



THE COURT OF APPEAL
CIVIL

[Unapproved]
[No Redaction Needed]
Court of Appeal Record Number: 2022/214
High Court Record Number: [2022] IEHC 385

Costello J.
Haughton J.
Butler J.

Neutral Citation Number [2023] IECA 180

BETWEEN

RYANAIR LIMITED

PLAINTIFF/RESPONDENT

AND

ON THE BEACH LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 17th day of July 2023

1. This is an appeal against the judgment and order of the High Court ([2022] IEHC 385) (Stack J.) dated 23 June 2022 where the High Court refused to dismiss the proceedings for want of prosecution by reason of inordinate and inexcusable delay. The application was made pursuant to the inherent jurisdiction of the court in accordance with the well-known principles set out in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459. The trial judge found that the plaintiff (“Ryanair”) was responsible for both inordinate and inexcusable delay, and this finding has not been appealed. The appeal concerns the balance of justice and whether, in the circumstances, it would be just to dismiss the proceedings.

Background

2. The proceedings were issued on the 27 September 2010. They concern the disputed sale by the defendant (“On The Beach”), an online travel agent, of tickets for travel on Ryanair flights as part of bespoke package holidays which On The Beach puts together and sells to its customers. Ryanair says On The Beach has no permission to do this; that it is breaching Ryanair’s terms and conditions, infringing its copyright in its database and engaged in the tort of passing off. On The Beach entered a conditional appearance on 24 January 2011. On The Beach then issued a motion on 11 March 2011, contesting the jurisdiction of the Irish Courts to hear the proceedings. The High Court rejected the contentions of On The Beach in 2013 (Laffoy J, S[2013] IEHC 124) and the Supreme Court rejected the appeal from that judgment on the 19th February, 2015 ([2015] IESC 11).

3. Ryanair delivered a statement of claim on the 22 April 2015. On The Beach responded with a notice for particulars dated 4 June 2015. These were replied to on the 16 September 2016, and On The Beach issued a motion on the 5 May 2017 seeking to compel Ryanair to provide further and better particulars. In the meantime, Ryanair decided that it wished to amend its statement of claim and by letter dated the 8 November 2017 it served a draft amended statement of claim on the solicitors for On The Beach and sought its consent to the proposed amendments. This was refused. The motion to compel further and better particulars was adjourned generally in December 2017 to allow Ryanair to bring a motion to amend its statement of claim. For reasons which were never explained, Ryanair failed to take any further steps in the proceedings. On the 31 July 2020, it filed a notice of change of solicitor and a notice of intention to proceed which were then served on On The Beach’s solicitors on 5 August 2020.

4. On The Beach issued its motion to dismiss the proceedings on the ground of inordinate and inexcusable delay on the 21 June 2021. On the same day it instituted competition law

proceedings against Ryanair in England and Wales, alleging breaches of competition law and in particular of abuse of a dominant position.

The evidence of On The Beach

5. On The Beach's motion was grounded on the affidavit of Simon Cooper sworn on 7 June 2021. He says he is the founder and Chief Executive Officer of On The Beach limited, an online travel agency, and that On The Beach is part of a group of companies whose parent company is On The Beach Group Plc.

6. Mr. Cooper says that On The Beach apprehends that Ryanair has no intention of prosecuting its claim and instead it is using the existence of the proceedings for two identified improper purposes.

- “(a) To damage OTB's business and to smear its reputation, by claiming to customers (and the world at large) that OTB is unlawfully screen scraping the Ryanair website; and*
- (b) to exert improper pressure on OTB in other unrelated disputes by alleging that OTB is unlawfully screen scraping the Ryanair website.”*

The essence of his claim as to this non-litigious prejudice is set out in paragraph 7:

“... Ryanair is using the existence of these proceedings (whether or not they are referred to expressly) to support its allegations of unlawful screen scraping and to help it exert improper pressure on OTB in other disputes. By failing to progress the proceedings, Ryanair is keeping this prospective claim hanging over OTB for these illegitimate purposes.”

7. In paragraphs 8 through to 19 he sets out details of what he describes as Ryanair's campaign against OTB. He avers that Ryanair *“has embarked upon a smear campaign against OTB which seeks to denigrate its reputation.”* In support of this assertion, he refers to various posts and videos from September 2020 until 31 March 2021. He complains that

Ryanair has raised the same issues in this campaign as arise in these proceedings and that Ryanair is “quite prepared to state publicly that (by way of example only) OTB is a ‘screen scraper’, that it acts ‘illegally’; that it uses ‘fake’ customer contact details and payment cards to make bookings; and that it ‘dupes’ its customers.” At para. 19 he avers that:

“The smear campaign described above is obviously prejudicial to OTB because of the damage being inflicted on OTB’s reputation. The existence of these moribund proceedings gives this smear campaign legitimacy and credibility, which I would respectfully suggest is not fair to OTB nor an appropriate use of the court system.”

8. Separately, he asserts that the existence of the proceedings and the requirement by On The Beach and On The Beach Plc to disclose the existence of the proceedings is prejudicial as it discourages investors and it hinders On The Beach and its parent company from attracting investment. He refers to the mere existence of the proceedings as being “clearly prejudicial” to On The Beach because “no investor looks favourably upon material litigation”. He says that the existence of such litigation is a real “red flag” for certain investors, while others will assess the value of the assessment opportunity by reference to the existence of the litigation. This has been the actual experience of On The Beach and On The Beach Plc in relation to these proceedings both while seeking private equity investment in 2013 and when listing on the London Stock Exchange in 2015. He sets out the evidence to support this assertion in paragraphs 23 to 34 of his affidavit.

