close connections with the dispute, so that the orderly administration of justice will often favour permitting the jurisdiction where the motor accident occurred or the breach of contract happened to hear the dispute, the foreign domicile of the defendant notwithstanding.

21. These principles may be said to form the basis of the entire Brussels Regulation (and, indeed, the wider Lugano Convention) system which has been the mainstay of the European Union's jurisdiction allocating rules for the best part of 50 years. It is true, of course, that the present jurisdictional dispute falls completely outside the scope of the Brussels/Lugano system and is governed by our own national conflict of law rules. The point, however, is that conflict of law rules reflecting the principal allocation of jurisdiction as between competing *fora* must, in general, at least, in order to be fair, reflect these considerations of foreseeability and the orderly administration of international justice.

22. These considerations apply with particular force in the case of internet defamation where traditional rules in relation to jurisdiction have, to some extent, at least, been overtaken by technological developments. As the Court of Justice observed in Case C-509/09 and Case C-161/10 *eDate Advertising GmbH* EU:C:2011: 685:

> "45. The placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control.
>
> 46. It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State."

23. All of these difficulties identified by the Court of Justice in *eDate Advertising* apply to the present case. The internet forum itself was hosted in California and, so far as can be ascertained, the participants themselves (all of whom used pseudonyms) came from a variety of (mainly) European jurisdictions. The affidavit evidence of Ryanair indicates that twelve participants identified themselves by reference to an Irish location. This, however, does not in and of itself necessarily mean that any of them actually accessed or downloaded Mr. Fleming's post when they were in Ireland. It is, nevertheless, hard to say that a participant posting from Australia on an international website based on California in relation to incidents which took place in Spain could reasonably foresee that he would thereby expose himself to litigation in this jurisdiction *simply* by reason of comments made about an Irish-based airline in the course of that posting where that poster had no other connections with this jurisdiction and where the forum itself was not hosted in Ireland.

The jurisdiction of the Irish courts

24. It is against this general background that the question of jurisdiction may now be considered. Quite apart from any other consideration, the plaintiff must, of course, establish publication in this State in order to establish jurisdiction. There is, however, no evidence before the court to establish that this post has been seen, accessed or down-loaded by any third party within this jurisdiction. Proof of publication to a third party is, of course, an essential ingredient of the tort: see s. 6(2) of the 2009 Act. There could, of course, be many circumstances where the fact of publication in an on-line version – such as the of a major newspaper - would, as a matter of common sense, lead to the inference that it was so published to a third party. This cannot, however, obscure the fact that the plaintiff is still required to prove that the material was accessed or downloaded by a third party in this jurisdiction.

25. This point is well illustrated by the decision of Gray J. in *Al Amoudi v. Brisard* [2006] EWHC 1061, [2007] 1 W.L.R. 113. In this case the plaintiff, an Ethiopian businessman who was based in Saudi Arabia, but who also spent two months every year in the United Kingdom, had commenced defamation proceedings in the English High Court against a Swiss-based financial website. The website had alleged that the plaintiff was a financier of international terrorism.

> The website itself appears to have been a relatively obscure one which was hosted by a French national based in Switzerland, so that it appeared that ([2007] 1 W.L.R.. 113, 117) "the number of hits made on the website from the United Kingdom has been few." The plaintiff sought, however, to have that part of the defence which denied that there had been publication struck out on the ground that the very existence of a publicly accessible website itself gave rise to a presumption of publication. Gray J. held, however, that there could be no such presumption, saying that in every case the question of publication was a matter of fact for the jury. He thought ([2007] 1 W.L.R. 113, 120) that in the case of an internet libel, "it would be for the claimant to prove that the material in question was accessed and downloaded".

26. If one applies the reasoning in *Al Amoudi* to the facts of the present case, it is clear that in order to show that the tort of defamation has been committed in Ireland, it would be necessary for Ryanair to prove that some third party had either accessed or downloaded this post in the State. In an affidavit sworn on 13th October 2013 the Head of Legal and Regulatory Affairs, Mr. Oisín O'Neill, stated:

> "…the said website could be accessed by any user of the world wide web and is to be inferred that a substantial number of users have in fact accessed it and read the words complained of….[T]he website has in excess of 375,000 registered members, generating an average of 2,000 posts per day and nearly 1,000,000 visitors per month…"

27. In a further affidavit sworn by Ms. Yvonne Moynihan, a legal and regulatory affairs advisor with Ryanair, on 21st January 2015, Ryanair identified eleven contributors to the particular website discussion who stated in their post (or posts) that they were located in Ireland. Ms. Moynihan also drew attention to another contributor who was stated to be based in Europe, but who was identified by her as a named individual living in Co. Meath. None of this, however, in itself establishes that any of these *twelve* particular contributors accessed or downloaded the offending post in this jurisdiction.

28. It is true that the website could have been accessed by any one with access to the internet anywhere in the world. Nevertheless Ryanair has not identified any third party who has come forward to say that they have accessed or downloaded this particular post in this jurisdiction.

29. The Supreme Court's decision in *Coleman v. MGN Ltd.* [2012] IESC 20 is also of some importance in this context. Here the question was whether the publication in the on line edition of the well known British newspaper, *The Daily Mirror*, was sufficient to ground the defamation proceedings in this jurisdiction for the purposes of Article 5(3) of the Brussels Regulation. Denham C.J. held that the fact of such publication had not been made out, "as there was no evidence of any hits on such site in this jurisdiction." In the absence of such proof, the Supreme Court held that it had no jurisdiction in the absence of evidence that a tort had been committed here.

30. It follows, therefore, that independently of any other consideration, the plaintiff has not demonstrated that the Irish courts have jurisdiction in the matter since, to repeat, there is no actual evidence that a third party located in this jurisdiction has accessed or down-loaded the offending post.

