THE COURT OF APPEAL

Irvine J.
Hogan J.
Keane J.

Record No. 2015/323

Lorraine Lawless

Plaintiff/Appellant

- and -

Aer Lingus Group plc

Defendant/Respondent

Judgment of Ms. Justice Irvine delivered on the 29th day of July 2016

1. This is the plaintiff's appeal against the order of the High Court (Kennedy J.) dated 10th June 2015. The order under appeal relates to the plaintiff's motion dated 11th June 2015 seeking discovery as against the defendant in what is commonly described as a personal injuries action.

Factual background
2. The plaintiff is an Aer Lingus cabin crew member who claims that she was injured on 11th February 2011 when the aircraft on which she was working at the time made a heavy landing at Dublin Airport. The particulars of the wrong alleged in the personal injuries summons plead as follows:-

> "On or about 11th February 2011 the plaintiff, while in the course of her employment with the defendant as an air hostess, was seated in and using a "jump seat" provided for the defendants for the use of cabin crew particularly during take off and landing when the said aircraft made a heavy landing as a consequence of which the plaintiff sustained severe personal injuries, loss, damage and expense."

3. Full particulars of negligence and breach of duty were outlined in the endorsement of claim. All of these refer to allegations against the plaintiff's employer relating to the nature of the seat with which she was provided for the purposes of her work. No plea was made to the effect that there was anything irregular about the manner in which the plane was landed neither was there anything pleaded from which such a complaint could be inferred.

4. In their replies to the defendant's notice for particulars dated 26th October 2012, the plaintiff's solicitors stated the following concerning the "jump seat" the focus of the plaintiff's claim, namely:-

> "[It] was sufficiently dangerous and unsafe that while sitting thereon our client suffered a significant jarring type injury on heavy landing. A proper and safe seat would have ensured that the plaintiff was not injured. The plaintiff is not a qualified engineering expert, however an expert engineer would facilitate the court by explaining the technical deficiencies of the seat which resulted in the plaintiff's injuries."

5. In its defence delivered on 29th April 2013 Aer Lingus put the plaintiff on proof of the heavy landing for which she contends, as well as proof of each of the allegations of negligence and injuries asserted.

6. Somewhat unusually, in light of the fact the pleadings had not alleged any pilot error, the plaintiff, by letter of 14th February 2014, sought voluntary discovery from Aer Lingus of ten categories of documents several of which related to the training, supervision and licences of the pilots on board flight EI 433. By letter of 17th September 2014 the defendant's solicitors indicated their willingness to make discovery in respect of certain categories of documents. However, they refused the discovery of categories 1, 2, 3 and 4. Further, they were only willing to comply with category 8 insofar as it might be confined to the moment of touchdown.

7. In a somewhat unusual turn of events having regard to the earlier pleadings, by letter dated 21st May 2014 the plaintiff for the first time delivered particulars of negligence which related to the piloting of the plane on the day the plaintiff's sustained her injuries. The following eleven new particulars of negligence and breach of contract were advanced:-

> (k) Exposed the plaintiff to a heavy and unsafe landing where the aircraft [flight no. EI433] in which the plaintiff was travelling was caused to hit the runway with considerable force;
>
> (l) failed to properly train the pilot of / or to ensure that a sufficiently trained and / or qualified pilot was in charge of flight EI433 on the day in question in the conditions that prevailed;
>
> (m) failed to apply adequate care and / or skill to ensure a smooth landing of flight EI433 in conditions that prevailed;
>
> (n) failed to properly supervise the pilot in control of the landing;
>
> (o) exposed the plaintiff to a risk of damage or injury of which it knew or ought to have known;
>
> (p) failed to control or manage the aircraft such as passengers and crew were safe therein;
>
> (q) exposed the plaintiff to a danger of foreseeable risk of injury in and about the driving management and control of the airplane;
>
> (r) or failed to take adequate care for the safety of the plaintiff;
>
> (s) exposed the plaintiff to an unnecessary risk of injury;

(t) allowed a pilot without adequate qualifications and / or experience to be responsible for the landing;

(u) the doctrine of *res ipsa loquitur* is hereby raised and will be relied upon.

Discovery

8. By letter dated the 14th February 2014, the plaintiff sought discovery of 10 categories of documents and by letter dated 18th September 2014 the defendant solicitors, Messrs O'Rourke Reid agreed to make discovery in respect of five such categories of documents and agreed to make discovery in respect of a sixth category albeit in a manner which confined the discovery to a particular timeframe to which I will later refer. Accordingly, when the matter came before the High Court for hearing on 10 June 2015 the following categories of documents were in dispute namely:-

Category 1:

Any document in the power or possession of the defendant comprising and / or evidencing the licences held by the pilots on board flight EI433 from Milan Linate to Dublin on 11th February 2011.

