[2020] IEHC 629

THE HIGH COURT

[2019 No. 2944 P]

BETWEEN

ER TRAVEL LIMITED

PLAINTIFF

– AND –

DUBLIN AIRPORT AUTHORITY AKA DAA PLC

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 4th December 2020.

I

Background

1. In its judgment of 18th February 2020 (*ER Travel Ltd. v. Dublin Airport Authority aka DAA plc* [2020] IEHC 62), this Court ordered that ER pay security for costs of €170,000. The background to that judgment is captured in paras. 1-3 of same, which state, inter alia, as follows:

> *"1. ER Travel Ltd. ("ER"), an Irish-registered company, provides car rental services in Ireland. Car rental services at Dublin Airport typically operate as an on-Airport concession which is allocated by way of a competitive tendering process that is run by the DAA. ER's business model is different: it offers internet booking facilities to customers who are transferred, following their arrival at Dublin Airport, to an off-Airport parking area, culminating, ER claims, in a better-value car rental service.*
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> *2. Issues arose between ER and the DAA in 2015/2016, after it came to the attention of the DAA that ER was sending shuttle buses to the airport to collect ER's customers and transfer them to ER's off-Airport car park. The DAA considered that this constituted a breach of its bye laws which provide that permission is required from the DAA to conduct business activities at Dublin Airport. There was an ongoing dispute between the parties between March 2016 and April 2019. In April 2019, ER issued proceedings seeking, inter alia, declarations that: - (1) the DAA has acted ultra vires and in breach of the airport bye-laws; (2) the DAA has acted ultra vires and/or deliberately and consciously in its own self-interest, contrary to law and/or disproportionately in making bye-laws which prohibit the use of Dublin Airport for, inter alia, business purposes; (3) the DAA is seeking to prevent, restrict or distort competition contrary to the Competition Act 2002, through its agreement/s with such car rental companies as are licensed to operate from Dublin Airport's premises; (4) the DAA, in restricting or otherwise interfering with ER in seeking to enter, park on, and collect members of the public from Dublin Airport, is unlawfully abusing a dominant position in breach of the Competition Act 2002; and (5) the DAA is infringing the rights of passengers by restricting their use of Dublin Airport facilities, including the facility of being collected by third parties with whom such passengers wish to transact business other than on Dublin Airport lands.*

3. This judgment is concerned with an application for security for costs brought by the DAA pursuant to s.52 of the Companies Act 2014 seeking that ER provide security for the costs of the DAA in relation to its defence of the within proceedings…"

2. DAA was successful in the last-mentioned application. However, the security for costs has not yet been paid. DAA has therefore brought the within application seeking, *inter alia,* the following reliefs:

"(a) an Order pursuant to the inherent jurisdiction of the Court dismissing the Plaintiff's claim for want of prosecution on account of the failure by the Plaintiff to provide security for costs;

(b) an Order providing for the costs of and incidental to this application and, as necessary, the costs of these proceedings; and

(c) such further or other orders, reliefs or directions as this Honourable Court deems fit."

3. This application occurs in the context of the Coronavirus pandemic which, as of the date on which this application was heard, has seen over 13 million Coronavirus cases and, tragically, over 325,000 fatal Coronavirus cases reported in the EU/EEA and the UK *(https://www.ecdc.europa.eu/en/cases-2019-ncov-eueea;* accessed 1 December 2020). In scenes that were unimaginable a year ago, almost all of the western nations have gone into lockdown for one or more periods during this year in a bid to curb the spread of the virus. At the time of writing, the tantalising prospect of imminent mass vaccination offers the hope of a return to some semblance of normality in the, hopefully, not-too-distant future. However, the economic cost of the pandemic will be with us for some time to come.

4. Almost all sectors of the economy have been adversely affected by the Coronavirus pandemic, perhaps none more than the international travel sector in which ER operates, its managing director averring, *inter alia*, as follows, in this regard:

"5…. [T]he Plaintiff, together with every other company that relies upon the hospitality and travel industry, is on its collective knees. The Plaintiff is no different and is essentially in deep-freeze in the hope that it can ride out the devastation to its business.

