

**THE HIGH COURT
COMMERCIAL**

[2020] IEHC 584
[2019 No. 9399 P]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

**SKYSCANNER LIMITED
SKYSCANNER HOLDINGS LIMITED
SKYSCANNER 2018 LIMITED**

DEFENDANTS

(NO. 2)

JUDGMENT of Mr. Justice Twomey delivered on the 13th day of November, 2020

SUMMARY

1. This judgment considers two conflicting claims which can often arise when dealing with the costs of an unsuccessful interlocutory injunction application:
 - Unfair for plaintiff to pay costs of failed injunction if he wins permanent injunction
On the one hand is the claim that it would be unjust for a plaintiff, who subsequently wins a permanent injunction (after all the evidence is available) to have previously paid the costs of the unsuccessful interlocutory injunction application (which interlocutory injunction presumably would have been granted if all the evidence had been available), or
 - Unfair for successful defendant of failed interlocutory injunction not to get costs?
On the other hand is the claim that it is unjust for a defendant to have to pay the costs of defending and winning the interlocutory injunction application (which injunction should not have been sought since there was insufficient evidence for it to be granted).
2. There is obviously some merit in the argument, that it would turn out to be unfair on a plaintiff if costs were awarded against him at the interlocutory stage if he were to win the permanent injunction (and there have been instances when costs have not been awarded against an unsuccessful plaintiff in interlocutory injunction proceedings). However, it is arguably also unfair on a defendant who has been put to the cost of defending unsuccessful injunction proceedings not to be entitled to recover those costs from that plaintiff. After all, the defendant did not choose to go to court, but was forced to do so and the plaintiff was the person who knew what evidence he had, and what additional evidence he expected to have at the trial, but he nonetheless chose to pursue the interlocutory injunction, rather than waiting for the trial.
3. These issues are considered in this judgment where Ryanair failed in its application to get an interlocutory injunction against Skyscanner, but nonetheless it asks this Court to make a no costs order in relation to that application on the basis that it would be unfair if Ryanair has to pay Skyscanner's costs, if Ryanair is successful in getting the permanent injunction.

BACKGROUND

4. This is a costs application in relation to the refusal by this Court to grant an injunction to Ryanair against Skyscanner (see *Ryanair v. Skyscanner Ltd and ors.* [2020] IEHC 399 (the “principal judgment”). The injunction, if it had been granted, would have required Skyscanner to oblige those on-line travel agents (“OTAs”), whose booking of Ryanair flights had been facilitated by Skyscanner on its website, to provide to Ryanair the email addresses of passengers, for whom it had booked those flights.
5. While this was the form of injunction sought in the interlocutory proceedings pending the trial of the action, the substantive proceedings, which are yet to be heard, seek, *inter alia*, a broader injunction which would restrain Skyscanner from facilitating the sale of Ryanair flights on its website.
6. The principal judgment was delivered on 30th July, 2020 and it was concluded therein that there is a fair issue to be tried regarding whether, *inter alia*, Skyscanner is accessing price, flight and timetable (“PFT”) information from the Ryanair website in breach of Ryanair’s Terms of Use for that website. This Court therefore concluded that there is a fair issue to be tried as to whether an injunction should be granted preventing Skyscanner from facilitating the sale of Ryanair flights on the Skyscanner website.
7. However, this Court refused the interlocutory injunction, requiring Skyscanner to oblige the OTAs to provide passengers’ email addresses, because it concluded, *inter alia*, that the form of injunction was in substance a mandatory injunction and that Ryanair failed to establish that it had a strong case that was likely to succeed.
8. However, it is relevant to note that this Court also concluded that even if the injunction sought had been prohibitory in nature, an interlocutory injunction was still not justified, on the balance of justice, for the various reasons set out in the principal judgment.
9. Furthermore, this Court also concluded that, as damages were an adequate remedy for Ryanair, an interlocutory injunction would not have been justified in any case.
10. It is clear therefore that Ryanair comprehensively lost its interlocutory injunction application.