Category 2:

Any documents(s) in the power or possession of the defendant recording or evidencing the total hours flown by the pilots on board flight EI433 on 11th February 2011 including details of hours flown on type and capacity.

Category 3:

Any document(s) recording or evidencing the date of the first and most recent line and periodic checks of the pilots on board flight EI433 on 11th February 2011.

Category 4:

All document(s) in the power or possession of the defendant recording, comprising and / or evidencing any restricted flying policy applicable to any of the pilots on board flight EI 433 on 11th February 2011.

Category 8:

All document(s) in the power or possession of the defendant comprising printouts of Systems Data for the period encompassing thirty seconds before touchdown and fifteen seconds after in the increments provided by the system recording tabular and / or graphic data of:-

(a) aircraft weight,

(b) radio altitude,

(c) barometric and radio rate of descent,

(d) heading, normal, horizontal and longitudinal accelerations,

(e) oleo compression status,

(f) wind direction and speed.

9. In relation to categories 1 to 4 above the reason advanced for seeking such discovery was that the plaintiff's aviation expert had advised that such documents needed to be obtained in order to prove that the pilots on board flight EI433 were inadequately qualified, trained and supervised with the result that the plane was landed heavily thus causing the plaintiff's injuries. As to category 8 the reason advanced was that the documentation would provide incontrovertible evidence as to whether the aircraft made a heavy landing, whether it was landed with all due skill and diligence and whether the decision to allow the pilot in question land the plane given the conditions was appropriate.

10. It is to be noted that the use of the words "heavy landing" and "hard landing" are used interchangeably in aviation parlance and in these contexts tend to have a particular technical meaning. That this is so is clear from the affidavits sworn by the parties in the context of the application for discovery and also from the reasons advanced by the plaintiff to support her application for discovery. It is not in dispute that a heavy or hard landing is one which involves a G Force of 2.6 or more. It is also accepted that once a heavy or a hard landing is recorded this automatically results in the generation within the cockpit of what is described as a "load 15" printout and that in turn this document generates the requirement that the plane be subject to a technical inspection. That said, counsel for the plaintiff, Mr King B.L submits that when the plaintiff complains of a heavy landing she does not confine herself to the aviation definition of "heavy" or "hard" landing, but rather reefers to a "hard" or "heavy" landing in the ordinary, non-specialist sense of these words.

Ruling of the High Court judge

11. In her judgment delivered on 10th June 2015 the High Court judge set out the submissions advanced by the parties and also what she considered to be the appropriate principles to be applied by the court on an application for discovery. In doing so she made clear that the onus was on the applicant to demonstrate that the documents sought were necessary and relevant to the issues to be determined at the hearing of the action. In the course of her ruling the High Court judge noted that the pleadings as originally cast made no mention of any allegation of negligence on the part of the pilot. However, insofar as that claim was made in the additional particulars delivered on 21st May 2014, she expressed herself satisfied that the negligence alleged was dependent upon proof of what had occurred at the time of landing rather than anything which had occurred over the 30 seconds before or after 15 seconds after touchdown, that being the period proposed by the plaintiff to govern the documents set out in category eight.

12. In reaching her conclusions the High Court judge also took into account the discovery which the defendant had agreed to make. This included the captain's aircraft technical log, any special report as may have been written by the captain and any incident investigation report for the relevant flight. She also referred to the fact that the defendant's agreement to furnish the "load 15 print

out", to which I have already referred, if such a document had been generated and a copy of any work order detailing any inspection carried out following the landing of the flight. She noted that if a heavy landing had occurred that a "load 15 print out" would have been generated and that this in turn would give rise to a detailed inspection of the aircraft concerned.

13. In her ruling, the High Court judge concluded that the documents sought at categories 1 to 4 where not necessary or relevant to the issues between the parties and in the course of so doing commented upon the fact that a heavy landing could take place whether a pilot had a licence or not and that the converse was equally true.

14. As to whether the documents referred to in category 8 were necessary and relevant, beyond those which relate to the touchdown itself, she concluded they were not in circumstances where the plaintiff's claim was based upon proof that she sustained an injury through a heavy landing which she maintained was negligent in all of the circumstances.

