THE HIGH COURT

[2023] IEHC 196

[2021 No. 4937 P]

BETWEEN

AILEEN SHERIDAN

PLAINTIFF

– AND –

RYANAIR DAC

DEFENDANT

JUDGMENT of Mr Justice Max Barrett dated 10th February 2023.

SUMMARY

This is a successful application brought by Ms Sheridan pursuant to O.28, r.1. RSC seeking an order allowing her to amend a personal injuries summons so that she can invoke the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999).

1. Ms Sheridan exited a plane in Majorca in August 2019. As she did so, she claims that she tripped on a metal lip or the like and sustained personal injuries. She now wishes to bring action against Ryanair.

2. Because this is a case in which airline liability for injury to a passenger is alleged, Ms Sheridan's action falls to be brought under the Montreal Convention for the Unification of

Certain Rules for International Carriage by Air (1999). The Montreal Convention was raised in correspondence (i) between Ms Sheridan's lawyers and Ryanair's insurance team (in letters of 16th July 2020,[1] 19th July 2021,[2] 3rd August 2021[3]), and (ii) in correspondence between the lawyers for both sides (in a letter of 8th December 2021).[4] However, all mention of the Montreal Convention was omitted from Ms Sheridan's personal injuries summons through inadvertence on the part of her legal team.

3. Ms Sheridan's legal team was at all times patently aware of the Montreal Convention. It raised Montreal Convention aspects of the proceedings in correspondence with Ryanair's insurers and solicitors. It also formulated its pleadings to reflect aspects of that correspondence. (So, for example, it did not join the operator of Palma Airport to the proceedings.) Yet thanks to inadvertent error the Convention gets no mention in the issued summons. Ryanair now seeks to capitalise on this slip. In a letter of 1st February 2022 to Ms Sheridan's solicitors, it writes:

> "*In your summons you plead the acts of the defendant constituting the wrong and the circumstances relating to the commission of the wrong and we do not accept that you have brought this claim pursuant to the appropriate provisions of the Montreal Convention nor has the Montreal Convention been pleaded by you in connection. In those circumstances we confirm that we will in our defence of this case plead that there is a 'non-suit' and that the plaintiff* is not entitled to proceed *any further with her claim against our client having regard to the provisions of the Montreal Convention, the requirement that the case be properly pleaded in that regard and as the claim can only be brought under the exclusive jurisdiction of the Montreal Convention it cannot survive the two year limitation period provided for in the Convention and in the Irish legislation incorporating the Convention into national law.*"

[1] *I.e.* Letter of 16th July 2020 between Padraic Smyth & Co Ltd (Insurance Brokers) and Nathaniel Lacy and Partners (Solicitors) in which Padraic Smyth and Co Ltd mentions the applicability of the Montreal Convention.
[2] *I.e.* Letter of 19th July 2021 in which Nathaniel Lacy, Solicitors, indicate to Padraic Smyth & Co. Ltd that "*We confirm that we will shortly be issuing High Court proceedings against Ryanair DAC under the Montreal Convention*".
[3] *I.e.* Letter of 3rd August 2021 from Nathaniel Lacy, Solicitors, to Padraic Smyth & Co. Ltd in which Nathaniel Lacy indicates that "[W]*e are today issuing proceedings against Ryanair DAC in relation to the above matter. Please confirm that there is no necessity for us to join AENA SME, the operator of Palma Airport*".
[4] *I.e.* Letter of 8th December 2021 from Nathaniel Lacy, Solicitors, to Ronan Daly Jermyn, Solicitors (acting for Ryanair) indicating that "*As you will note proceedings have been issued as against Ryanair DAC pursuant to the Montreal Convention*".

4. Though it is open to Ryanair to take this approach one does have to wonder whether Ryanair and/or its lawyers have never been guilty of inadvertent error.

5. In any event, arising from the above, Ms Sheridan's legal team have brought a notice of motion seeking the following reliefs:

> "*1. An Order pursuant to Order 28 RSC amending the personal injuries summons as per the amended personal injuries summons, said amendment highlighted and underlined red, exhibited in the [attached] grounding affidavit…*[5]
> *2. Such further or other order as this honourable court deems fit*
> *3. An order for the costs of and incidental to this application*".

