[2019] IEHC 772

THE HIGH COURT

[2013 No. 3285 P]

BETWEEN

(1) IRELAND AND THE MINISTER FOR FINANCE

PLAINTIFFS

– AND –

COMHFHORBAIRT (GAILLIMH) TRADING AS AER ARANN

DEFENDANT

(2) IRELAND AND THE MINISTER FOR FINANCE

PLAINTIFFS

– AND –

AER LINGUS LIMITED

– AND –

COMHFHORBAIRT (GAILLIMH) TRADING AS AER ARANN

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered 14th day of November, 2019.

1. Background

1. In its judgment of 2nd July, 2019 (the 'Principal Judgment'), the court rejected Aer Arann's examinership and set-off defences. As a consequence of that judgment, the court has been asked to grant judgment to the plaintiffs in respect of the State aid sought to be recovered in the within proceedings (plus interest and costs, less monies paid on account to date). Aer Arann intends to appeal that portion of the Principal Judgment which relates to examinership. In consequence, Aer Arann has applied to the court for a stay on the execution of the Principal Judgment, with the granting of such stay to be subject to an undertaking or order that Aer Arann will, in six equal instalments over a six-month period, pay 50 per cent of the pre-examinership aid plus interest into an escrow account to be operated by the plaintiffs. The plaintiffs oppose this, contending, *inter alia,* that absent convincing proof from Aer Arann that it would suffer irreparable harm if a stay were refused, the court must refuse the stay sought.

2. Applicable Principles

2. The following observations as to the key principles governing the within application might usefully be made:

I. European Union Law.

(i) Though the court has to be mindful of the principle of legal certainty, the court must also be mindful of the fact that the purpose of recovering State aid is to restore the *status quo* ante and to eliminate the distortion of competition caused to the market by the unlawful State aid. "*That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient…in other words, by the undertakings which actually benefited from it…By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored". (Germany v. Commission (Case C-277/00)* [2004] E.C.R. I-3925, para. 75).

(ii) Although the recovery proceedings are subject to Irish law:

(a) *"In accordance with the principle of effectiveness, as consistently applied specifically to State aid in the case-law, a Member State which, pursuant to a decision of the Commission, is obliged to recover unlawful aid is free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of Union law". (Scott and Kimberly Clark (Case C-210/09)* [2010] E.C.R. I-4613, para. 21).

(b) National procedural rules that yield the result of *having "prolonged the unfair competitive advantage resulting from the* [state] *aid*" can be contrary to European Union law (*Commission v. France (Case C-232/05*) [2006] E.C.R. I-10071, para. 52).

(iii) Consistent with the obligation of good faith cooperation between national courts, on the one hand, and the European Commission and the European-level courts, on the other, "*national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU…." (Mediaset (Case C-69/13)* [ECLI:EU:C:2014:71], para. 29).

(iv) In taking a decision before final judgment in proceedings, a national court "*must preserve the interests of individuals….[but] in doing so it must also take fully into consideration the interests of the Community" (Transalpine Ölleitung in Österreich GmbH v. Finanzlandesdirektion für Tirol and Others (Case C-368/04)* [2006] E.C.R. I-9957, para. 48).

(v) So far as the granting of the stay sought could be considered to be a significant obstacle to the effective application of European Union law, and the court considers that it could, if granted, be such, the European Court of Justice has been clear that "*[a] significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of res judicata or by the principle of legal certainty" (Klausner-Holz (Case C-505/14)* [ECLI:EU:C:2015:742], para. 45).

(vi) A national court must (per the European Court of Justice in *Commission v. Germany (Case C-527/12)* [ECLI:EU:C:2014:2193]) comply with the conditions identified in the *Zuckerfabrik and Atlanta* case-law *(Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn (Joined Cases C-143/88 and C-92/89)* [1991] E.C.R. I-415; *Atlanta Fruchthandelsgesellschaft mbH and others v. Bundesamt für Ernährung und Forstwirtschaft (Case C-465/93)* [1995] I-3761) before staying recovery proceedings enforcing a decision of the European Commission. Thus, (1) the national court must entertain serious doubts as to the validity of the Community act and (2) there must be urgency to avoid serious and irreparable damage to the party seeking the suspension.