Forum conveniens

31. There remains for consideration the question of *forum conveniens*. As I have already indicated, I agree with the conclusion of O'Connor J. that the connections of the alleged tort with this jurisdiction are simply too tenuous and that there is nothing to suggest that his conclusion that the proceedings should be dismissed on *forum conveniens* grounds was incorrect, even if – contrary to my view – the High Court had jurisdiction in this matter. Having regard to the special facts of this particular case, if the High Court had jurisdiction, it could only have been on the rather slender and exiguous basis that a handful of contributors to the forum discussion had accessed or downloaded the offending post in question in this jurisdiction. This in itself is a strong indicator that Ireland is not the natural forum for the hearing of these defamation proceedings.

32. Counsel for Ryanair nonetheless placed considerable significance on the decision of Eady J. in *Richardson v. Schwarzenegger* [2004] EWHC 2422. In that case a leading English newscaster, Ms. Anna Richardson, had interviewed a prominent US politician, Mr. Arnold Schwarzenegger, at the Dorchester Hotel in London in December 2000. Ms. Richardson claimed that at the end of the interview Mr. Schwarzenegger placed her on his lap and indecently touched her breasts, something which he denied. Mr. Scharzenegger maintained that it was in fact Ms. Richardson who had made certain sexual advances to him and that the interview had been terminated by him at that point.

33. In the course of a subsequent political campaign in California for the Governorship of that State, Mr. Schwarzenegger's spokesman, a Mr. Sean Walsh, was asked about Ms. Richardson's claims. He denied that Mr. Schwarzenegger had ever behaved in this fashion and he claimed that these allegations had been concocted by Ms. Richardson. Ms. Richardson then sued Mr. Walsh for defamation in the UK. Mr. Walsh's allegations against Ms. Richardson were published in the Los Angeles Times.

34. Mr. Walsh then sought to have the English proceedings dismissed for want of jurisdiction and on *forum conveniens* grounds. So far as the jurisdictional issue was concerned, Eady J. concluded that the plaintiff had "a real prospect of success of establishing that a tort has been committed within this jurisdiction and that she has suffered at least some damage in consequence." The judge reached that conclusion in circumstances where there was no issue concerning publication in the United Kingdom.

35. All of this is also in contrast to the position in the present case where, to repeat, there is simply no evidence that the post in question has ever been accessed or down-loaded by a third party based in this jurisdiction.

36. Having disposed of the jurisdictional issue, Eady J. next addressed the question of *forum conveniens*. He observed that once the Court had jurisdiction it was more difficult to resist the argument that it was a convenient forum. He acknowledged, however, that "common sense suggests that the more tenuous the connection with this country the harder it will be for the claim to survive." Eady J. nevertheless concluded this was not a case which should be dismissed on *forum conveniens* grounds because:

> "(i) The claimant is a United Kingdom citizen;
>
> (ii) She is resident here;
>
> (iii) She works here;
>
> (iv) She is widely known through work here and has an established reputation in this country;
>
> (v) She has no comparable connection with any other jurisdiction, including the United States;
>
> (vi) In the light of the presumption, to which I have referred, damage to her reputation has been suffered here;
>
> (vii) The underlying events, if there is ever to be a plea of justification, took place here at the Dorchester Hotel in December 2000;
>
> (viii) English law is applicable to the publication in this country."

37. One may accept that many of these factors are also referable to the position of Ryanair. It is an Irish company which is resident here and which has an established reputation in this State. But unlike the position in Richardson, the underlying events did not, moreover, take place in this jurisdiction, but rather in Spain.

38. Moreover, while Eady J. seemed to think it was obvious that English law was applicable once jurisdiction was established, yet to my mind it is far from clear that even if the Irish courts had jurisdiction in the matter Irish law would be regarded as the proper law of the tort, given that these comments were made by an Australian in Australia on a website hosted in California.

39. There are, however, also other considerations. Ryanair is a huge multi-national corporation with enormous assets. In the nature of things it will be far easier for Ryanair to commence proceedings in Australia than for Mr. Fleming to travel to Ireland to defend defamation proceedings here. While it is true that a judgment from an Irish (or European) court concerning aviation safety would be of more direct benefit to Ryanair as compared with a verdict from an Australian court, it cannot be said that an Australian court verdict would not also be of assistance so far as the general defence of its reputation.

40. The other major difference from *Richardson* is fact that the publication itself has but tenuous connections with Ireland. At least in *Richardson* the plaintiff could clearly point to the fact of publication in the United Kingdom in relation to events which, if they occurred at all, occurred in the United Kingdom, whereas, to repeat, there is no actual evidence of publication in Ireland. In the absence of unambiguous evidence pointing to publication in Ireland, the orderly administration of international justice strongly suggests that the more convenient forum remains the courts of the place where the defendant is domiciled. This is perhaps just another way of saying again that even if the jurisdiction of the Irish courts were to be have been established in some technical sense (by, *e.g.,* Ryanair showing that one or two people had actually accessed the offending post in Ireland), the connections with this State would nonetheless have remained too tenuous to displace the conclusion that the courts of the defendant's domicile remain the most natural forum.

41. In summary, therefore, even if (contrary to my view) it could be said that the Irish courts had jurisdiction in this matter jurisdiction should nonetheless be declined on *forum conveniens* grounds.

42. In the light of this conclusion, it is unnecessary to address the further argument advanced by Mr. Fleming, namely, that the unenforceability of any Irish judgment obtained in these proceedings is a further reason why jurisdiction should be declined on forum conveniens grounds.

Conclusions

43. It follows, therefore, that for the reasons just stated, I would uphold the decision of the High Court and dismiss the appeal, both on grounds of lack of jurisdiction and, in any event, *forum conveniens*.