9. Mr. Cooper points out that On The Beach Plc continues to have to make disclosure about the litigation in its annual financial reports and he exhibits the relevant extracts from the financial reports for 2015 to 2021. He says that these disclosures continue to be prejudicial for On The Beach Plc because:

“42. ... [T]he existence of this litigation will likely put off certain investors from investing in OTB PLC. Indeed, we know this issue is highly relevant to our investors

because financial analysts and investors have asked us about the litigation when we present our financial results, for example during the question and answer session which follows between analysts, investors and OTB PLC's management."

Mr. Cooper says that financial analysts who report on OTB PLC to investors provide guidance on whether to invest in that company and that these investment reports specifically refer to the litigation with Ryanair. In paragraphs 44 to 49 he sets out extracts from reports from November 2015, April 2015, March 2017, March 2019, July 2019 and March 2021.

10. He alleges that Ryanair is wrongfully exploiting the existence of these proceedings in a dispute between Ryanair and On The Beach in relation to refunding passengers in relation to flights cancelled due to the Coronavirus pandemic. On The Beach complains that Ryanair is not refunding it for payment Ryanair received for flights which in the event were not operated. Ryanair says it is required to refund the passengers, and not the credit card owned by OTB, which was used to book the flights. On The Beach is relying on the Visa Scheme Rules to enable card issuers to reverse transactions and recover the monies paid into Ryanair's bank where Ryanair fails voluntarily to repay the payment made using the Visa card issued in the name of On The Beach. Mr. Cooper says that On The Beach has initiated chargebacks and has successfully recovered tens of millions of pounds through the process. He says that Ryanair has threatened to report On The Beach to the UK Financial Conduct Authority and *"in addition, Ryanair has continually referenced screenscraping and the screenscraping litigation in its correspondence with OTB to exert pressure upon OTB. The implication is that, unless OTB drops its chargeback requests against Ryanair, Ryanair will opt to pursue this litigation."* Mr. Cooper quotes from eight letters dated between 22 July 2020 and 6 May 2021 and he concludes at para. 53:

“It is clear that Ryanair is using this litigation as a stick with which to beat OTB in unrelated disputes, whilst never actually progressing the litigation. It is inherently unfair and prejudicial to OTB for Ryanair to abuse the court process in this way.”

11. In paragraphs 54 – 56 Mr. Cooper addresses what he describes as additional prejudice On The Beach will suffer. He avers as follows:

“54. Such a significant amount of time has now passed since Ryanair began this litigation that the vast majority of those involved at the time the proceedings were issued have since left OTB. This includes Wendy Parry (Chief Financial Officer) who left in January 2017. I imagine the position is similar for Ryanair.

55. Moreover, the memory of witnesses who would testify is likely to have faded with time. It will be difficult for witnesses to speak to events which occurred over a decade ago. This will become more difficult with more time passing between now and any potential trial, particularly given Ryanair’s dilatory approach to these proceedings. It is clearly prejudicial for OTB to have to defend legal proceedings which are so significant to the business in circumstances where many potential witnesses have left the business and may no longer be willing to spend significant amounts of time going through matters which occurred so long ago. Even those witnesses willing to help are not likely to be able to recollect events which occurred so long ago. This prejudice has been caused by Ryanair’s total failure to progress the present proceedings.

56. Finally, the long duration and stop-start nature of this litigation has been an enormous burden and distraction for OTB. On more than one occasion, OTB has invested the time, effort and energy to engage in the litigation and to put itself in a position to proceed with it, only then to see it paused for months if not years as Ryanair decides to let it lie dormant, before we then have to

refamiliarise ourselves again with the litigation when Ryanair decides to take some new procedural step. The inefficiency caused by the conduct of the litigation in this way has wasted significant management time and cost for OTB.”

12. At para. 61 he avers:

“The passage of time is also likely to be prejudicial to OTB’s ability to defend itself in these proceedings. Key individuals who would be witnesses for OTB have now left the businesses and their memories will surely have faded in relation to matters which occurred more than 10 years ago”

13. Mr. Cooper swore a second affidavit on the 9 November 2021 in response to the affidavit of Thomas McNamara dated 12 October 2021. Mr. McNamara queried whether the existence of the proceedings in fact impacted negatively on On The Beach’s ability to attract investors. He noted that On The Beach had raised capital of £26,000,000 through a share placing in July 2021, and he exhibited an article from Travel Weekly disclosing same. In response Mr. Cooper said in his second affidavit (para. 18(f)(iii)) as follows:

“The same point can be made in relation to our share issue in July 2021, which raised £26m. This litigation continues to be material to OTB and, as such, has to be disclosed in our financial statements. In the same way as investors in the 2013 private equity investment and 2015 IPO decided not to invest in OTB, or decided to reduce their investment upon learning of these proceedings, it is obvious that this issue will continue to affect OTB’s ability to secure new investment. No investor likes to read about material litigations such as this.”

14. He rejects Mr. McNamara’s suggestion that the action will primarily involve documentation and technical evidence rather than oral testimony. He says witness evidence will be required *“to explain matters pertaining to OTB and its business going back to when*

Ryanair first directed its complaints at OTB.” Likewise, he contests Mr. McNamara’s assertion that *“the events complained of do not involve events in the past”* on the basis that *“[t]hese proceedings commenced in 2010 and relate to matters which occurred before and during these proceedings.”* (Emphasis added)

Ryanair opposed the application and Mr McNamara swore two affidavits on its behalf. Where necessary I shall refer to his evidence in the course of the discussion of the issues in this appeal.