[Court Note: The court notes in passing that ER's business model is geared towards the more budget end of travel, *e.g.*, the kind of traveller who hails from one EU Member State, wishes to spend a weekend in another EU Member State and wants to do so on a 'shoestring' budget; the isolation/quarantine periods that currently attach to much Europe-wide travel have essentially brought this form of travel to an end for now.]

6. I say the Plaintiff is desirous to continue to prosecute the action and fully intends to lodge the security for costs. However, the plaintiff seeks the indulgence of this

Honourable Court in the context of the current pandemic, the current devastation to the Plaintiff's business and the expected recovery of the plaintiff….

8. I respectfully request this Honourable Court to exercise its discretion to refuse the terms of the motion or, in the alternative, to adjourn the Motion generally with liberty to re-enter at a time when the Plaintiff will have had some opportunity to recover from the blows inflicted upon it by the effective shut-down of the air travel industry."

5. Complaint is made by the DAA that the foregoing is very general and involves the making of broad assertions without any supporting exhibits. It is quite general. However, the court accepts the contention made by ER that its trade has essentially ceased at this time and that it cannot identify with specificity how its trade will progress in the next few months, this being dependent on what progress is made in combatting Coronavirus Europe-wide, what decisions European governments make as regards international travel, and what incentives might be made available by European governments to support the tourism and travel sectors.

6. Viewed against the just-described background, how does the within application fall properly to be viewed? Is it an opportunistic application by DAA that can lawfully be brought but which has been taken in blithe disregard of the above realities? Or is it a legitimate application of real substance? It seems to the court that it is a legitimate and permitted application brought by DAA as a prudent step to protect itself commercially from financial/litigation risk in what are exceptionally difficult trading times for it also – and DAA is as entitled as any other commercial entity to take whatever steps are open to it to protect itself at law. Thus, an officer of DAA has averred, *inter alia*, as follows in the context of the within proceedings:

"10. The Defendant, a global airports and travel retail group, is eminently aware of the impact of the pandemic on this industry and has itself been severely impacted as a result of Covid-19.

11. Against this backdrop, I say and believe that Mr Hanley's contention that no prejudice will be suffered by the Defendant as a result of the within proceedings sitting idle for a further indefinite period is wholly incorrect. The Plaintiff's claim seeks to cast doubt over the statutory framework within which the Defendant operates, as well as raising competition law issues….This is a risk which the Defendant should not have to bear indefinitely….

12. As well as exposing the Defendant to…operational concerns, the very existence of the proceedings exposes the Defendant to reputational and financial harm….

13…. In circumstances where the company has lost significant revenue for the year ended 2020, the Defendant is making every effort to reduce liabilities (to include contingent liabilities) for the year ended 2020.

14. I therefore say and am advised that the Defendant does in fact suffer a very real prejudice by the continuance of these proceedings, particularly where the Plaintiff has demonstrated no desire…to ensure the expeditious disposal of the proceedings whether prior to or following the onset of the Covid-19 pandemic….".

7. In short, the DAA, like most, perhaps all, other businesses is 'battening down the hatches' at this time in the face of the unprecedented financial and trading risks to which it stands exposed by virtue of the Coronavirus pandemic. It sees the within proceedings to present it with financial/legal/reputational, *etc*. risk and its preference is to see that risk obviated through the dismissal of the plaintiff's claim or (as became clear at the hearing of the within application) at the least mitigated substantially through the imposition of some form of limited timeframe, rather than ER's mooted adjournment of the motion generally with liberty to re-enter – a form of relief which would run the risk of turning the within proceedings into something of a potentially never-ending saga. The court accepts some level of prejudice to present for DAA, at the least if the within proceedings are allowed to continue without some meaningful limitation on how protracted they may become.

