

THE HIGH COURT

[2021] IEHC 788

[Record No. 2017/8782 P]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

SC VOLA.RO SRL

AND

(By Order of Court of 8th March 2019)

YPSILON.NET AG

DEFENDANT(S)

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 15th day of December 2021.

Introduction

1. This judgment relates to four discovery applications – two prosecuted by the plaintiff ('Ryanair') against each of the defendants ('Vola' and 'Ypsilon' respectively), and one by each of the defendants against Ryanair – which were heard together by me over three days in early June 2021. There have been several applications to court in the course of the proceedings and the following written judgments have been delivered: -

- (i) Judgment of 14th January, 2019, Ní Raifeartaigh J, reported at [2019] IEHC 239 ('the jurisdiction judgment'): this judgment concerned an application by Vola contesting the jurisdiction of the Irish courts to hear the case;
- (ii) judgment of 22nd June, 2020, Sanfey J, reported at [2020] IEHC 308 ('the abuse of process judgment'): this judgment primarily concerned an application by Ryanair to strike out Vola's counterclaim as an abuse of process, and an application by Vola for a stay on the plaintiff's claim pending determination of Vola's counterclaim. Each side sought in the alternative an order that its own claim be tried and determined first in a modular trial;
- (iii) judgment of 24th July, 2020, Sanfey J, reported at [2020] IEHC 367 ('the consequential orders judgment'): This judgment dealt with the orders to be made on foot of the foregoing judgment;
- (iv) judgment of 1st June, 2021, Sanfey J, reported at [2021] IEHC 379 ('the particulars judgment'): In this application, Ryanair sought to have Vola's counterclaim struck out for failure to deliver appropriate replies to queries raised by the court in the abuse of process judgment.

2. As is apparent from the consequential orders judgment, this Court directed a modular trial whereby the issues of liability in the plaintiff's claim were to be heard and determined first, with Vola's counterclaim being tried and determined thereafter as a second module. An order was made on 30th July, 2020 to give effect to these directions.

3. The applications for discovery in the present matter each relate to the first module, *i.e.* the liabilities issues in Ryanair's claim. Those applications are as follows:

- (i) Ryanair's motion against Vola filed on 5th February, 2021;
- (ii) Ryanair's motion against Ypsilon filed on 5th February, 2021;
- (iii) Vola's Motion against Ryanair filed on 3rd February, 2021;
- (iv) Ypsilon's motion against Ryanair filed on 9th February, 2021.

4. Each of these four motions involved an exchange of extensive correspondence and affidavits setting out the reasons for and against discovery of the chosen categories of documents. Detailed written submissions were furnished in support of the parties' respective positions on each of the motions. The parties also helpfully set out on spread sheets, for ease of reference, the categories of documents sought in each motion and a summary of the argument, cross-referenced to the affidavits, made by the parties in relation to each issue.

5. This judgment sets out the court's conclusions in relation to each of the categories in the four motions.

The proceedings

6. I do not propose to set out in any detail in this judgment the background to the disputes between the parties. However, a brief synopsis of the issues as defined by the pleadings is necessary in order to explain the context in which these applications are brought.

7. Ryanair carries on an international business as a low-fares airline. In its statement of claim, it contends that it also, through its website at www.ryanair.com ('the Ryanair website'), is a provider "...of flight advertisement, search, information, reservation and purchase services in respect of its own flights, as well as additional facilities whereby complementary and ancillary services such as accommodation – reservation, car hire and insurance services may be booked by Ryanair's customers".

8. Vola is a limited liability company incorporated in Romania and carries on business as an online travel agent ('OTA') providing internet search and booking facilities in respect of airline flights and other services through its website www.vola.ro ('the Vola website').

9. Ypsilon is a limited liability company incorporated in Germany and accepts in its defence that it is a "provider of integrated technology and payment solutions for the travel industry". Ryanair alleges that Ypsilon provides Vola with flight data pertaining to Ryanair through a process of "screen-scraping", an allegation which Ypsilon denies.

10. The plaintiff issued a plenary summons on 29th September, 2017, and a statement of claim on 17th November, 2017. This statement of claim was subsequently amended to accommodate the addition of Ypsilon as a defendant, and references in this judgment to the statement of claim are to the amended version which includes Ypsilon as a defendant.

11. Ryanair seeks a wide range of reliefs against the defendants, alleging that they are engaged in a process of "screen-scraping", whereby data the property of Ryanair is taken or extracted from the Ryanair website without Ryanair's authority, and used for the defendants' purposes. It is alleged that the defendants' activities "...are critically affecting Ryanair, the Ryanair website and the Ryanair Business Model (including the direction the company is heading and/or intends to head, in accordance with the Ryanair Business Model), thereby causing damage, inconvenience and expense to Ryanair" [para. 10 statement of claim]. Ryanair alleges that the defendants are in breach of contract, have unlawfully infringed on Ryanair's intellectual property rights, and are guilty of conversion, trespass to goods or property, and passing off.