Judgment of the High Court

15. The trial judge identified that the application to dismiss the proceedings by reason of inordinate and inexcusable delay had been brought pursuant to the inherent jurisdiction of the court and that the relevant principles were those set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. She first dealt with whether the delay was inordinate and concluded that it was. She then considered whether it was excusable. She felt that the delay in excess of three years from late 2017 to June 2021, which was occasioned by Ryanair’s failure to take any step of any kind in the proceedings, was not capable of being excused.

16. Stack J. then turned to consider whether the balance of justice favoured dismissing the proceedings. She considered whether the threshold in this regard had been *“recalibrated”*. At para. 43 she said:

“I think it is more helpful, rather than seeking to define the nature or level of prejudice which will in general be required, to place it in the balance with the other factors in the balance of justice. At the end of the day, the overall test is that the interests of justice must favour the dismissal of the proceedings. Depending on the circumstances in an individual case, perhaps including the nature of the claim made and the alleged injustice to the plaintiff, the prejudice required to justify dismissing a claim will be lesser or greater depending on the circumstances.”

17. Importantly from the point of view of On the Beach, at para. 45 she accepted that prejudice can take many forms, and may not necessarily relate to the fairness of the trial and the impact of delay on a defendant's ability to defend the proceedings. At para. 48 she identified the nub of the case on the balance of justice.

“... the balance of justice in this case really turns on whether On The Beach has demonstrated prejudice, even if moderate in nature, which would now make it unjust to permit the proceedings to continue. In this respect, On The Beach have asserted four categories of prejudice, referred to above, which they say either cumulatively or individually justify dismissal of the proceedings in the interests of justice. These are:

- (i) the alleged damage to the defendant's business reputation,*
- (ii) the effect of the litigation on the defendant's efforts to raise funding,*
- (iii) the alleged collateral reliance by the plaintiff on this litigation so as to gain advantage in other disputes, and*
- (iv) both general and specific prejudice relating to the ability of witnesses to give evidence.”*

18. She first considered the evidence in relation to the effect of the proceedings on the defendant's business reputation. She noted Mr. Cooper's evidence that simply having these proceedings extant is sufficient to legitimise and give credibility to the smear campaign he describes. She referred to Mr. Cooper's extracts from public statements by or on behalf of Ryanair from mid July 2020 to May 2021. She observed that most of the exhibited statements related to online travel agents generally and not On the Beach specifically and that On the Beach is usually mentioned as an example rather than being the primary target of the statement. She expressed the view that if the motivation (or even part of the motivation) behind the proceedings was to conduct some form of smear campaign that one would have expected it to have started far earlier. Alternatively, she says that the public

statements by Ryanair from mid July 2020 about online travel agents “*are so recent and of such limited duration that it could not justify the dismissal of the proceedings.*” She viewed the statements as “*a somewhat strongly worded summary of [Ryanair’s] legal position as asserted in these proceedings*” and she did not accept that the “*real motivation for the proceedings is as a screen for a ‘smear campaign’*”. She observed that On the Beach had not provided any legal basis for the proposition that it was improper or illegal for Ryanair to comment publicly on the lawfulness or otherwise of the business model of On the Beach. She rejected the reliance placed by On the Beach on caselaw to the effect that to have negligence proceedings hanging over solicitors and other professionals for a protracted period was sufficiently prejudicial to warrant dismissing the proceedings. She did not regard the position of professionals as being equivalent to that of commercial undertakings. In *McGuinness v. Wilkie and Flanagan Solicitors* [2020] IECA 111, the Court of Appeal referred to the inevitable serious consequences for the professional reputation of solicitors practicing in a small local community where the existence of a long-running claim would be widely known. At para. 56 she held:

“Certainly, businesses need to protect their brand but statements of this kind from competitors are part of the cut and thrust of business and the situation of a company like On The Beach is removed from that of a professional firm who can show that the mere existence of proceedings is damaging their reputation in the pool of actual and potential clients. There is no evidence here that the public statements of Ryanair are dissuading the public from using On The Beach to book flights or holidays through their website.”

19. She therefore did not see that “*On the Beach has established the more moderate prejudice relevant to the application of the Primor principles under this heading.*”

20. She next considered the second category of alleged prejudice, the impact on On The Beach's attempts to raise finance. She said:

“60. As part of this allegation of prejudice, On The Beach complains that it is obliged to disclose the existence of the litigation on an ongoing basis in its annual reports and asserts that this dissuades investors and is a matter referred to in the reports of financial analysts.

61. If it were in fact the case that proceedings were preventing or impeding a defendant in its efforts to raise necessary capital or attract investment, in my view, that would be prejudice which would weigh heavily in the balance of justice. However, I do not think that On The Beach has established that this prejudice exists.”

21. She then set out why she reached this finding of fact. Most importantly at para. 63 she concluded that there was no evidence of any difficulty in raising finance occurring later than 2015 and she held *“therefore there is no evidence linking any such alleged difficulty – even if it could be said to be referable [sic] to the litigation – to the inexcusable period of delay.”* She noted the evidence from Ryanair of the fact that On the Beach had raised £26 million by way of a share placing in July 2021. As regards the evidence relied upon by Mr. Cooper, she noted that it disclosed the attitudes of various potential investors to the litigation and its impact on their interest in investing in On the Beach but that the responses pointed in different directions, some of which referred to the business model of On the Beach rather than the litigation as such. At para. 70 she noted that different views were expressed, but that not all of the negative views related to the litigation as such, but instead commented on the business model itself and whether it can survive technological changes likely to arise in the future. She held that On The Beach had failed to establish prejudice of the nature it had claimed.