‘No costs’ in failed interlocutory injunction as Ryanair may win permanent injunction?

11. Notwithstanding this fact, Ryanair claims that no costs should be awarded against it for the failed interlocutory injunction application in this case. It does so on the basis that if costs were awarded, this would be unjust, if, at the hearing of the action, when all the evidence is before the trial judge, he/she was to determine that an injunction should be granted to Ryanair. This would lead to a situation where Ryanair would have ‘unjustly’ paid the costs for the refusal of an interlocutory injunction, which, in light of the prospective trial judge’s decision to grant a permanent injunction, should never have been refused.
12. In making this argument, Ryanair refers to this Court’s criticism, in the principal judgment, of Skyscanner’s ‘*deliberately non-forthcoming*’ approach in relation to how it

obtains PFT information from the Ryanair website. The background to this criticism is that in its judgment, this Court noted that in a separate High Court case (*Ryanair v. S.C. Voia.ro S.R.L.* [2019] IEHC 239), criticism had been made by Ní Raifeartaigh J. of a defendant which had, similar to Skyscanner, provided little or no information on how it was accessing PFT information from the Ryanair website, in defending proceedings taken against it by Ryanair.

13. This Court concluded that, in light of Skyscanner's reference to various other sets of proceedings involving Ryanair in the hearing before this Court, that Skyscanner was likely to have been aware of the criticism of the party accessing Ryanair's PFT information in the *Voia* case. Despite this, Skyscanner took a similar non-forthcoming approach to disclosing how it obtained PFT information from the Ryanair website in the proceedings before this Court.
14. Ryanair claims that if Skyscanner had been more forthcoming about how it accessed the PFT information (which, it claims, Skyscanner will have to be at the hearing of the action), Ryanair would have satisfied this Court that it had a strong case that was likely to succeed. Similarly, Ryanair claims that once discovery and witness evidence is complete it will be clear that this PFT information is being obtained by Skyscanner in breach of Ryanair website's Terms of Use, thereby justifying the grant of the permanent injunction by the trial judge.
15. For these reasons, Ryanair maintains the position that no order as to costs should be made by this Court even though it lost the interlocutory injunction application.

But it is not Skyscanner's function to complete gaps in Ryanair's proofs

16. Skyscanner, for its part, argues that it is not its function to complete the gaps in Ryanair's proofs, in particular in relation to Ryanair's claim that Skyscanner is obtaining the PFT information from the Ryanair website in breach of the Terms of Use of Ryanair's website and Ryanair's claim that Skyscanner is unlawfully 'screen-scraping' from the Ryanair website.
17. In this regard, it is correct to say that Ryanair should have been aware of what evidence it required when it decided to proceed with the hearing seeking an interlocutory injunction.
18. It is also the case that while Ryanair might be disappointed with its failure to obtain the interlocutory injunction, it must have been aware that this was a distinct possibility in light of the denial by Skyscanner that it had obtained the PFT information in breach of the Terms of Use of Ryanair's website and the lack of evidence in this regard in light of Skyscanner's '*deliberately non-forthcoming*' approach regarding how it accessed the PFT information from the Ryanair website.
19. Yet, rather than awaiting discovery and witness evidence, Ryanair chose to proceed with the interlocutory injunction application which it comprehensively lost. It seems to this Court that as a matter of general principle, its decision to inflict upon Skyscanner the cost

of successfully defending the six-day hearing cannot be without some financial consequence, or to put it another way, Skyscanner should not be left with the financial burden of defeating an unsuccessful claim.

20. It is important to note that this Court cannot predict whether, if Skyscanner had been more forthcoming, the interlocutory injunction would have been granted or not. Neither can it be sure that after discovery and witness evidence and a consideration of the various and novel legal issues concerning 'screen-scraping', that a trial judge will find, *inter alia*, that the screen-scraping of which Skyscanner is accused, is unlawful such as to lead to a grant of a permanent injunction.
21. It is against this factual background that a decision regarding the costs of the interlocutory injunction needs to be taken.

