

Between:

RYANAIR LIMITED

Plaintiff

– and –

THE REVENUE COMMISSIONERS, IRELAND, THE ATTORNEY GENERAL  
AND THE MINISTER FOR FINANCE

Defendants

**JUDGMENT of Mr Justice Max Barrett delivered on 22nd January, 2019.**

1. Overview. Ryanair seeks, *inter alia*, leave to amend the re-re-amended statement of claim, as well as certain other orders. Most of the amendments sought are unopposed and will be allowed. The first opposed amendment relates to Ryanair's existing claim as to breach of constitutional property rights. Ryanair's pleadings currently claim that the air travel tax (ATT) breached its property rights on the basis of irrationality, disproportionality and discrimination. However, the ATT can also be viewed, Ryanair now claims, as interfering retroactively with those property rights. Ryanair's line of argument is as follows: by virtue of EU state aid rules the ATT calls the airlines ultimately to pay Ireland €8 in respect of each passenger to whom the €2 rate applied. But at the time of the relevant conduct (when the relevant passengers were being flown) €2 was the only rate that Ryanair could apply. So, Ryanair claims, the ATT caused Ryanair to suffer a retroactive liability in that it was forced to pay the State the equivalent of €8 tax per passenger, even though when it flew the passengers there was no such liability. The defendants do not say this argument is bound to fail. The basis for their opposition is logistical prejudice. The second set of amendments concerns Ryanair's approach to fare-pricing, where the main objective is, Ryanair maintains, to fill aircraft, the extraction of profit from each passenger being of secondary importance. Ryanair calls the just-described pricing policy as 'load factor active, yield passive'. The defendants say this set of amendments is new and risks derailing the timing of the trial.

2. Case-Law and Commentary. The court notes: (1) the principles accepted by Birmingham J. in *Rossmore Properties Ltd v. ESB* [2014] IEHC 159, 7-8 as being applicable to an application like the present application; (2) the identification by Clarke J. in *Woori Bank and Hanvit LSP Finance Ltd v. KDB Ireland Ltd* [2006] IEHC 156, 5 of the two ways in which prejudice might arise (only logistical prejudice is contended for here); (3) the Supreme Court's decision in *Aer Rianta International cpt v. Walsh Western International Ltd* [1997] 2 ILRM 45, where Murphy J. touched on an issue that the defendants have raised in the within proceedings, viz. a perceived threat to the intended trial date; Murphy J.'s observations are also of interest in demonstrating the serious nature of prejudice that counts when it comes to resisting amendment; (4) Keane C.J.'s observations in *Crofter Properties Ltd v. Genport Ltd* (Unreported, Supreme Court, 16th March, 2001), 8-9, concerning, *inter alia*, the significance of the reasons given for delay in making application to amend, which observations seem especially pertinent where (as here) the defendants do not maintain that the proposed contentions are bound to fail; and (5) the statements of principle in *Delany and McGrath on Civil Procedure* (2018), 4th ed., paras. 5-189 and 5-240-241.

3. The Retroactive Tax Claim Amendment. Ryanair's existing constitutional claim is summarised in para 12.1 of the re-re-amended statement of claim, viz. that the ATT was "*an unjustifiable interference with the [constitutional] property rights of the Plaintiff*". Para.13 states that "*The ATT and/or the Differentiated ATT interfered with the Plaintiff's property rights in a discriminatory, unjust, irrational and disproportionate manner and were unjustified*". The proposed amendment, at sub-para. 6 and 7 states: "*6. Further or alternatively by applying the €2 rate the Defendants knew or ought to have known that the Plaintiff would ultimately be required to pay the State €8 in respect of each passenger to whom the €2 rate applied. 7. The effect of the Commission Decision was to impose a liability on the Plaintiff to pay €8 to the State in respect of each €2 passenger despite the fact that at the time these passengers purchased the Plaintiff's tickets no such liability was imposed by the State. In the premises the liability operated retroactively as the said liability was imposed in respect of taxation was (or is equivalent) to retroactive taxation.*" The factual basis for these proposed pleadings is already in issue between the parties.

4. Turning to the opposed para.20 (this is the second opposed part of the retroactive tax amendment), it provides that "*In particular in respect of the aforesaid retroactive taxation, the Plaintiff had no opportunity to pass on that liability to the passengers concerned. Had the tax been imposed at the time at €10 the Plaintiff would not have borne the full economic burden since some of it would have been passed on. The sum of the State's gain through the said retroactive tax was greater than the sums which would have been payable to the State had a uniform rate been set at €10 at the relevant time. Passengers on the relevant routes would have been discouraged by a €10 rate and reduced ticket sales would have resulted in a reduced sum of ATT payable to the State.*" The foregoing gives rise to two factual issues which the defendants claim are new and may require discovery: (1) had the tax been €10, how much would have been passed on? (2) to what extent would the higher rate have discouraged passengers from flying with Ryanair? But these two points are already in issue in the existing claim.