6. In resisting this application a solicitor for Ryanair has averred, amongst other matters, as follows (and much the same points were made by counsel for Ryanair at the hearing):

> "*6. …*[T]*his is not an application to make reference to a section of an act or some other similar type of matter.*
> *7. The Montreal Convention provides an exclusive cause of action. This principle is well established internationally including in this jurisdiction….*
> *8. Similarly consistent case-law has held that if there is no remedy provided under the Convention then no remedy exists.*
> *9.* …[T]*he consequence of this is that one does not have a general cause of action whether in negligence or contract or any other forum. The cause of action, if any, arises exclusively and only by reference to the Montreal Convention.*
> *10. …*[I]*f there is not reference…to the Montreal Convention nor its enactment and force of law…in this jurisdiction then there is no sustainable and recognised cause of action which has been set out in the pleadings.*

[5] Order 28, rule 1 RSC is the pertinent provision when it comes to this application. It provides as follows:

> "*The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*"

11. I say for that reason there is a huge difference -I say that is a wholly different matter and in respect of which the plaintiff has not set out sufficient basis upon which the court should or would grant such a remedy."

7. The text of the Montreal Convention was not opened in court. However, I understand the relevant provision to be Art.35 ("*Limitation of actions*") which provides:

"*1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.*

2. The method of calculating that period shall be determined by the law of the court seised of the case."

8. I understand from the website of the International Civil Aviation Organization that Ireland signed the Montreal Convention on 16th August 2000, deposited its instrument of ratification on 29th April 2004, and that the Convention took effect in Ireland from 28th June 2004.[6]

9. Article 35(2) plainly instructs that the method of calculating the applicable two-year period shall be determined by the law of the court seised of the case. Here, Ms Sheridan has brought her action in Ireland.

10. Before I turn to consider some applicable case-law, it is perhaps useful, having indicated above how Ryanair views the situation presenting, to quote from an affidavit sworn by a solicitor for Ms Sheridan in which that solicitor avers as to how Ms Sheridan's legal team perceives matters. That solicitor avers:

"*4. …*[T]*he…personal injuries summons was issued on the 6th day of August 2021, within the two-year requirement under Article 35 of the Montreal Convention….*[A]*n appearance was entered on behalf of* [Ryanair]*…on…1st October 2021 and a notice for particulars was raised on…22nd January 2022.*

[6] See *https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf*.

5 ....[A]*t all material times, it was the intention of the plaintiff to issue proceedings pursuant to the…Montreal Convention….I wrote to…Ryanair…and/or their legal representative, indicating that we intended to issue proceedings pursuant to the Montreal Convention on…19th July 2021. Furthermore…there was correspondence between the defendant and the plaintiff referring to the…Montreal Convention following the delivery of our letter of claim on…16th July 2020….*

6 ....[A]*t the time of the drafting of the…personal summons and same being issued, due to an electronic error, a paragraph was omitted from the…summons which pleaded Article 17 of the Montreal Convention and that the within proceedings were being issued pursuant to same.*[7]

7. [T]*he said omission was a genuine electronic error….*[A]*t all material times, it was the intention of the plaintiff to issue proceedings pursuant to the Montreal Convention, of which the Defendant was on notice…and aware of.*

8 ....[T]*he said error was discovered when both I and counsel were reviewing the matter on or about the 1st February 2022. Furthermore, I say that I received correspondence from* [Ryanair]*…referring to the…failure to plead the Montreal Convention and their contention that the proceedings are now statute-barred….*

9 ....[T]*he proposed amendment to the personal injuries in all the circumstances is just and will allow the real question in controversy between the parties be determined.*

10 ....[B]*ased on the facts pleaded, it could not have been anything other than the Montreal Convention which the plaintiff was intending to rely on in the prosecution of her claim….*[A]*t all material times and based on the facts as pleaded in the…personal injuries summons, the plaintiff was pursuing a claim pursuant to the…Montreal Convention….*

11 ....[T]*he…Montreal Convention and/or cause of action can be readily identified from the facts which were already pleaded and which state that the*

[7] Article 17(1) of the Montreal Convention provides, amongst other matters, as follows (under the heading "*Death and Injury of Passengers -Damage to Baggage*":

> "*The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*"

plaintiff suffered and sustained severe personal injuries, loss and damage without a lawful passenger and in the course of disembarking the defendant's aircraft….

