

THE HIGH COURT

1998 11138 P

BETWEEN/

RYANAIR LIMITED AND RYANAIR DIRECT LIMITED

PLAINTIFFS

AND

MURRAYS EUROPCAR LIMITED AND EUROPCAR (UK) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered on 18th day of May, 2009

1. The recent history of this long-running action is that in May, 2006, the first-named defendant brought an application for discovery of documents and by consent an order to that effect was made on 18th July, 2006. The Plaintiff was to make discovery by 10th October, 2006 but failed to do so. An application to strike out the claim for failure to make discovery was brought on 2nd February, 2007 and the affidavit was eventually produced on 15th February, 2007.

2. Inspection of the discovered documents was then sought and refused and an order for inspection was then obtained from the Master of the High Court on 28th June, 2007. Inspection was not permitted by the plaintiff within the 30 days stipulated in the order with the result that an order was sought from and granted by the Master on 13th November, 2007, as amended by an order of 8th April, 2008 dismissing the plaintiff's claim as against the first-named defendant for failure to comply with the order of 28th June, 2007. The plaintiff then applied to have that claim reinstated and the matter was determined before MacMenamin J. on 12th February, 2009.

3. Subject to the terms laid down in that order, including lodgement of a sum of €485,622, the permitting of inspection and the payment of 50% of the costs to date in the action, the reinstatement of the claim was permitted.

4. On that motion, a very great emphasis was placed obviously on the delay on the part of the plaintiff in prosecuting its claim and on its failures to comply with previous orders. For the purpose of answering the allegation that this delay and these failures indicated that the plaintiff had no serious intention of pursuing the alleged claim but was in reality seeking to obstruct the defendant's claim, an affidavit was sworn by Mr. Cawley on behalf of the plaintiff and in para. 4 of that affidavit Mr. Cawley swore:

"In particular I deny absolutely the suggestion that Ryanair seeks to hinder the efforts of the first-named defendant in litigating the dispute or that this is intended. In fact the case is that Ryanair has obtained a report from Patrick Massey, consultant and former member of the Competition Authority, which is strongly supportive of the case that the first-named defendant failed in its obligation to provide a competitive pricing policy. Ryanair is in fact most anxious to litigate this matter, which could proceed to trial rapidly."

5. The first-named defendant now applies for an order permitting inspection of that report on the basis that any privilege that might have been claimed in it has been waived by its being thus deployed in that affidavit in support of the claim to reinstate the action. The law on the issue is clear from the authorities opened to the court and especially the decision of the High Court in *Byrne v. Shannon Foynes Port Company* [2008] 1 I.R. 814, and the Supreme Court in *Hannigan v. Director of Public Prosecutions* [2001] 1 I.R. 378. The authorities cite the well-known statement:

"The general rule is that where privilege material is deployed in court in an interlocutory application, privilege in that and any associated material is waived..."

6. It is also clear, however, that a mere reference to a document is not sufficient to treat it as deployed in that sense. This is so even if some reliance is placed on it. Reliance is not the test as Clarke J. put the matter very aptly in the *Byrne v. Shannon Foynes Port Company* [2008] 1 I.R. 814, case:

"It is important to note that the test is to the effect that the document concerned was 'deployed'. It is clear from Marubeni Corporation v. Alafouzof [1988] C.L.Y. 2841 that a mere reference to a privileged document in an affidavit does not in itself amount to a waiver of privilege and that this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test. Properly speaking, the test is whether the contents of the document are being relied on rather than its effect."

7. As thus put, the test is as to whether the party concerned has placed reliance on the content of the document concerned. It does not seem to me that the mere disclosure of the existence of the document without claiming any privilege in respect of it in an affidavit of discovery can be said to amount to the placing of reliance on the document in the proceedings so as to, properly speaking, suggest that the document has been deployed.

8. In the present case the court is satisfied that privilege has not been waived. In effect all that has been done is to refer to the existence of a strong supportive report from an expert in order to rebut the accusation that the plaintiffs' claim is obstructive or vexatious. The content or basis of the report was not mentioned. No use is made of any particular advice or expertise contained in it. It is merely referred to in corroboration of the plaintiffs' intention to prosecute the claim.

9. For these reasons the court considers that privilege has not been waived in this case and that the order for inspection of the report need not be granted.