(vii) Further to point (vi):

(a) Purely financial damage cannot, in principle, be regarded as irreparable. In this regard, the European Court of Justice has observed (a) in *Zuckerfabrik*, para. 29 that a national court "*must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid*", an observation it repeats in *Atlanta*, para. 41.

(b) So far as the granting of a stay can be seen (at least by analogy) to be an interim measure, such measures are only justified if, per the General Court in *Frucona Košice v. Commission (Case T-103/14 R)* [ECLI:EU:T:2014:255], para. 52, "*According to consistent case-law, where the damage referred to is of a financial nature, the interim measures sought are, in principle, justified when it is apparent that, without those measures, the party applying for them would find itself in a position that could imperil its financial viability before final judgment is given in the main action or its market share would be affected substantially having regard to, inter alia, the size and turnover of its undertaking and to the characteristics of the group to which it belongs…."*

(c) So far as the question of urgency is concerned, assessment of same must take account of such resources as are available to other group companies, the General Court observing in this regard in *Frucona Košice*, para. 54, that *"[t]his taking into consideration of the financial strength of the group to which the applicant belongs is based on the idea that the objective interests of the undertaking concerned are not distinct from those of the persons that control it or are members of the same group. Whether the damage alleged is serious and irreparable must therefore be appraised at the level of the group comprising those persons. That coincidence of interests is justification for the applicant's interest in carrying on business not being appraised independently of the interest the persons controlling it have in its continued survival…."*

(viii) Even if *Zuckerfabrik* and *Atlanta* only apply where a party before a national court challenges the validity of a decision of the European Commission, the court is mindful of the observation of the European Court of Justice in *Commission v. Italy (Case C-305/09)* [2011] E.C.R. I-3225 (para. 46) (a case concerned with the validity of certain enforcement steps taken by Italy to recover aid, but not with the validity of the underlying decision) that, *inter alia, "although the review by a national court of the formal legality of a national measure seeking the recovery of unlawful State aid must be viewed simply as an expression of the general principle of EU law of effective judicial protection, national courts are required, under* [what is now Art.16(3) of Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union], *to ensure that the decision ordering the recovery of the unlawful aid is fully effective and achieves an outcome consistent with the objective pursued by that decision".*

Aer Arann, in its written submissions, contends in this regard that "the Zuckerfabrik principles are not applicable for the following reasons…(a) This case does not involve any challenge by Aer Arann to the legality of the Commission's recovery decision….(b) The judgments of the Court of Justice in both Zuckerfabrik and Atlanta specifically reflect the principle that the granting of interim relied relating to the enforceability of EU measures may have far-reaching effects, and may constitute an obstacle to the full effectiveness of regulations in all the Member States in breach of [Art.288, para. 2 TFEU]….These considerations do not apply…where a stay is sought pending appeal to vindicate the fundamental EU legal rights to legal certainty of Aer Arann, which asserted rights are obviously particular to Aer Arann….(c) It…follows that there is not…any Commission decision, ruling, regulation or judgment of the EU Court directing or mandating this Court to apply the Zuckerfabrik/Atlanta principles to an application for a stay of execution". Three points fall to be made in this regard: (1) as to (a), the stay would mean, in effect, that the decision of the European Commission was not being applied to Aer Arann; (2) as to (b), this is to underplay the seriousness of what the European Commission has identified, viz. a distortion of competition which the State is required to rectify, i.e. this is not a private matter without real and serious public consequence; (3) as to (c), while this may be so, this Court must nonetheless act in accordance with the general principles of law that it identifies above.

II. Irish Law.

(ix) An appeal does not automatically stay an order (Hilary Delany, Declan McGrath and Emily Egan McGrath, *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) 876.

(x) It follows from (ix) that the onus is on the party seeking a stay to demonstrate that the stay is warranted.

(xi) The national procedural rules applicable to the granting of the stay sought are O.86A, r5(1) Rules of the Superior Courts (RSC) and O.58, r.10(1) RSC, with "*the overriding consideration in deciding whether to grant a stay [being]…to maintain a balance so that justice will not be denied to either party"* (Delany and McGrath, *op. cit*., 876-7).