15. The High Court judge did not find it necessary to deal with the defendant's submission that she should not direct the discovery sought by reason of an existing agreement between Aer Lingus and Impact / Irish Airline Pilots Association which was intended to regulate the use of data gathering systems. That was an agreement which provided that information such as that sought by the plaintiff at category 8 should not be disclosed unless so required by court order for the purposes of civil or criminal proceedings. She also deemed it unnecessary to deal with arguments raised by the defendant concerning EU Regulation 996/2010 relied upon by the defendant. That is a regulation that governs the manner in which flight data recordings should be maintained and which provides that information such as that sought in category 8 should not be made available save under the limited circumstances provided for in Art. 14(2) and (3) thereof.

The appeal
16. In her Notice of Expedited Appeal dated 27th June 2015 the plaintiff has set out twenty one separate grounds of complaint concerning the order made by the High Court judge. That in turn has spawned an equally detailed rebuttal of those grounds in the Respondent's Notice dated 24th July 2015.

17. The plaintiff's appeal came before this court for hearing on the 27th May 2016. At that stage the defendant had not furnished the discovery which it had agreed to make in September 2014. Neither of the plaintiff requested that the defendant would do so regardless of its appeal against the order of the High Court refusing discovery of the remaining categories of documents.

18. In circumstances where the submissions of the parties did not conclude on the 27th of May 2016 this Court directed the defendant, prior to the date of the resumed hearing, to furnish discovery in accordance with the agreement earlier reached. It further gave the plaintiff 14 days to make such submissions as might be deemed appropriate in light of the discovery received and gave the defendant 14 days to respond to any such submission.

19. The defendant's affidavit of discovery was duly sworn by Mr O'Connor Nolan on 15th June 2016 and this affidavit together with the documents discovered therein were furnished to this court when it is resumed its hearing of the appeal on 22nd July. The plaintiff chose not to deliver any further submission in light of this discovery.

20. It, of course, must be acknowledged that the High Court judge when she made her decision did not have the benefit of sight of these documents. Further, notwithstanding significant affidavit evidence put before the court on the part of the defendant, the High Court judge was not advised of the fact that the documents - which they had agreed to discover would demonstrate - that the landing in aviation terms came nothing close to a heavy or hard landing in the specialist sense of that term as used in the aviation industry. The G Force exerted on touchdown was 1.6, thus coming well below what might be considered heavy or hard. Thus, no load 15 report was generated with the result that there was no post landing examination of the aircraft.

21. In reaching my conclusions which I now intend to set out in a relatively sparse manner, I have taken into account the extensive written submissions delivered by the parties and, of course, the oral submissions made in the course of the appeal by Mr. King B.L. on behalf of the plaintiff, and Mr. Sreenan S.C. on behalf of Aer Lingus.

Jurisdiction
22. The first matter to be briefly addressed in the course of this ruling is the court's jurisdiction on this appeal. This is an appeal against an order made by the High Court judge in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach. The Court is able to do this because it has available to it all of the affidavit evidence that was before the High Court at the time the original interlocutory decision was made. The role of the appellate court in this regard is set out in the decision of this court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and by McMenamin J. in *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6.

23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion.

The principles to be applied
24. There is no disputing the fact that the High Court judge correctly identified the legal principles to be applied on an application for discovery. I will not labour these because they are well known to the parties and are as set out extensively in the written submissions of the parties. It suffices to quote from the judgment of Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 which has been approved of and applied in almost every major case in this jurisdiction in relation to discovery. This is what he said at page 63 of his judgment:-

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document can properly be

said to contain information which may enable a party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences."

25. Counsel for the plaintiff, Mr King, accepts that he bears the onus of establishing that the documents sought by way of discovery are both relevant and necessary for disposing fairly of the matters in issue in the proceedings, as was emphasised by Fennelly J. in his frequently cited judgment in *Ryanair plc v. Aer Rianta cpt* [2003] IESC 62. Further, he maintains that he has discharged that burden.

26. Of some further assistance concerning the approach of the court on an application for discovery is the decision of McCracken J. in *Hanna v. Commissioners of Public Works* [2001] IEHC 59 where he emphasised that "relevance" must be determined in relation to the pleadings in the specific case and not by submissions as to alleged facts put forward in affidavits, unless such submissions relate back to the pleadings, or in the case of an application for further and better discovery, to previously discovered documents. He also stated that the court must decide as a matter of probability whether any particular document is relevant to the issue to be tried and that discovery cannot be ordered simply because there is a possibility that documents may be relevant.