12. *Furthermore…at paragraph 5 of the issued personal summons, the plaintiff pleads that she has complied with all the provisions of the Civil Liability and Courts Act 2004 and the within proceedings are a civil action to which the PIAB Act 2003 does not apply….*

13 ….[T]*he proposed amendment causes no genuine prejudice or unfairness to* [Ryanair] *where at all material times they were on notice of the plaintiff's intention to issue proceedings pursuant to the Montreal Convention and the said cause of action is readily identifiable from the facts already pleaded in the personal injuries summons*."

11. The central issue in this application is whether the proposed amendments would wrongly deprive Ryanair of the benefit of the limitation period arising under Art.35 of the Montreal Convention. Previous case-law in this area typically proceeds by reference to the Statute of Limitations. However, it can be applied also to the situation presenting here.

12. The traditional common law approach when deciding whether or not to allow amendments in this context is evident in *Weldon* v. *Neal* (1887) 19 Q.B.D. 394 (CA). In *Weldon* the plaintiff commenced an action for slander in September 1883. At the trial the judge nonsuited the plaintiff on the ground that the alleged slander was not actionable without special damage, and the plaintiff had not alleged any special damage. The trial judge refused to give leave to amend. The plaintiff subsequently obtained from the Court of Appeal an order for a new trial with leave to amend her statement of claim. In April 1887, she amended her statement of claim. The statement of claim as amended set up in addition to the claim for slander fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of such amendment were barred by the Statute of Limitations, although not barred at the date of the writ. The Divisional Court ordered the paragraphs stating such fresh causes of action to be struck out on the ground that amendments ought not to be allowed which would deprive the defendant of the benefit of the Statute of Limitations. The plaintiff (who appears to have been self-represented) brought an unsuccessful appeal to the Court of Appeal. The entirety of Lord Esher MR's judgment in that case comprises the following (and is testament to the ability to be comprehensive, compelling, correct, and concise in one's judgment):

"*We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations , it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so. This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule. For these reasons I think the order of the Divisional Court was right and should be affirmed*."[8]

13. The facts in *Weldon* were different from those presenting here. Ms Weldon essentially sought to load timed-out fresh causes of action into an in-time set of proceedings relating to a different cause of action. In the present case there was but a slip of the type (and in the circumstances) described above.

14. In Ireland, a departure from the *Weldon* approach came in *Krops* v. *The Irish Forestry Board Ltd* [1995] 2 IR 113. There, it was sought to add a nuisance claim to an in-time application previously commenced against the Forestry Board for negligence, breach of duty and breach of statutory duty following the death of Mr Krops' wife after a tree fell on their car. The Forestry Board maintained that to allow the amendment would be to deprive it of a defence to the claim of nuisance that presented under the Statute of Limitations. Mr Krops maintained that no prejudice could arise where no new facts were being alleged. Allowing the amendment, Keane J., at p. 121, observed that "*Where…an amendment, if allowed, will not in any way prejudice or embarrass the defendant by new allegations of facts, no injustice is done…by permitting the amendment*".

[8] Lindley and Lopes L.JJ. concurred.

15. Here, it is not sought to rely on any new facts. All that it is sought to do is to amend a personal injuries summons so that it accurately reflects (i) the action that Ms Sheridan always wanted to bring, and which (ii) had been mentioned in correspondence with Ryanair, and which (iii) Ryanair had therefore been primed to expect, but which (iv) through human inadvertence was not included in the summons. Viewed so, what Ms Sheridan has come seeking actually seems less extensive than what was granted by Keane J. in *Krops*.

16. The decision of Keane J. in *Krops* received the imprimatur of the Supreme Court in *Croke* v. *Waterford Crystal* [2005] 2 I.R. 383, where, amongst other matters, Geoghegan J., at 401, refers to O.28, r.1. being intended to be a "*liberal rule*" informed by the notion that the interests of justice are best served if the real issues in controversy between the parties are before and can be determined by the court.