22. Then she considered the impact of the disclosure of the litigation risk in annual reports from September 2015 to September 2020. At para. 73 she held:

“However, I do not think that On The Beach have shown even moderate prejudice on the basis of these disclosures. They are included for the benefit of investors and, as set out above, no effect on the ability of On The Beach to attract investment subsequent to the 2015 IPO has been established. In fact, as submitted by counsel for Ryanair in the course of the application, for so long as the proceedings are not determined, On The Beach continues to trade in accordance with its existing business model and it may well be getting a benefit from that delay.”

23. She considered the reports from analysts from 2017 to 2021 and she concluded at paras. 76 and 77:

“76. However, the key point for the purposes of my consideration is that there is nothing in any of this advice to show that the litigation in itself is curbing On The Beach’s ability to raise finance or to conduct its business. While the litigation is highlighting a doubt over On The Beach’s business model, On The Beach has not shown that these proceedings have prevented it, in any material way, from raising capital or attracting investment. The fact that the only Sell note post-dates the pandemic may have as much to do with the hugely negative impacts of the pandemic on the businesses of both parties to these proceedings, as to the litigation risks arising from the proceedings themselves.

77. It is my view, therefore, that On The Beach has not established even a moderate prejudice under this heading arising out of the very existence of the proceedings, such as to tip the balance of justice in favour of the dismissal of them in light of the

inexcusable and inordinate delay by Ryanair in progressing them from December, 2017, to June, 2021.”

24. She then addressed the alleged collateral benefit of the existence of these proceedings in other disputes. She noted the evidence of Ryanair that it is obliged by Regulation (EC) No. 261/2004 to refund passengers directly where flights were cancelled by reason of Covid-19 restrictions. It exhibited a decision of the Danish Regulator which ordered Ryanair, even where a passenger booked through an online travel agent, to refund the passenger directly. She took account of the fact that Ryanair said it could not do this because it did not have the credit card details and email addresses of passengers who had booked through an online travel agent. Without the passengers' contact details and details of their credit cards, it could not notify them of their refund and/or refund them the cost of the cancelled flight(s). The trial judge reached her conclusions on this point in para. 81 as follows:

“If it is the case that Ryanair is going to be obliged by the regulators of various member states of the European Union to refund passengers directly and not through the OTA who made the booking on behalf of the customer, I find it difficult to see how this amounts to Ryanair obtaining a collateral benefit out of the proceedings for the purposes of its dispute with On The Beach in relation to passenger refunds. This seems to me to be a separate dispute which would exist even if the proceedings had never been instituted. Accordingly, I do not think I can ascribe much, if any, weight to it in the balance of justice.”

25. Stack J. next addressed the general and specific prejudice asserted by On the Beach in defending the proceedings. She referred to the evidence of Mr. Cooper in relation to the memory of witnesses and recollection of matters dating back to 2010 and the departure of Ms. Wendy Parry, the Chief Financial Officer of On the Beach in January 2017. She noted that Ryanair said that the critical evidence in the case would be documentary and technical,

involving expert evidence. She accepted that Ryanair were broadly correct in this submission.

26. Stack J. was of the view that this type of case was somewhat similar to *Comcast International Corporation & Ors.v. Minister for Public Enterprise* [2012] IESC 50 where Clarke J. pointed to the fact that while oral evidence would be necessary, documents would be essential in proving the plaintiff's case and it would not be wholly dependent on oral testimonies. In her view oral evidence is less likely to be material than was the case in *Comcast*, given the nature of the issues in the proceedings. She identified several features of the case which meant that it could still be fairly tried. The case relates to the general business models of both Ryanair and On the Beach dating back to 2010. The evidence as to the relevant technology will relate to different periods of time and different practices, some of which will be quite recent. The case did not concern a specific event or finite series of events which would be proved primarily by reference to oral testimony. It concerned the respective business models of the parties *"in respect of which there must be a form of corporate memory"*. She noted that apart from the departure of Ms. Parry there was no evidence from On the Beach *"to show a wholesale alteration of senior personnel in On the Beach, or any suggestion that evidence as to business practices from a couple of years ago could not be safely tendered. In any event, the proceedings have been in being for a considerable time and it has been open to On the Beach throughout to keep appropriate records so as to allow it to defend the proceedings."*

27. She noted that the illegalities asserted by Ryanair are ongoing ones, *"albeit ones to be judged against the background of different practices relating to the Ryanair website and the technology used by both sides overall, of the relevant period."* She referred to one of the key amendments in the amended statement of claim related to changes to the Ryanair website from 2015 onwards. *"As a result, at least some of the issues will be decided by reference to*

business practices taking place over the last number of years, and not a defined event which took place in 2010, or some years before the issue of the plenary summons.”

28. In relation to Ms. Parry she noted that On the Beach had given no explanation of the evidential deficit impliedly arising by reason of her departure in 2017. Stack J. noted that there was no evidence that Ms. Parry would not agree to give evidence even though she is working elsewhere. She concluded that On the Beach had failed to show even moderate prejudice to the fairness of the trial and that the prejudice asserted did not weigh heavily in the balance of justice in the case.