(xii) When it comes to the balancing exercise which must be carried out in deciding whether to grant or refuse a stay in the context of a monetary award, Delany and McGrath (*op. cit*., 877) observe, *inter alia,* that the task now at hand "*is well summarised by Egan J.* in Redmond v. Ireland [[1992] 2 I.R. 362, 366] *in the following terms. On the one hand, if a stay is granted and the plaintiff later succeeds in upholding the award he will inevitably have suffered delay in receiving his money for which interest payments will not always compensate. On the other hand, if a stay is refused and the defendant subsequently wins the appeal, the award may no longer be recoverable. It is generally accepted that the court must do its best to balance the conflicting considerations which must arise in such cases although it has been acknowledged that 'there may be no perfect solution [Redmond, 367]."*

(xiii) The court has been referred to the helpful decision of the Court of Appeal in *Star Elm Frames Ltd v. Fitzpatrick* [2016] IECA 234 and its emphasis, when it comes to the balancing exercise, on balancing the rights and interests of the successful and unsuccessful parties; the court is mindful too of the more detailed iteration of the applicable test by Clarke J., as he then was, in *Okunade v. Minister for Justice* [2012] 3 I.R. 152, 193:

> *"[I]n considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings* [the test was extended to appeals by *C.C. v Minister for Justice* [2016] 2 I.R. 680] *the court should apply the following considerations:-*
>
> *(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but, if so, then;*
>
> *(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
>
> *(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
>
> *(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,*
>
> *(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,*
>
> *(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.*
>
> *(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,*
>
> *(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."*

3. Application of Principle

3. The court notes and accepts all of the above points of principle. More particularly:

(A) As to points (vi) and (vii), sub-points (1) and (2), (A) there can be no doubt as to the validity of the decision of the European Commission (which has been upheld by the European Court of Justice) and (B) the court respectfully does not consider, by reference to the evidence before it, that Aer Arann has (I) established the requisite

urgency, or (II) shown that a refusal of the stay sought would imperil its financial viability, taking account of the characteristics of its corporate group. Indeed, Aer Arann has been properly frank in this last regard, stating, *e.g.*, in its written rejoinder submissions that "*it does not base its stay application on a submission that, were a stay declined, it would suffer irreparable financial harm or would go out of business….Rather, its submission is based on the simple proposition that to require it to repay, in full, the State aid pending the hearing of the appeal will impose a significant cash disadvantage on Aer Arann and, more particularly, the Stobart Group".*

(B) As to point (xiii), using the lettering/numbering of the above-quoted text from *Okunade*:

(a) To require that something be but arguable is a relatively low threshold, which here has been surpassed.

(b) In terms of where the greatest risk of injustice would lie, the court notes that it is not denied that Aer Arann/its corporate group are in a position to pay the State aid amount today. But this may not be the case by the time this matter is heard and adjudicated on appeal. The court does not mean to suggest in this that there is some heightened risk associated with Aer Arann or its corporate group; it means merely that nothing is certain in business life from one day to the next. By contrast, the State will always be present and able to tax/borrow so as to meet any (if any) damages and costs ordered.

(b)(i) The court notes that the decision of the European Commission is not just *prima facie* valid; it has been upheld by the European Court of Justice (and its validity is not challenged in these proceedings).

(b)(ii) As to the public interest in orderly operation of the particular scheme, what is at play here is the orderly operation of the European Union law regime concerning State aid.

(b)(iii) There may be a risk presenting, if the court were to grant the stay sought, that the European Commission would commence infringement proceedings against the State.

(b)(iv) Although there is clearly financial pain to Aer Arann in paying the full amount now owing, the court does not consider that the evidence before it shows that a refusal of the stay sought would imperil the financial viability of Aer Arann or its parent company taking account of the characteristics of its corporate group.

(c) If damages ultimately fall to be paid by the State, they will be an adequate remedy for Aer Arann; by contrast they would not be an adequate remedy for the State which is concerned fundamentally with the distortion of competition (adverse to the public good) that has been identified by the European Commission in its decision.

(d) Having regard to the recency and substance of the decision of the European Court of Justice in *Klausner-Holz*, as relied upon by the court in the Principal Judgment, the court must respectfully conclude that it considers that the appeal which Aer Arann intends to bring is unlikely to succeed.

4. Conclusion

4. For the reasons identified above, the stay sought is respectfully refused.