Decision

27. Having considered the written and oral submissions made by the parties on this appeal I am fully satisfied with the approach and the conclusions reached by the High Court judge. I have no doubt but that she was correct when she concluded that the documents sought in categories 1 to 4 inclusive are neither necessary nor relevant to the issues to be determined by the court on the hearing of this action. I have reached a similar conclusion in relation to the documentation pertaining to the thirty seconds immediately prior to and the fifteen seconds post the landing of flight EI433 on the day in question and which are covered in category 8.

28. Because of the legal principles earlier referred to it is essential to review the decision of the trial judge concerning the disputed categories of discovery documentation having regard to the issues which arise from the pleadings as delivered.

29. There are principally two liability issues in this case. The first relates to the claim as initially made by the plaintiff in her personal injury summons to the effect that her employer was negligent in failing to provide her with a jump seat that would protect her from a heavy landing. It is pleaded that the defendant was aware, from complaints earlier made, of the inadequacy of these seats to protect crew members from injury in the course of their employment. The second is an issue is one which can be identified by combining paras. (k) and (m) of the plaintiff's notice of updated particulars dated 21st May 2015. The allegation of negligence made is that the plaintiff was caused to sustain injury because the aeroplane in which she was travelling hit the runway with unacceptable force having regard to the prevailing conditions.

30. It has to be said that at the time the initial application for discovery came before the High Court the plaintiff must have believed that there was at least a possibility that the landing concerned was a heavy or hard landing within the aviation meaning of those words. That this is so is clear from the letter seeking voluntary discovery and, in particular, from the reasons provided to justify the documents specified in categories eight and nine. There reference is made to the fact that the documents sought would provide "highly technical incontrovertible evidence" as to whether the aircraft made a "heavy landing". The "heavy landing" is referred to in the context of the request for discovery of any "load 15" printout which the plaintiff's expert, Captain Ryan, who advised on the issue of discovery, would have known is only generated following what an aviation terms may be described as a heavy landing. However, these are not matters of any great import to what in reality is a rather straightforward issue.

31. In relation to categories 1-4 inclusive, insofar as they are directed to the second of the liability issues to which I have earlier referred, I am not satisfied that the plaintiff has established that these documents are either necessary or relevant. Not only has the plaintiff failed to convince me that these documents are probably relevant to that issue but she has also failed to convince me that they there is any possibility that they could be of relevance to the liability aspect of her claim. I fear that her application for discovery of these documents falls to be condemned as a fishing expedition.

32. In the plaintiff's letter seeking voluntary discovery it was stated on her behalf that the documents described in categories 1 to 4 were required because her aviation expert considered them necessary to prove that the pilot was unqualified, inadequately trained or inadequately supervised. However, not only does the plaintiff not need to prove anything irregular concerning the licence held by the pilot or the extent of his or her experience, training or supervision on the day in question to succeed in her claim, such information as might be gleaned from these documents would be wholly immaterial to the court's decision concerning her claim as cast.

33. The plaintiff's complaint is that there were no conditions to justify the heavy impact that the plane made when it met the runway. It matters not in this regard whether she intends to rely upon the landing as being "heavy" as defined in aviation terms or just heavy but not so heavy as would meet the technical definition of that word. The court will have to decide as a matter of fact whether the force generated on landing was negligent or not in the prevailing circumstances. Either the landing was to a standard which was professional and acceptable having regard to the prevailing conditions or it was not. If the landing was heavy to the point which the court considers it negligent it does not matter who was flying the plane or what their qualifications were once they were an employee of Aer Lingus. Likewise, if the landing was unacceptably heavy having regard to the prevailing circumstances, proof that the pilot concerned took the annual pilots' prize for excellence in the week previous to the plaintiff's injury would not protect the defendant from a finding of liability. Hence, it cannot be said that the documentation sought in categories 1 to 4 inclusive are necessary or relevant.

34. In looking at whether it was necessary for the plaintiff to have these documents so as to advance the liability aspect of her claim it is relevant to note that prior to the hearing in the High Court the plaintiff had agreed to furnish documentation in relation to category eight, albeit limited to the moment of touchdown. That being so the plaintiff's expert was always going to be in a position, without the need for any further documentation by way of discovery, to opine as to whether the landing was heavy to the point that it should be considered to be negligent in all of the prevailing circumstances.

35. For similar reasons I am satisfied that the High Court judge was correct in refusing the plaintiff's application for discovery of the documentation set out in category eight insofar as it relates to the period spanning 30 seconds prior to the landing and 15 seconds thereafter. The plaintiff was not injured either before or after touchdown. If she was injured in the manner alleged, this occurred as a result of the impact of the aircraft meeting the runway. As to how the aeroplane was piloted either side of touchdown, is in my view, immaterial to any issue the court has to decide.