29. She held that even taking all of the prejudice established – such as it is – together, in her view On the Beach had failed to show “*even the moderate prejudice required to discharge the onus on it to demonstrate that justice requires that the proceedings would be dismissed. The height of the prejudice which has been established is that at least some investors were dissuaded during the IPO in 2015, from investing in On The Beach. Others were not put off and, in any event, there were substantive concerns about the viability of the business model. However, On the Beach has recently raised significant capital, notwithstanding the existence of these proceedings.*”

30. She balanced the alleged prejudice to On The Beach arising from the continuation of the proceedings against the prejudice to Ryanair in dismissing the proceedings and concluded that the balance of justice “*clearly favours the continuance of the proceedings*” and accordingly she dismissed the application.

The Appeal

31. As set out above, there is no appeal from the findings of the High Court that Ryanair was responsible for inordinate and inexcusable delay in the prosecution of the proceedings. The appeal concerns the balance of justice and whether it will be just in all the circumstances to dismiss the proceedings. The notice of appeal raised two issues which were not pursued

in either written or oral submissions and thus appear to be no longer maintained. These were the finding that the parties were jointly responsible for the period of delay between early 2015 and December 2017 when the issue of replies to particulars was or was not being pursued and secondly whether the decision in the case *Ryanair DAC v. S C Vola.Ro SRL and Ypsilon.Net AG* [Record No. 2017/8782P] would have ramifications for the outcome of these proceedings.

32. As counsel for On the Beach said, the appeal is focussed and addresses the question of the balance of justice in the case. It maintained that it suffered prejudice arising from the existence of the proceedings which cumulatively tilted the balance of justice in favour of dismissing the proceedings. It relied upon the four categories of prejudice referred to by Stack J. in her judgment.

33. On the other hand, if the appeal is allowed, Ryanair will suffer the ultimate prejudice of having its case dismissed without a decision on the merits.

Scope of review

34. The scope of the review of the decision of the High Court by this Court is not in controversy but it is useful briefly to re-state it. In *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327 Collins J. (with whom Whelan and McGovern JJ agreed) reviewed the decisions in *Lawless v. Aer Lingus* [2016] IECA 235 and *Collins v. Minister for Justice, Equality & Law Reform* [2015] IECA 27. He noted that Irvine J. concluded that while the Court of Appeal will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court and its scope is not confined to cases where an error of principle has been disclosed. He quoted from para. 23 of the decision in *Lawless* where Irvine J emphasised that the appeal from an interlocutory order is not an application heard *de novo*. She said:

“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.”

35. Collins J. therefore concluded in para. 39:

“Accordingly, while as a matter of principle ‘great weight’ is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court. It is also clear that the [appellant] is not required to establish any error of principle as a prerequisite to this Court coming to a different conclusion to the Judge.”

36. Irvine J. expressed similar views in *Cassidy v. The Provincialate* [2015] IECA 74 which were endorsed by Whelan J. in *Greenwich Project Holdings Ltd. v. Cronin* [2022] IECA 154 which was further followed by this Court in *Gibbons v. N6 (Construction) Ltd.* [2022] IECA 112 by Barniville J. (as he then was) and in *Cave Projects Ltd. v. Gilhooley* [2022] IECA 245 by Collins J.. At para. 34 of his judgment in *Cave Projects*, Collins J. confirmed that errors of assessment may justify appellate intervention, even in the absence of any error of principle by the High Court.

37. In *Ryanair Ltd. v. Billigfluege.de GmbH & Ors.* [2015] IESC 11, the Supreme Court considered the role of an appellate court in an appeal from a hearing on affidavit. Charleton J. (*nem. dis.*), held at para. 5:

“Any party appealing a decision, however, bears the burden of demonstrating that the trial judge was incorrect as to whatever findings of fact underpin a decision. Where an appeal is taken against essential findings of fact drawn from affidavit evidence, the appellant must establish an error in those findings that is such as to render the decision untenable. ...Thus, an appellant arguing for the reversal of any judgment founded on

a rigorous analysis of affidavit evidence as to fact bears a heavy burden in seeking to demonstrate that a trial judge has fallen into such error that the decision made is untenable.”

38. These principles are relevant to the consideration of this appeal.

Case law in relation to delay

39. The principles set out in the judgment of Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 by which an application made pursuant to the inherent jurisdiction of the court to dismiss a case on the grounds of inordinate and inexcusable delay are well established and were set out in the first paragraph of the judgment of the High Court. It is not necessary to repeat them here. More recently in *Mangan v. Dockery* [2020] IESC 67 McKechnie J. speaking for the Supreme Court at para. 105 distilled the key principles as follows:

“As the relevant passages from the judgment of the Chief Justice are well known, it will be sufficient to simply indicate the following:-

- *The delay complained of must be both inordinate and inexcusable: it is for the moving party to so prove.*
- *Even where such is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings?*
- *In considering the latter, there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out.*
- *The individual circumstances of every case and the conduct of each party feeds into this assessment.”*

40. Four judgments of this Court have extensively reviewed the case law in relation to delay in 2022: *Gibbons v. N6 (Construction) Ltd.* [2022] IECA 112; *Barry v. Renaissance*

Security Service Ltd. [2022] IECA 115; *Greenwich Project Holdings Ltd. v. Cronin* [2022] IECA 154 and *Cave Projects Ltd. v. Gilhooley* [2022] IECA 245. In *Gibbons*, Barniville J. referred to the three limbs of the *Primor* test and addressed the type of prejudice on which a defendant may rely in an application to dismiss proceedings on the grounds of inordinate and inexcusable delay. At para. 98 he held:

“98. Also significant in the factors identified by Hamilton C.J. in *Primor* is his acknowledgment that prejudice to a defendant could arise in many ways and is not confined to the risk that a fair trial might not be possible. It can also include damage to a defendant's reputation and business and indeed other forms of prejudice. A good example of prejudice in addition to “fair trial” prejudice can be seen in the judgment of Noonan J. in the Court of Appeal in *McGuinness*. In that case, among the types of prejudice found by the court to tilt the balance of justice in favour of dismissing the claim was having serious claims hanging over the heads of professional people over a protracted period of time (para. 26). In *Myrmidon*, MacGrath J. referred to the prejudice to defendants arising from “the oppressiveness of a claim hanging over them for such a period of time” (para. 50). As a matter of principle, therefore, in assessing where the balance of justice lies, the court can consider prejudice other than “fair trial” prejudice.”