II

Some Law

8. In the course of argument, the court was referred by counsel to the following case-law: *Lough Neagh Exploration Ltd v. Morrice* [1999] 4 I.R. 515, *Superwood Holdings plc v. Sun Alliance (No. 3)* [2004] 2 I.R. 407 and the English case of *Speed Up Holdings Ltd. v. Gough & Co.* [1986] FSR 330. The court turns to consider the Irish cases hereafter; *Speed Up* is referenced in the consideration of Lough Neagh and does not require to be considered separately.

9. When the court refers hereafter to the 'Exceptional Circumstances Presenting', it means to refer to (i) the existence and ongoing continuation of the Coronavirus pandemic; and (ii) the abnormal social and economic circumstances presenting in which, as a result of (i), there are repeated lockdowns and/or rising Coronavirus infection rates across many EU Member States; there are, *inter alia*, intra-EU/EEA and UK-related travel restrictions, including but not limited to isolation/quarantine requirements; there has been a massive constriction of international tourism and travel; there has been a cessation of the budget end of the market that is the focus of ER's business; there is, at the time of writing, the real promise of successful mass vaccination, albeit with no certainty as to how quickly mass vaccinations will be rolled out; there is no certainty as to whether there will be a proper summer holiday season in the year ahead; and the shorter and longer-term economic prospects for the EU/EEA and UK do not seem especially bright at this time.

10. The court notes that in all of the above-mentioned cases there were no circumstances presenting that were even remotely akin to the Exceptional Circumstances Presenting. Those precedents fall therefore to be applied in the context of the Exceptional Circumstances Presenting.

a. Lough Neagh

11. In this case, the High Court had ordered the payment of security for costs. That security was not brought and a successful strike-out application was brought to the High Court, that decision being upheld by the Supreme Court, Hamilton C.J., in the sole judgment of that court, observing, *inter alia*, as follows at pp. 529-530:

> *"Ordinarily an order requiring a party to give security for costs will merely provide that the proceedings should be stayed until such security is provided. On the other hand, counsel for the plaintiff necessarily conceded that the party in whose favour the order is made might apply to the Court at an appropriate stage to have the proceedings dismissed if, or so counsel would argue, the party in whose favour the order was made could establish that it would be prejudiced by the stayed proceedings continuation in being…..In Speed Up Holdings Ltd v. Gough & Co. [1986] F.S.R. 330 a deputy judge of the High Court, Mr Evans-Lombe QC, considered in some detail the power of the Court to dismiss proceedings under its inherent jurisdiction where a plaintiff had not complied with an order made under the Companies Acts requiring security for costs. The learned judge recognised that generally the interests of the party obtaining the order were protected by staying the further proceedings but identified a number of circumstances in which it would be appropriate, under the inherent jurisdiction of the court, to make an order dismissing the proceedings. <u>One of the circumstances envisaged was the conclusion that there was no reasonable prospect that the security was going to be paid</u> ['Underlined Text 1']. Having reviewed all of the circumstances of the case the deputy judge fixed an extended time limit within which the security was to be paid and provided by his order that in default of payment by that date that the action should stand dismissed.*
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> *<u>O' Sullivan J. concluded that he had a discretion as to whether in all of the circumstances he would strike out the plaintiff's claim</u>. It does not appear from the submissions made to this Court that that conclusion was seriously disputed by the plaintiff. Certainly, I am satisfied he did have such a discretion. Furthermore, O'Sullivan J. went on in his judgment to review the judgments of this Court in Murphy v. J. Donohoe Ltd [1996] 1 I.R. 123 and Mercantile Credit Co. of Ireland Ltd. v. Heelan [1998] 1 I.R. 81, where this Court considered the imposition of the sanction of dismissing or striking out actions for failure to comply with an order for discovery. <u>The learned trial judge rightly concluded that the effect of those judgments was that this ultimate sanction would not be available for the purpose of punishing the defaulter and where available should be exercised sparingly and then only in extreme cases</u> [the underlined text in this paragraph being 'Underlined Text 2']. Having reached that conclusion and applied the same principles by analogy to failure to comply with an order to provide security the learned judge made an order striking out the plaintiff's claim herein. [Emphasis added].*
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> *I am satisfied that the order aforesaid represented a proper exercise by the learned judge of the discretion vested in him. If, however, there had been any residual doubt as to the propriety of his decision this was disposed of by the adjournment*