COSTS IN INTERLOCUTORY INJUNCTION APPLICATIONS

22. A number of principles appear to this Court to be relevant to the determination of whether Ryanair is correct in its contention that there should be no costs awarded against it for its unsuccessful application for an interlocutory injunction.

Litigation should not be consequence-free

23. In a different context, the Supreme Court has remarked upon the inappropriateness of 'consequence-free' litigation, i.e. in *W.L. Construction Limited v. Chawke* [2020] 1 I.L.R.M. 50, in the context of the rationale for the jurisdiction which allows a court to join an individual to proceedings for the purpose of finding them liable for costs, where that individual will benefit from litigation initiated through an insolvent company. At para. 67 of her judgment, O'Malley J. stated:

"This is, in my view, a clear example of the mischief aimed at by the exercise of the jurisdiction. In particular, the comments made by Clarke J. [in *Moorview Developments Ltd v. First Active plc* [2011] 3 I.R. 615] as to **the need to prevent persons litigating on a consequence-free basis**, with the aim of personal benefit, seem apposite in this case." (Emphasis added)

24. If there was to be no consequence for a failed interlocutory injunction application (as suggested by Ryanair's application for a 'no costs' order), then there would be little or no disincentive to a party to use court resources (in this case six days of court hearing time) for tactical or other reasons, to seek an unjustified interlocutory injunction, even when the evidence is insufficient.
25. This is because if there were a general rule that there was to be no order as to costs in relation to a failed interlocutory injunction application, a plaintiff could adopt the approach that there was little to lose in attempting to get an interlocutory injunction, as well as the permanent injunction, on the grounds that there will be no order as to costs.
26. Indeed, the same could be said to a lesser degree if there were a general rule that costs were to be reserved or were to be made costs in the cause after a failed interlocutory injunction application, since there is a chance that those costs could eventually end up

being paid by the other side and so the plaintiff will not in this situation ever have to pay for the failed interlocutory injunction application, even if there was no basis for seeking the interlocutory injunction in the first place. This is not of course to say that there will not be certain cases, such as the *Glaxo and Paddy Burke* cases to which reference is made below, where the court determines that costs should not be awarded against a unsuccessful applicant for an interlocutory injunction.

27. In general terms, it seems to this Court that if a party decides to take the financial risk of seeking an interlocutory injunction, and if it loses because, for example, the Court determines that it did not produce sufficient evidence to satisfy the test for the grant of the injunction, it is important that as a matter of principle that that party suffers financial consequence for its decision, or more accurately that the defendant does not suffer financially for being put to the cost of successfully defending the unsuccessful application, in keeping with the general rule that costs follow the event.
28. Otherwise, and particularly if there was to be no order as to costs, every set of injunction proceedings might be preceded by an application for an interlocutory injunction on the basis that there is little or no financial disincentive to a party seeking same, even though that party might not have sufficient evidence to satisfy the grant of such an injunction.

Founding principle that 'costs follow the event'

29. This Court is conscious of the founding principle that costs follow the event, now contained in ss. 168 and 169 of the Legal Services Regulation Act 2015, which principle applies just as much to interlocutory injunction applications, as it does to other forms of litigation. One of the underlying rationales for this principle would appear, to this Court, to be the importance of ensuring that plaintiffs who decide to pursue interlocutory injunctions (before their permanent injunction application is heard) are disincentivised from doing so, unless they have grounds for obtaining such injunctions.
30. This is achieved by virtue of the fact that if a plaintiff fails, he will suffer the financial consequence of having costs awarded against him. If there were no such financial consequences, in all proceedings seeking a permanent injunction, there might not be a sufficient incentive for a plaintiff to avoid putting a defendant to the additional expense of defending an interlocutory injunction application, regardless of how likely such an application is to succeed. This would be because for the interlocutory injunction application, the plaintiff would have little or no '*skin in the game*' if he knew there was going to be no order as to costs against him (or indeed if costs were to be reserved or made 'costs in the cause'), even if unsuccessful in his application.