41. Barniville J. referred to the decision of Irvine J. in *Mellerick* in which she held that in cases following the *Primor* line of jurisprudence, where inordinate and inexcusable delay is established, “even marginal prejudice may justify the dismissal of the proceedings” (para. 32) and:

“That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. [in *Primor*]...”

42. Barniville J. rejected the suggestion that there are separate classes of cases which should be treated differently and noted that it was preferable “*to consider on the facts of each case the nature of the prejudice asserted by the defendant and to weigh that prejudice as part of the overall assessment of where the balance of justice lies.*” (para. 105).

43. On *The Beach* relied on authorities which supported the proposition that once inordinate and inexcusable delay was established a plaintiff would not be absolved of fault unless it could point to countervailing circumstances (*Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 IR 510) while *Ryanair* relied upon *Gibbons, Barry, Greenwich* and *Cave Projects* which held that, as the moving party, the burden remained on the defendant to establish that the balance of justice favoured the discontinuance of the proceedings. It is not necessary to resolve the issues presented by the two lines of authority to determine this appeal. Accordingly, the resolution of those issues should await a case where it is required in order to determine the dispute between the parties.

44. In para. 36 of *Cave Projects* Collins J. identified a number of points arising from the jurisprudence. Not all of these are relevant to this application. He emphasised that the dismissing of a claim is a far-reaching decision and that the Court must be satisfied that the “*hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be[.] proportionate and [.]just*”. The third point he identified is the nature and extent of the delay as being critical to the consideration in the balance of justice:

“*Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff’s delay.*” (emphasis in the original)

45. Uncontroversially, he identified that each case will turn on its own facts and circumstances, and the issue of prejudice is a complex and evolving one. He emphasised

the centrality of prejudice to the consideration of the balance of justice. In his seventh bullet point he confirmed that prejudice is not confined to “*fair trial*” prejudice and that it may include damage to a defendant’s reputation and business. He observed that:

“It is, perhaps, an issue that should be approached with a degree of caution, lest it appear that the law confers on certain categories of defendant - and in particular professional defendants - some form of privileged status. ... The impact of the delays on the business of the defendants [in McGuinness] had also manifested itself in a concrete and quantifiable way, in that the cost of its professional indemnity insurance had increased significantly on an annual basis (the impact of unresolved litigation on a corporate defendant’s financial accounts provides another example of how delay may produce concrete adverse impacts beyond any “fair trial” prejudice).”

46. He noted that even in the absence of evidence of specific/concrete prejudice, general prejudice may suffice to warrant the dismissal in any given case but “*it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis.*”

Discussion

47. When considering the elements of prejudice relied upon by On The Beach, those which would have occurred had Ryanair not been guilty of inordinate and inexcusable delay and which would have been suffered had the proceedings progressed with reasonable expedition, or which would not have occurred but for delay solely attributable to the actions of On The Beach, cannot, as a matter of principle, be weighed against Ryanair in the assessment of the balance of justice. To hold otherwise would be to dismiss the proceedings on the grounds of prejudice arising from the mere existence of litigation to a defendant rather than on the grounds of prejudice attributable to delay by a plaintiff in progressing the litigation. A defendant may not complain of prejudice stemming from the existence of proceedings which

are being bona fide prosecuted against it. In *Cave Projects* it was held that there should be a causal connection between the culpable delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. In other words, prejudice may be suffered by a defendant arising from the vicissitudes of life absent any culpable delay by a plaintiff in bringing a case to trial. Such prejudice would not of itself justify dismissing the proceedings and depriving the plaintiff of a trial on the merits simply because the defendant's ability to defend the claim was negatively impacted by developments occurring between the accrual of the cause of action and the date of trial, where the case was progressed with appropriate expedition. Similarly, prejudice arising from the mere existence of such proceedings cannot justify an order dismissing the claim where such prejudice is suffered during the reasonable period of time which it would take to bring the action in question to trial.

48. Between the entry of a conditional appearance on 24 January 2011 and the decision of the Supreme Court on 19 February 2015 dismissing On The Beach's objection to the jurisdiction of the Irish courts to hear the proceedings, Ryanair was prevented by the actions of On The Beach from progressing these proceedings. This period of time, therefore, must be excluded from the considerations of prejudice arising from the inordinate and inexcusable delay in the prosecution of the proceedings thereafter. Furthermore, it is appropriate to exclude the reasonable time which one would expect a case of this nature to take to come to trial. In my view a period of three years would not be unreasonable given the complexity of the case, both factually and legally. This means that the Court can only consider prejudice arising from the beginning of 2018 until the motion issued on 21 June 2021. This was accepted by counsel for On The Beach who agreed that the Court should assess the question of prejudice by reference to events occurring after 2017, save insofar as witnesses would have difficulty in giving evidence at trial in relation to events from 2006.