17. In *Lismore Homes Ltd* v. *Bank of Ireland Finance Ltd* [2006] IEHC 212, among the applications before Quirke J. were applications to consolidate certain sets of proceedings and also to allow an amended and consolidated statement of claim to be delivered. The amendments, if allowed, would have seen claims of conspiracy, deceit, and misrepresentation added to proceedings commenced 16 years previously on the basis of information known before those proceedings commenced. Quirke J. rejected the application to add in these claims, observing:

> "*The fact that the amendment sought will deprive the opposite party of a defence pursuant to the provisions of the Statute of Limitations will not, of itself, necessarily be fatal to the application. However it is a factor which may be taken into account by the court in considering whether or not the amendment should be permitted. Order 28 Rule 1 of the Rules of the Superior Courts empowers the court to permit "… all such amendments…as may be necessary for the purpose of determining the real questions in controversy between the parties". As a general principle the court should be slow to permit an amendment amounting to a new cause of action based upon facts which have not been pleaded where the new cause of action would otherwise be barred by the Statute of Limitations. That is necessary inter alia to ensure that the stated intention of the Oireachtas may not be defeated in particular cases and the provisions of a statute rendered meaningless. The court has jurisdiction to permit an amendment which is required in order to plead a cause of action which can be readily identified from the facts already*

pleaded. It may do so even if the amendment includes a cause of action which would otherwise be barred by the Statute of Limitations. However, an amendment should be permitted only where no injustice will be caused to the opposite party." (pp. 21-22)

[Emphasis added].

18. Factually, the facts of the present proceedings are not like those that presented in *Lismore*. The summons issued on 6th August 2021, Ms Sheridan's intention (as was clear from the pre-litigation correspondence) was always to rely on the Montreal Convention and this was known to Ryanair. Thanks to human inadvertence the summons that issued did not contain a reference to the Montreal Convention. Ms Sheridan's legal team recognised the error when reviewing the file some six months later.

19. Where *Lismore Homes* acquires a particular relevance is in the observations of Quirke J. that I have underlined above. Quirke J. expressly contemplates that, as a matter of Irish law (the relevant law when one has regard to Art.35(2) of the Montreal Convention) the High Court has jurisdiction to permit an amendment which is required to plead a cause of action that can be readily identified from the facts already pleaded "*even if*", to borrow from Quirke J. "*the amendment includes a cause of action which would otherwise be barred by the Statute of Limitations*". As Quirke J. notes, such an amendment "*should be permitted only where no injustice will be caused to the opposite party*." I accept for the reasons identified in the above-quoted averments by Ms Sheridan's solicitor that no prejudice presents for Ryanair here.

20. I have also been referred by Ms Sheridan's counsel to *Rossmore Properties Ltd* v. *ESB* [2014] IEHC 159. There, Birmingham J. was faced with an application to amend (radically) a statement of claim (by deleting all the existing wording and substituting new wording). That is a situation far removed from the situation here. In his judgment, Birmingham J., at para.19. adopts the following set of principles as principles applicable to an application to amend pleadings:

"*1. The parties enjoy complete freedom of pleading…. Absent pleas that are scandalous or vexatious or the like, the plaintiff cannot be dictated to as to how to formulate and present his or her claim.*

2. *Order 28* [RSC]*…which is the rule that deals with amendments is intended to be applied liberally.*
3. *Amendments shall be made for the purposes of determining the real questions in controversy between the parties.*
4. *Amendments should not be permitted when doing so could cause real or actual prejudice to other parties.*
5. *Amendments should be allowed if all that is present is litigation prejudice…capable of being dealt with by orders for costs or other directions by way of case management.*
6. *There is no rule that* per se *precludes radical amendments.*
7. *There is no rule against introduction of a new cause of action if it falls within the ambit of the original grievance.*"

21. This series of principles has latterly received the imprimatur of the Court of Appeal in *Persona Digital Telephone Ltd* v. *Minister for Public Enterprise* [2019] IECA 360, para.12. Facts-wise I am not presented with the kind of radical amendments that confronted Birmingham J. Nor do I consider that there is anything in the principles identified by Birmingham J. that requires me to state anything that I have not already stated.

Conclusion

22. This is a case in which it was clearly 'telegraphed' to Ryanair before the summons issued that it was intended to bring Montreal-based proceedings. The summons issued on time. Due to human inadvertence the text relating to the Montreal Convention was omitted. No new facts are being pleaded by Ms Sheridan. The Montreal-based cause of action arises from the facts already pleaded. Order 28, rule 1 RSC is intended to be a liberal rule informed by the notion that the interests of justice are best served if the real issues in controversy between the parties are before and can be determined by the court – here by having Ryanair's alleged Montreal-based liability put in issue between the parties. I accept for the reasons identified in the above-quoted averments by Ms Sheridan's solicitor that there is no prejudice presenting for Ryanair here. All this being so, I will allow the amendments sought. I will hear the parties as to costs.