Departure from default rule because of conduct of party

31. The default rule, that costs follow the event, is set out in s. 169(1)(c) of the Legal Services Regulation Act 2015 which states that:

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

[....]

(c) the manner in which the parties conducted all or any part of cases”

32. It follows that, while the default rule is that costs follow the event, it is also possible for a court to record in its award of costs its displeasure in relation to how one party conducted the litigation, such as where a party is deliberately non-forthcoming, which can have the effect of leading to unnecessary litigation, or extending unnecessarily that litigation, or in some cases leading to unjust results from that litigation. So, just as it has been noted that unnecessary interlocutory injunction applications can lead to a waste of court time (to be met with an award of costs), so too litigants who are deliberately non-forthcoming can lead to the waste of court time (which can be met with a variation to costs orders).

Default rule that judge who hears interlocutory application should deal with costs

33. This Court is also conscious of the terms of Order 99, rule 2(3) of the Rules of the Superior Courts, which states that:

“The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.”

It seems to this Court that the principle underlying this default rule is that the High Court judge, who has heard the interlocutory application, rather than the trial judge, is best placed to determine the costs of that interlocutory application. Therefore, notwithstanding the fact that there will usually be discovery and witness evidence *after* the interlocutory hearing and before the trial of the permanent injunction application, the law nonetheless favours the judge, who has assessed the evidence available at the stage of the interlocutory proceedings and witnessed at first hand the conduct of the parties, making a decision regarding costs where possible.

In addition, it seems to this Court that underlying this default rule that costs should be apportioned between the parties by the judge hearing the interlocutory application, because not every failed interlocutory injunction goes to trial, whether because of changed circumstances or otherwise and so those costs should not, as a general rule, be left to the trial judge.

A rule that costs not awarded against unsuccessful interlocutory injunction applicant?

Glaxo v. Rowex

34. The High Court case of *Glaxo Group Ltd v. Rowex Ltd* [2015] 1 I.R. 185 was relied upon by Ryanair in support of its submissions regarding costs. The *Glaxo* case was one in which costs were not awarded against a plaintiff which had failed in its interlocutory injunction application but were instead reserved on the grounds that it would be unjust if the plaintiff succeeded at the trial in obtaining a permanent injunction, if it had to pay the costs of a failed interlocutory injunction. In the *Glaxo* case however it is relevant to note that the strongest factor giving rise to a risk of injustice if costs were awarded at the

interlocutory stage was the adequacy of damages which Barrett J. felt would have to be returned to at the trial.

Paddy Burke v. Tullyvaraga

35. Ryanair also relied upon *Paddy Burke (Builders) Ltd v. Tullyvaraga Management Company Ltd* [2020] IEHC 199. In that case, McDonald J. refused to order costs against the failed applicant for an interlocutory injunction in that case, as he stated that it was possible (although, it may have seemed unlikely, based on evidence presented at the interlocutory stage) that evidence might become available through discovery and the calling of witnesses that might lead to a permanent injunction being granted at the trial.

Crowley v. Promontoria

36. In *Crowley v. Promontoria (Oyster) DAC & ors.* [2020] IEHC 365, Sanfey J. awarded costs against the plaintiff for his failed interlocutory injunction application where he claimed priority over the first named defendant's charge. He held that the fact that under s. 31 of the Registration of Title Act 1964 the first defendant's ownership of the charge was conclusive evidence of its title to the charge, meant that it was unlikely that a different picture would emerge at the trial and that it was appropriate to award costs against the plaintiff as the interlocutory injunction application was '*without merit, and has caused considerable expense*'.

37. It is clear from the review of these cases, which are fact-specific, and indeed the statutory provisions, that there is not a general principle in interlocutory injunction applications that the costs of a failed interlocutory injunction should be reserved, be costs in the cause (or that that there should be no order as to costs, as suggested by Ryanair), on the grounds that it would be unjust for a plaintiff who could get a permanent injunction if he had previously been ordered to pay the costs of a failed interlocutory injunction.