49. It necessarily follows that the prejudice asserted by On The Beach in relation to alleged difficulties it or its parent experienced in securing investment in 2013 and in relation to the IPO in 2015 and the departure of Ms. Wendy Parry as an employee of On the Beach in January 2017 cannot form part of the Court's assessment of the balance of justice in determining whether the proceedings should be dismissed or permitted to continue to trial.

Non-trial prejudice – damage to the business reputation of On The Beach

50. Mr. Cooper's evidence in this regard is set out above. It is remarkable for its lack of any reference to specific prejudice other than the fact that it is required to disclose the existence of the litigation in its annual accounts. The prejudice asserted is that of having the proceedings hanging over the company and the requirement to report the existence of the proceedings in its Annual Reports. It was correctly accepted by the trial judge that this could amount to a prejudice to which the court should attributed weight (see *Anglo Irish Beef Processors, Myrmidon, Gibbons and Cave Projects*). While the facts in this case differ to those in the cases cited and the prejudice identified in *Gibbons* and *Anglo Irish Beef Processors* was greater than the evidence of prejudice in this case, I accept that the fact of the existence of the proceedings and the requirement to disclose the proceedings as a litigation risk *may*, on the authorities, amount to a prejudice to the appellant. The issue is whether On The Beach has established the existence of such alleged prejudice and, if so, the degree of same.

51. Actual evidence of the adverse impact of the damage to On The Beach's business reputation is absent. While, as observed by Collins J., evidence of prejudice suffered by the moving party is not a pre-condition to the Court striking out proceedings on the grounds of inordinate and inexcusable delay, its absence is relevant and revealing.

52. As has been frequently observed, each case turns on its own facts and circumstances. In the circumstances presenting between these parties, if the proceedings were struck out by

this Court on grounds of delay, that would not be the end of the dispute between these parties. Ryanair asserts that there is a continuing breach of contract/tort. It says that it would be open to it to bring new proceedings making essentially the same allegations against On The Beach. Those hypothetical future proceedings would not be barred by any delay and would require to be disclosed in the Annual Reports of the appellant.

53. Mr. Cooper relies upon what he refers to as Ryanair's "*smear campaign*" against On The Beach. However, the smear campaign he identifies commenced in July 2020 and it clearly cannot support any case for prejudice which pre-dates this. The trial judge rejected the evidence of the alleged smear campaign as amounting to prejudice arising from the existence of the litigation to On The Beach's business reputation. She pointed out that as the campaign complained of had commenced just under two years previously, the evidence was "*so recent and of such limited duration that it could not justify the dismissal of the proceedings*". I would agree with this observation.

54. It is also important to note that no case was made that Ryanair was not entitled to comment publicly on the lawfulness or otherwise of the business model of On The Beach. Its real objection was to the pejorative language in which it did so. However, as was pointed out by counsel for Ryanair, if Ryanair has overstepped the mark in that regard, On The Beach is not without a remedy and that remedy is not the dismissal of these proceedings.

55. On The Beach argued that the trial judge incorrectly distinguished between the litigation prejudice suffered by professional defendants on the one hand and commercial undertakings on the other hand by reason simply of the existence of the proceedings. For the reasons explained by Collins J. in *Cave Projects*, and Barniville J. in *Gibbons*, the Courts should be cautious about categorising some cases as ones to which different considerations apply for the purposes of applications of this nature. It is not necessary to consider the possible distinctions between the prejudice sustained by professionals and those of

commercial undertakings by reason of the continued existence of litigation in order to resolve this appeal, as I am satisfied that there is no evidence to support even moderate prejudice to On The Beach arising from the continued existence of these proceedings. Inference alone, in the circumstances of this case, involving hotly disputed business models and practices in which the parties will be in dispute regardless of the existence of proceedings, does not suffice. I would agree therefore with the conclusions of the trial judge in para. 58 of her judgment.

Non trial prejudice: negative impact on the ability of On The Beach to raise funds

56. As explained above, On The Beach may not rely upon the difficulties which it may have had in the past in procuring investment in 2013 or in the IPO in 2015 as a ground for dismissing these proceedings. Furthermore, On The Beach bears the burden of establishing that the trial judge erred in her findings of fact and at para. 61 of her judgment quoted above, where she concluded that On The Beach had not established that the prejudice asserted existed. Insofar as On The Beach relied upon its obligation to disclose the existence of the litigation as a risk in its Annual Reports, the trial judge held that this had no impact on On The Beach's ability to attract investment after 2015 (Para. 73). In fact, if anything, the evidence points the other way. In July 2021, when the travel restrictions imposed as a result of the Coronavirus pandemic were still very prevalent, and when leisure travel had virtually completely stalled for nearly a year, the appellant raised a further alternative £26,000,000 as confirmed by Mr. Cooper in his second affidavit.

57. In relation to the allegation that On The Beach suffered prejudice based upon the reports of financial analysts identifying the existence of the litigation in their comments on On The Beach, it has advanced no argument to suggest that the trial judge's conclusion in para. 76 is in error or was not one open to her to reach on the evidence. In that paragraph she concluded that "*there is nothing in any of this advice to show that the litigation in itself*

is curbing On The Beach's ability to raise finance or to conduct its business." She expressly concluded that *"On The Beach has not shown that these proceedings have prevented it, in any material way, from raising capital or attracting investment."* On the evidence before her, that was a conclusion of fact which was open to her to reach and no basis for interfering with it has been convincing advanced to this Court.