granted by this Court in January last and the failure of the plaintiff to provide the required security even after the first defendant had co-operated with the plaintiff in the manner sought by it. In my view the appeal should be dismissed and the order of O'Sullivan J. affirmed.

12. Re. Underlined Text 1: The court considers that there is no reasonable prospect of the security for costs being paid by ER at this time because of the Exceptional Circumstances Presenting. However, the exceptionality of the Exceptional Circumstances Presenting is a matter for which the court must duly make allowance. (DAA has mooted the possibility that the security would not have been paid anyhow; however, the court can only adjudicate on the facts that present, not on the facts as they might have been, and that facts that present show there to be Exceptional Circumstances Presenting).

13. Re. Underlined Text 2: The court notes the reference to strike-out being granted "*should be exercised sparingly and then only in extreme cases*". Even were this application brought in a normal scenario, in which nine months had passed since the order for security for costs had been brought and ER was dragging its heels in terms of paying the security and progressing the within proceedings, the court's instinctive sense (subject to argument) is that in such circumstances (which do not present) it would be inclined even then to give ER one last chance to 'get its house in order' by granting an 'unless' order and naming a date by which payment and progress were to be made (and what kind of progress). However, the scenario that presents is entirely abnormal because of the Exceptional Circumstances Presenting. So even if this were an extreme case, and the court is not convinced that it is, at least not yet, that extreme case (which the court does not consider to present) would require (a) to be viewed in the context of the Exceptional Circumstances Presenting and (b) a measured response that fell short of dismissal. If such an extreme case required a measured response that fell short of dismissal it seems to the court that the case now presenting must likewise require a response that falls short of dismissal.

b. Superwood

14. In *Superwood*, the plaintiffs sought damages from the defendants for wrongful repudiation of insurance policies. Their claim before the High Court was unsuccessful and they appealed to the Supreme Court. Further to an application by the defendants, the Supreme Court ordered the plaintiffs to furnish security for costs pursuant to s. 390 of the Companies Act 1963 in respect of the costs of the appeal. The plaintiffs having failed to provide such security, the first, second and third defendants sought to have the appeal struck out. The plaintiffs argued that the court could not strike out proceedings on the basis of a failure to comply with an order made under s. 390 of the Act of 1963, without express jurisdiction to do so. Rising to the challenge of want of jurisdiction, the Supreme Court, granted the relief sought, holding that it had an inherent jurisdiction to do so, which jurisdiction could be exercised where there was no reasonable prospect that the security for costs would be provided. In the sole judgment for the court, Keane C.J. observed, *inter alia,* as follows:

"27 As is clear from the decision in Lough Neagh Exploration…the order sought may be made where there is no reasonable prospect that the security is going to be given. In the present case, the original order for security for costs was made nearly two years ago….

29 I am satisfied that the history of these proceedings, since the plaintiffs were required to furnish security for costs, makes it clear beyond doubt that there is no reasonable prospect that they will furnish the sum required. If the plaintiffs had placed before the court any evidence of a realistic programme under which the necessary monies would be raised within a reasonable time, I would have been disposed to give them some further period of time within which to raise the monies before finally striking out the appeal. They have had ample time in which to bring before the court such evidence but have not done so. Instead, they have chosen to bring a number of different applications to the court in a futile attempt to reopen the matters determined in the judgment of this court of the 12th April 2002, requiring the provision of security, or to reduce the amount of the security ordered. In these circumstances, I am satisfied that there is no alternative to striking out the plaintiffs' appeal."