36. Perhaps the fact that the plaintiff's injuries are alleged to have been sustained in the course of an adverse event involving an aeroplane rather than one involving a car has caused some confusion and that clarity can be brought to bear on the issue by considering a somewhat analogous road traffic accident case.

37. Let us assume for a moment that the plaintiff takes a lift home from the airport in a car owned by one of her colleagues. Her colleague slams on the brakes with the result that the plaintiff is badly jolted forwards and backwards while restrained by her seatbelt in the passenger seat. Let us further assume that, unfortunately, the plaintiff develops serious soft tissue injuries to her neck and back. Accordingly, she later sues her colleague for the injuries sustained complaining that the car was driven negligently in that it was brought to an unnecessarily abrupt stop. A full defence is delivered on behalf of the driver which denies of the severity of the manoeuvre complained and asserts that the driving was reasonable in all of the circumstances.

38. I venture to suggest that it is obvious that the plaintiff in such circumstances could not establish her entitlement to discovery of her colleague's driver's license or documents which might tend to establish whether or not she had ever taken driving lessons. Such documents could never be considered either necessary or relevant to the issues which the court would have to decide at the hearing of the action. The issues to be determined by the court in the circumstances just outlined would be as follows: –

1. As a matter of fact, how severe was the braking manoeuvre performed by the driver?

2. Was the severity of the manoeuvre as found by the trial judge reasonable in all of the prevailing circumstances? This issue might include a consideration of factors such as whether a child had run out in front of the car or whether the driver apprehended some other impending disaster. And,

3. if the manoeuvre was found to be unreasonable and negligent in the circumstances, the extent of the resulting injury to the plaintiff.

39. Applying similar considerations to the present case I am quite satisfied that the High Court judge was correct when she concluded that the documents sought were not necessary or relevant for the proper disposal of this action having regard to the discovery to which the defendant has consented.

40. Having reached this conclusion it is not necessary to proceed to consider any of the supplemental arguments advanced on behalf of Aer Lingus concerning the effect of the agreement between Aer Lingus and Impact / Irish Airline Pilots Association or EU Regulation 996/2010 on the plaintiff's application for discovery. However, in relation to the defendant's reliance upon the aforementioned Regulation, I have to say that I found Mr. King's submission convincing insofar as he pointed to the inconsistent position that had been adopted by Aer Lingus concerning this regulation. While it objected to providing the disputed discovery documents in category eight based upon this regulation it nonetheless agreed to discover other documents within the same category which would appear to be covered by that very same regulation.

41. There is just one final matter to which I would wish to make a brief reference and it is this. Discovery is an expensive and time consuming process and, as such, can greatly increase the costs of litigation and delay the proper, effective and timely administration of justice. In a not insignificant number of cases, discovery is sought in relation to documentation which is not in truth required to advance the claim or defence of the party making such a request. Not only are the number of cases in which discovery is sought growing, but in very many cases once the decision has been made to seek discovery, the requesting party will seek to cast the discovery net way beyond what might reasonably be required for the proper resolution of the issues in the case. The result of this type of approach is to discourage voluntary engagement on the part of the recipient of such a request with the likely consequence that the dispute will only be capable of being resolved with the court's assistance.

42. The overuse of the discovery procedure is to be discouraged for the reasons so clearly stated by Hogan J. in paras.10 - 15 of his judgment in *IBB Internet Services Ltd. v. Imagine Communications Ltd.* [2005] IECA 242. In the course of his judgment, albeit in the context of significant commercial litigation, he commented upon the struggle faced by the courts in recent years in terms of judicial resources by reason of the ever-increasing amount of time which the courts are being asked to afford to increasingly complex applications for discovery which oftentimes result in voluminous discovery which is simply not necessary for the proper disposal of the issues before the court.

43. I make these comments because I believe they are of some relevance in the context of the discovery dispute in the present proceedings. The discovery sought was overly extensive with the result that the parties were unable to resolve their differences without the intervention of the court and a protracted exchange of affidavits. This had greatly added to the costs of this litigation which, from the pleadings, appears to be a relatively modest claim for damages for personal injury. It is, perhaps, unfortunate that at the time the request for the discovery was made or at latest when the replying affidavits to the motion for discovery were filed that Aer Lingus did not make known to the plaintiff that the documentation relevant to touchdown would establish as a matter of fact that the G Force exerted was 1.6. Perhaps such an approach might have commended itself to the plaintiff and might possibly have brought about a situation where a less extensive and more focused discovery order was sought in the first instance.

Conclusions

44. For all of the aforementioned reasons I would dismiss the appeal.