Non trial prejudice: alleged collateral benefit in separate dispute

58. This head of alleged prejudice relates to the dispute between On The Beach and Ryanair in relation to refunds for flights which were cancelled due to the Covid 19 Pandemic. The trial judge addressed this dispute and concluded that it was *"a separate dispute which would exist even if the proceedings had never been instituted"*. This finding of fact was not seriously disputed by On The Beach. Its claim of prejudice amounts to a complaint that, by reason of the existence of a new and separate complaint, which arose ten years after the proceedings were instituted, the balance of justice requires that these proceedings, which were commenced in 2010, must be dismissed because Ryanair refers to the underlying dispute (and sometimes the proceedings) in the context of the new dispute in relation to refunds. I fail to see how a fresh dispute, which is separate from the issues in these proceedings, can afford a basis for dismissing these proceedings simply because the prior dispute is referred to in the exchanges concerning the new dispute. In my judgment the refund dispute and the reference to these proceedings in the context of that dispute is irrelevant to the balance of justice in this appeal and does not require the dismissal of these prior existing proceedings.

General trial prejudice

59. Mr. Cooper's evidence in this regard is very generic. It could apply to every old case. It is clear from the authorities cited that more is required where a party seeks to rely on general trial prejudice. There is no evidence that witnesses are no longer available to On

The Beach or even that On The Beach has made any inquiries as to the availability of witnesses. It seemed highly probable that the main evidence in the case will be technical, relating to the information on the Ryanair website and whether it was, in fact, taken and used by On The Beach. There will be legal arguments in relation to the terms of use, whether those terms were binding on On The Beach, and whether the actions of On The Beach breached those terms. It is not clear that any of this evidence is personal to any particular witness and certainly it is not stated there is no one able to give evidence on these crucial matters. This is particularly striking given that Mr. Cooper was the founder of the company and remains its Chief Executive Officer. The evidence of Mr. Cooper disputing the averments of Mr. McNamara regarding the nature of the evidence likely to be adduced at trial is unpersuasive in my judgment. In summary, there is insufficient evidence to conclude that there is any real risk that it would not be possible to have a fair trial of these proceedings or that On The Beach would be unduly prejudiced in defending the claim.

60. Counsel for On The Beach argued that Ryanair's claim of passing off will require Ryanair to give evidence from travellers from 2004 onwards. He submitted that there would be no prospect of travellers giving any meaningful evidence at this remove. While that may well prove to be the case, it is primarily a difficulty for Ryanair as the plaintiff in the proceedings. Nonetheless, On The Beach is entitled to a fair trial and it will always be open to the trial judge, by appropriate rulings if necessary, to ensure that On The Beach obtains a fair hearing. It is also worth noting that On The Beach has known of the claim since September 2010. It would have been incumbent upon a party facing a claim for passing off to take steps to secure the necessary witnesses from members of the public to meet such a claim in a timely proactive fashion, as witness evidence in such cases is always likely to a greater or lesser extent to prove difficult to obtain with the passage of time. It is notable that Mr Cooper does not address the efforts of On The Beach to identify witnesses who might be

in a position to give evidence in relation to the claim for passing off. Finally, the claim in passing off is peripheral to the main thrust of these proceedings and the difficulties which On The Beach may have in obtaining witnesses to defend this aspect of the claim can amount to no more than moderate prejudice at most.

Specific trial prejudice

61. The only specific trial prejudice identified by Mr. Cooper is the alleged unavailability of Ms. Wendy Parry. Aside from the fact that Mr. Cooper does not aver that Ms. Parry will not be available to give evidence or that she will be unable to do so, or indeed what evidence she might be expected to give, for the reasons discussed at para. 49 above, it is not open to On The Beach to rely upon the alleged unavailability of Ms. Parry due to her departure from On The Beach in January 2017 as a basis for contending that the balance of justice requires the termination of the proceedings.

Conclusions

62. Looked at in the round, and considering all of the circumstances, the case of prejudice advanced by On The Beach is really very weak. On the other hand, the prejudice to Ryanair is clear if its proceedings are dismissed at this stage. If the proceedings are dismissed, it may institute new proceedings, but it will, in those circumstances, be deprived of its entitlement to claim damages for much of the period covered by these proceedings. Also, as was submitted by counsel for Ryanair (with whom counsel for On The Beach did not disagree), if fresh proceedings are commenced in respect of substantially the same causes of action, it is highly likely that On The Beach would oppose such a move on the basis that Ryanair is precluded from so doing or that such a step would otherwise constitute an abuse of the processes of the court. The prospect of Ryanair successfully initiating fresh proceedings is not without difficulty.

63. I am satisfied that the trial judge identified the correct principles to be applied to the application and correctly applied them to the facts before her and, in the exercise of her discretion, declined the relief sought. This Court will give due weight to the assessment of the High Court, though the Court may intervene even in the absence of any error in principle by the High Court. I am not satisfied that On The Beach has identified any error of assessment such as would justify this Court in intervening and overturning the decision of the High Court. In essence, On The Beach is dissatisfied with the High Court's assessment of the evidence and arguments. This is not sufficient. There was no failure on the part of the trial judge properly to assess the arguments and the evidence. Accordingly, I would not interfere with her judgment and I would dismiss the appeal.

64. As Ryanair has been successful on this appeal, my provisional view is that it should be entitled to the costs of the appeal against On The Beach. Should On The Beach wish to contend for a different order, it may contact the Office of the Court of Appeal within ten days of the delivery of this judgment and request a short hearing on the issue of costs. The office will then notify the parties of a date for the hearing. If the Court makes an order as provisionally outlined, the party seeking the hearing may incur further costs.

65. Haughton and Butler JJ have each read this judgment and authorise me to indicate their approval with the judgment.