15. As to:

- the "*reasonable prospect*" point in paras. 27 and 29, the court respectfully refers the parties to its comments re. Underlined Text 1 above.

- the period in which the unpaid security for costs has been unpaid, this Court delivered its judgment in this regard in February, so they have been outstanding since February, *i.e*. nothing close to the two-year period presenting in *Superwood*, and since soon after the date of delivery of the court's judgment that non-payment has been in the context of the Exceptional Circumstances Presenting.

- the "*realistic programme*" point in para.29, a similar criticism was made by the DAA here. However, as indicated above the court respectfully accepts the contention made by ER that its trade has essentially ceased at this time and that it cannot identify with specificity how its trade will progress in the next few months, this being dependent on what progress is made in combatting Coronavirus Europe-wide, what decisions European governments make as regards, in particular, the summer travel season, and what incentives might be made available by European governments to support the tourism and travel sectors, i.e. in the Exceptional Circumstances Presenting ER cannot yet provide the court with the type of informed "*realistic programme*" that appears to have been contemplated by the Chief Justice in *Superwood*. That said, there is only so long that this can continue to be the case. With the turn of the calendar year, governments will, for example, focus on what will be possible and permitted in terms of travel in the year ahead, including the spring and summer seasons, and it will become clearer how and at what speed mass vaccination will be rolled out Europe-wide (and the consequences of same for international travel). Notably, even in the two-year non-payment timeframe that

presented in *Superwood*, the Chief Justice indicated that he "*would have been disposed to give…some further period of time within which to raise the monies before finally striking out the appeal*" had the plaintiffs but "*placed before the court any evidence of a realistic programme under which the necessary monies would be raised within a reasonable time*". Here, for the reasons indicated, the court does not see that ER falls to be criticised for the absence of such a programme, so the criticism that prompted Keane C.J. to proceed as he did does not present, hence yielding a different conclusion as to how best to proceed.

– the multiple applications point made by Keane C.J., nothing of the like presents here.

III

Conclusion

16. Having regard to all of the foregoing, the court will adjourn this application and these proceedings to a date in mid-to-late July 2021 that is amenable to the parties. By that time, the 2021 trading performance of ER should be clear and the current uncertainty about how next year's summer season will proceed should largely have been set to rest. The court will expect to be provided, by ER, at that next hearing, with:

    (a) a comprehensive "*realistic programme*" of the type contemplated by Keane C.J. in *Superwood*;

    (b) ER's annual accounts for 2020;

    (c) ER's management accounts for 2021 (whether prepared monthly or otherwise);

    (d) if available by July 2021, ER's half-yearly accounts for 2021.

17. With the exception of the June 2021 management accounts and/or the half-yearly accounts the court will require that all of the foregoing be provided to the DAA by 30th June 2021. The June 2021 management accounts and/or the half-yearly accounts should be provided to the DAA as soon as available, assuming they become available before the adjournment date.

18. What the court seeks to achieve in the foregoing is that the DAA and the court be apprised in a meaningful and comprehensive manner of how ER stands at, or shortly before, the adjournment date in order that the court can decide in an informed manner how best to proceed.

19. Given the Exceptional Circumstances Presenting at this time and the various uncertainties that will likely present over the months ahead, the court is not minded to make an 'unless' order. However, ER should note the court's present sense that if these proceedings are to proceed, then in the interests of justice and fairness, they should proceed as soon as is feasible in late-2021 or early-2022.

20. Both parties have liberty to apply generally and, without prejudice to the generality of the foregoing, to have any motion heard on the adjournment date that they duly issue in advance of same.

21. No argument was made as to costs. Rather than take email submissions in this regard, the court would suggest that the parties pick a date in the next fortnight that suits them to make any argument they may have as to costs and to finalise the terms of the order that is to issue pursuant to this judgment. That should be a brief further hearing and can take place at 10 a.m. on the agreed date.