38. If there was such a general principle, a plaintiff who failed to obtain an interlocutory injunction would almost never have costs awarded against him, for the simple reason that there would, it seems, almost always be the possibility, in light of unknown evidence to be heard in the future, that a plaintiff could get a permanent injunction at the trial.

Unjust for successful litigant to suffer financial burden of defeating claim

39. It is also relevant to note the Supreme Court's pronouncements on the awarding of costs and in particular the judgment of McKechnie J. in *Godsil v. Ireland* [2015] 4 I.R. 535 at p. 543 *et seq.*:

"A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so, but it is, with the "costs follow the event" rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process including over court participation or attendance. If however, he should contest an unmeritorious point, the

consequences are his to suffer. **On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff.**

[...]

The general rule is that costs follow the event unless the court otherwise orders: O. 99, r. 1(3) and (4) of the Rules of the Superior Courts ("RSC").

[...]

It is only when justice demands, should the general rule be departed from. On all occasions when such is asserted the onus is on the party who so claims." (Emphasis added)

40. Applying this logic, it seems clear that the starting point is that it would be unjust if a winning litigant has to suffer the financial burden of defeating an unsuccessful claim. This Court should therefore adopt this as its starting point or default stance when considering costs.

ANALYSIS

41. In light of these principles, this Court concludes that the "event" for the purposes of the overriding rule that 'costs following the event' is the refusal of the interlocutory injunction sought by Ryanair. Thus, if nothing else was to be taken into account, the costs of this failed application should be awarded to Skyscanner, since it would be unjust, to quote McKechnie J. in *Godsil*, for Skyscanner to suffer any financial burden in defending that unsuccessful application. It is clear that the onus rests on Ryanair to displace this default rule.
42. On the other hand, it might seem to be *prima facie* unjust for a plaintiff who loses an interlocutory injunction application to have costs awarded against him, if after all the evidence is disclosed, he is granted a permanent injunction. However, it is important to remember that it was the decision of a plaintiff not to be satisfied with waiting to establish his rights or asserting his entitlements at the trial of the action, and to seek an interlocutory injunction pending that trial. This is not a decision that is forced upon a plaintiff. It is however a decision that is forced upon a defendant, who has to expend considerable sums in defending the High Court interlocutory injunction application, as well as the permanent injunction application. The plaintiff, in this case Ryanair, knew what evidence it was relying upon, and any *lacunae* in that evidence, yet it still spent six days in the High Court seeking that interlocutory injunction.
43. A key consideration for this Court therefore is that Ryanair did not have to take the interlocutory injunction application. It could have waited until the permanent injunction hearing when it would have its discovery and witness evidence. It took the interlocutory injunction application presumably because it believed that it had sufficient evidence to obtain an interlocutory injunction. It was proved wrong in making this 'call' and

Skyscanner should not have to pay the legal costs of Ryanair making a 'bad call', solely on the grounds that Ryanair's next 'call' (i.e. that it will get a permanent injunction when all the evidence is available), may turn out to be a 'good call'.

44. Of course, the allocation of costs is not just a matter of private interest between the parties, it is also important that parties are discouraged from seeking interlocutory injunctions unnecessarily in light of the pressure on court resources. As noted by MacMenamin J. in *Tracey v. Burton* [2016] IESC 16 at para. 45:

"Court time is not solely the concern of litigants or their legal representatives. There is a strong public interest aspect to these issues."

It seems to this Court that an order for no costs, as suggested by Ryanair runs contrary to the principle that there is a public interest in disincentivising the waste of court time and one way in which this is achieved is by making costs orders against parties who are unsuccessful in court proceedings.