5. Moving on to para.25(6)(d) of the proposed re-re-amended statement of claim, the first part (not opposed) states that "*Loss of revenue due to the decrease in passenger numbers arising from the unlawful excess tax, losses incurred as a result of the Plaintiff having to adjust its air travel ticket pricing in order to make provision for the payment of said unlawful excess taxes.*" Ryanair was already claiming loss of revenue due to the decrease in passenger numbers arising from the increase in the fares. So to the extent that that is a matter for discovery and evidence it was already in issue.

6. Moving on to Part VI ("*State Aid*"), in particular para.28, it is claimed (and the relevant amendments have been accepted by the defendants) that "*imposing the ATT which was at all material times liable to be recovered under the State aid rules and, without notice to the European Commission, the Defendants committed a grave and/or manifest breach of EU law.*" Once again the same point is made, viz. that the State knew or ought to have known that, as a matter of EU law, the ATT was going to lead to the airlines having to pay in the future €8 in respect of every €2 passenger. As can be seen, the claimed liability is currently alleged to arise under EU law. What Ryanair seeks to add is a similar claim under the Constitution. But what needs to be addressed in this regard is effectively in issue already.

7. As for 'pass on', the extent of pass on is clearly already in issue. After all it is necessary to determine the extent of pass on in order to decide how much (if anything) Ryanair is to be awarded by way of restitution and damages. This was put in issue in Ryanair's replies to the defendants' notice for particulars.

8. The Load Factor Active, Yield Passive Amendment. In the *proposed re-re amended statement of claim, the plaintiff claims, inter alia, damages for "losses due to the necessity for ticket pricing adjustments in order to make provision for the payment of the said unlawful excessive taxes"*, i.e. losses in respect of the adjustments that Ryanair had to make to its own ticket prices to deal with the

ATT. There follows the proposed amendment "(which particularly affected the Plaintiff which operates a load factor active, yield passive business model whereby discount fares are required to be offered to stimulate the market and fill aircraft capacity)". In the particulars, one sees among the particularised claims, at para.25(d), "...losses incurred as a result of the Plaintiff having to adjust its air travel ticket pricing in order to make provision for the payment of the said unlawful excess taxes". The foregoing involves an existing plea about Ryanair's pricing strategy and the adjustments it had to make to same to deal with the ATT. So even without the proposed text that follows (considered hereafter, and which the defendants oppose) Ryanair could in evidence properly explain how it adjusted its own pricing by reference to its own pricing strategy. But when one looks at the proposed amendment (which follows the words "excess taxes"), i.e. "(which particularly affected the Plaintiff which operates a 'load factor active, yield passive business model whereby discount fares are required to be offered')", the defendants claim that this is completely new and will lead to potentially new discovery/particulars. However, this is in issue already, as is clear from the replies to the notice for particulars. This, it seems, is why Ryanair's expert economists have confirmed that they can analyse the amendments and include them in their report without any new data or discovery beyond what they already need for the existing work. This is a strikingly confident confirmation for the expert economists to provide, but they have provided it.

9. Logistical Prejudice? The entire basis for the defendants' opposition to such of the proposed amendments as are opposed is logistical prejudice. In this regard, Mr Kenny, a principal officer at the Department of Finance avers, *inter alia*, as indicated hereafter. The court would but interject, before quoting from Mr Kenny's affidavit evidence, that it is important to distinguish between the assertions he makes and the evidence to substantiate them (the latter obviously being a critical matter for the court). So, per Mr Kenny: "15...[H]aving amended its pleadings earlier this year so as to substantively expand on the scope of its claim, Ryanair now seeks a further eleventh hour amendment which introduces a further substantial new aspect to the case. The proposal is that a claim of retroactive taxation which has never before been canvassed in correspondence or otherwise, and which the Defendants have never had an opportunity to consider will now be permitted despite the obvious prejudice to the Defendants from amendments of this nature at this stage in the proceedings."

10. What is the said "obvious prejudice"? Mr Kenny continues as follows: "16. Ryanair is also seeking amendments to introduce and rely upon a particular description of its business model, Load Factor Active, Yield Passive ('LFAYP') in the context of establishing loss and damage. Were it permitted, it would necessitate fresh discovery from the airline in respect of the use of discount fare to stimulate demand etc." Notably, however, although Mr Kenny avers that "it would necessitate fresh discovery", he is more equivocal when one reads the entirety of his affidavit. Thus he later avers, again referring to the load factor-active, yield-passive business model that "23. If it has been previously pleaded no amendment is surely needed. It is the fact that this introduces a new aspect to their claim which gives rise to the State's objection, not least because it will almost inevitably involve the State in seeking to re open the discovery and particulars of process").