45. It is also the case that defendants such as Skyscanner should not be financially burdened with defeating unsuccessful interlocutory injunction applications (whether due to insufficient evidence or otherwise). For this reason, it is important that costs are as a general rule awarded to such defendants to avoid them having to suffer this financial burden.
46. This Court concludes that the foregoing competing principles should be resolved by making it clear that it was, and is, this Court's view that the application by Ryanair for an interlocutory injunction was without merit at the interlocutory stage and that Ryanair should not have inflicted the financial cost on Skyscanner of defending these proceedings, even if Ryanair produces sufficient evidence to be granted a permanent injunction at the trial. This view must be reflected by making an award of costs against Ryanair.
47. However, just as Ryanair's decision to incorrectly (in this Court's view) seek the injunction should not go without consequence, so too Skyscanner's manner of conducting the case should also not be permitted to go without consequence, in this case by a reduction in the costs to be awarded to it.
48. In this way, the party seeking an interlocutory injunction on what this Court has determined were not sufficiently strong grounds is not allowed to do so without financial consequence, but also the party defending the interlocutory junction suffers the financial consequence of doing so in a manner which this Court determined was deliberately non-forthcoming (regarding the key issue in the dispute between the parties i.e. whether Skyscanner obtained the PFT information in breach of the Terms of Use on Ryanair's website).
49. For this reason, it is proposed to award the costs of the failed interlocutory injunction application against Ryanair, but to reduce those costs by 35% to take account of the non-forthcoming manner in which Skyscanner conducted the litigation, since it is possible (but

this Court can put it no higher than that), that if Skyscanner had been more forthcoming that this litigation might not have been necessary or might have been shorter.

Reduction of costs to reflect extensive competition law arguments raised by Skyscanner?

50. In addition to the non-forthcoming manner in which Skyscanner conducted the litigation, it is also the case that Skyscanner raised a competition law defence to the injunction application which took up quite an amount of the pleadings and the Court's time. In the context of the key issues which this Court normally has to determine in an interlocutory hearing, namely a fair issue to be tried, balance of convenience and whether damages are an adequate remedy, it was unusual in these interlocutory proceedings for Court to have expert evidence from competition law experts to consider.
51. However, Skyscanner justified this on the basis of the '*counsel of prudence*' and claimed that if the Court was inclined to grant the injunction on the balance of convenience that it should not do so since it would be potentially perpetuating anti-competitive behaviour. As is clear from the principal judgment, this Court placed little or no reliance on the competition law claims and the expert competition law evidence in reaching its decision.
52. While litigants may feel that they are entitled to raise every single possible point that might be in their favour, out of an abundance of caution, they must be cognisant of the fact that this may come with costs consequences, even if they win the litigation, particularly where a considerable amount of time is expended dealing with those arguments and in this case dealing with expert evidence where that time is not merited for the purposes of the court reaching its decision.
53. As already noted, the decision in *Tracey v. Burton* makes clear that the use of court time is not just an issue of concern to the parties themselves but is a matter of public interest. In this case, the considerable use of court time for an interlocutory injunction is evidenced by the fact that it took six days of court time, which is longer than many permanent injunction applications. In this regard, Ryanair submitted that unnecessary competition law issues took up approximately 20% of the hearing and paperwork.
54. It is clear from McKechnie J.'s judgment in *Godsil* that this Court in exercising its discretion as to costs is entitled to take account of a decision by a litigant to contest an unmeritorious point. In this case, there was a considerable amount of time spent on competition law issues and expert competition law evidence from Skyscanner (which had to be responded to by Ryanair, with their own expert evidence), and which this Court determined had little or no relevance to the injunction application.
55. This Court's assessment is that a deduction of 15% should be made in respect of the costs, to be awarded to Skyscanner, to take account of the costs which were incurred in dealing with the extensive competition law matters raised in considerable detail and involving the use of expert evidence.

CONCLUSION

56. In all the circumstances, this Court concludes that the most appropriate costs award in this case is one in favour of Skyscanner of 50% of the costs of the failed interlocutory injunction application. This award balances the fact that Ryanair lost the injunction application with the fact that Skyscanner engaged in a type of litigation tactic which had been disapproved of by the High Court in similar proceedings and the fact that Skyscanner raised extensive and time-consuming competition law issues and expert evidence which was unnecessary for the defence of the injunction application.