11. Returning, however, to para.17 of Mr Kenny's affidavit, he avers, *inter alia*, as follows: "17. I say and believe and am advised that the impact of the amendments to which the State objects is to unnecessarily and unacceptably delay the Restitution Proceedings coming on for hearing, to increase the costs of the proceedings...". That is an assertion. Why does Mr Kenny so aver? Because he says, believes and is advised that what is afoot will "[necessitate] the re-opening of particulars and potentially discovery and... require the State to turn around and face a new case at a time when the matter is otherwise set down for trial." That is tentative evidence and it seems to the court that such (if any) risk as presents in this regard can be addressed through strict timetabling (with the defendants free to propose to Ryanair what they consider appropriate in this regard, and the court available to make such order as seems to it to be appropriate in the event that the parties cannot swiftly agree a rigorous timetable between themselves).

12. One notable point made by Mr Kenny in para. 17 is that "no explanation has been proffered as to why this latest set of amendments is only now being canvassed." It is true that the amendments could previously have been pleaded; however, as should be apparent from the fact that the court is now being presented with a proposed re-re-amended statement of claim, getting to the present point in what is a not uncomplicated contest, has required repeated amendments to the pleadings. It is in the context of these repeated re-visitations of the pleadings that Ryanair appears to have spotted the desirability of amending its pleadings further in the now-desired manner. So yes, there has been delay in the sense that points are now sought to be pleaded which, as a matter of strict chronology, could previously have been pleaded, at least had they previously occurred to Ryanair; however, that is not a basis on which the court can properly refuse the application now made: the defendants have to show real, actual prejudice to justify such a refusal; and, with respect, they have failed to show this.

13. Paragraph 17 then ends with the averment (which follows on from the averment as to no explanation having been proffered as to why the latest set of amendments "is only now being pleaded"), that "This is despite the fact that their acceptance [i.e. the acceptance of the amendments] would have a significant impact on the timeframe within which the proceedings might be heard and determined." However, the court respectfully does not see that this follows from the evidence given by Mr Kenny.

14. Moving on to para.21, Mr Kenny avers, *inter alia*, in respect of the retroactive taxation and business model points, that "The inclusion of a new cause of action in respect of 'retroactive taxation' as well as claims in respect of Ryanair's business model are entirely new to the proceedings [so Mr Kenny considers; the court does not see that this is so] and will require further particulars and potentially also further discovery in order to be defended." Again the court cannot but note the tentative nature in which the foregoing is expressed. What this evidence means is that there could potentially be need for further discovery whereas Ryanair's (notably confident) evidence to the contrary is that no further discovery will be required.

15. Moving on to para.24, Mr Kenny avers that "For such reasons [aforesaid] I say that the State objects to the amendments identified above because permitting them will severely prejudice the State by [1] increasing the costs of litigation and [2] almost certainly delaying the trial date." As to [1], an increase in costs is not in itself good cause to refuse a proposed amendment – and, if at the end of the day Ryanair loses on this point it will, all else being equal, be liable for the costs incurred by the defendants. As to [2], this is unpersuasive for the reasons described previously above.

16. Continuing with para.24, Mr Kenny avers that "It would already seem impossible for the Ryanair Restitution proceedings to be heard in tandem with the Aer Lingus Restitution Proceedings...if further particulars and discovery have to be sought in the Ryanair proceedings". But, with respect, the court does not see that this is so. October is 8-9 months away, there is flexibility in the court's timetable, Ryanair has indicated to the court that it is committed to the October timeline, and, in any event, rigorous case management can, if and as necessary, be brought to bear.

17. Finally, turning to para.26 of Mr Kenny's affidavit, he avers as follows:

*"I say that the inevitable delay arising from the need to raise further particulars, reply to those particulars and the possibility that the State may need to seek discovery in order to fully address these last minute additions to the Plaintiff's case give rise to very real and unjustifiable prejudice to the Defendants. I say that after six years, three sets*

*of amendments to the claim it has to meet, an arduous discovery process which involved an appeal by the Plaintiff to the Court of Appeal, the matter was finally ready to be set down for hearing in October 2019, to be heard in tandem with the Aer Lingus Restitution Proceedings which are listed for hearing at that time. I say and believe and am advised, permitting the amendments now proposed makes that highly unlikely if not impossible and would accordingly be entirely unjust to the Defendants herein."*

18. In effect the point being made by the defendants in this regard is that because the discovery process has hitherto been fraught with difficulty that provides a basis for the Court to refuse the amendments now sought. But this is, with respect, an irrelevant consideration: the amendments have to be judged on their own merits and by reference to any (if any) prejudice that they will cause to the defendants. It is not relevant that for other reasons in respect of other parts of the within proceedings the discovery process was arduous and/or lengthy and/or that significant costs were incurred in the context of same.

19. Conclusion. For the reasons stated above, the court does not see that the logistical prejudice contended for offers a sound basis on which to refuse the amendments sought. Nor does the court see any other reason to present as to why those amendments should now be refused. The court will, therefore, make the orders sought at items 1, 3 and 4 of the notice of motion. The separate order referred to at item 2 of the notice of motion concerning the name-change from Ryanair Ltd to Ryanair DAC is not a matter of controversy and will likewise be made.