12. Of particular concern to Ryanair is its allegation that Vola offers for sale and sells Ryanair flights through its call centre without the permission of Ryanair. As Ryanair puts it at para. 14 of the statement of claim: -

“The First Named Defendant uses and/or authorises and/or procures and/or directs and/or controls an automated system or software that enables it to enter into and use the Ryanair Website and underlying computer programmes and database(s), for the purposes of searching and/or booking the Ryanair flights that are ultimately sold by the First Named Defendant to the customer that uses the Vola Website. The First Named Defendant, its servants and/or agents enters into and uses the Ryanair Website by engaging in an activity commonly referred to as ‘screen scraping’, ‘crawling’, or the use of a ‘robot’ or ‘spider’. This automated system/software enables the First Named Defendant, its servants and/or agents to enter into and use the Ryanair Website by mimicking an actual customer” [para. 14 statement of claim].

13. The allegations of Ryanair against Ypsilon are summarised at para. 16 of the statement of claim as follows: -

“16. The Second Named Defendant offers for sale and sells, *inter alia*, services that engage in and/or facilitate and/or enable screen-scraping of the Ryanair Website and/or the selling of the Ryanair flights and/or flight data. The Second Named Defendant creates, and/or produces, and/or designs, and/or maintains, and/or develops, and/or uses, and/or authorises, and/or procures, and/or controls, and/or benefits from, and/or owns and offers for sale and sells to its customers (including the First Named Defendant) automated systems and/or software and/or computer program(s) and or API [application programming interface] and/or services, and/or applications designed to screen

scrape the Ryanair Website and/or search and book flights from the Ryanair Website ('Screen-Scraping Services'). The Second Named Defendant does so without the permission of Ryanair."

14. The statement of claim deals at some length with the manner in which Ryanair alleges the defendants enter into and use the Ryanair website in order to conduct a search for flight information on behalf of its own customers. It is alleged that the defendants, when inputting the parameters of a search, are required to click a button entitled "Let's Go!" under which it is expressly stated "By Clicking Let's Go I agree to Website Terms of Use", which statement contains an emphasised hyperlink enabling the user to view the Ryanair website terms of use. A tick-box is located to the left of the hyperlink, and upon the user clicking the "Let's Go!" button, the tick-box is caused to be "ticked" confirming the defendants' acceptance of and agreement with the Ryanair website terms of use. Ryanair contends in the statement of claim that this process involves the conclusion of a contract between the user – in this case, the defendants – and Ryanair, a process referred to as "click wrapping". It is specifically alleged by Ryanair that, by accessing the Ryanair website, the defendants are bound by the terms of use thereof. Ryanair argues that this applies whether the defendants access the search facility on the front-end webpage, or access the back-end of the Ryanair website directly.

15. Ryanair alleges that, by entering and/or using the Ryanair website, the defendants or either of them through their conduct have accepted the terms of use and are bound by them. Ryanair summarises what it alleges is the wrongdoing of the defendants in the statement of claim as follows: -

"26. The First Named Defendant offers for sale, and sells, Ryanair flights through the Vola website. The Second Named Defendant through the Ypsilon

Website, offers for Sale Screen Scraping services which enable online travel agents, such as the First Named Defendant, to offer for sale and sell Ryanair flights. Ryanair does not permit the sale of its flights and/or data by the Defendants. The sale of Ryanair flights and/or data by the defendants respectively is contrary to the Ryanair business model and is a position Ryanair specifically in its business model does not wish to be part of. In (i) offering for sale and selling/reselling Ryanair's flights and (ii) offering for sale and selling Screen-Scraping Services Respectively, in this manner the Defendants are acting in breach of the terms of use of the Ryanair Website and committing other wrongful acts as detailed hereunder. The Defendants are engaged in this activity for commercial gain and in so doing cause Ryanair loss, harm and damage together with exposure to potential litigation/sanction as shall be detailed hereunder, and to an unlimited obligation in respect of the care of the First Named Defendant's customers and/or passengers of Ryanair pursuant to Article 9 Regulation 261.”

16. The statement of claim goes on to outline the alleged breaches of contract on the part of the defendants, breaches of its copyright and data base rights, trade mark infringement, conversion and trespass to goods and/or property, infliction of economic loss and passing off.

17. Both defendants deny comprehensively the allegations made against them. Vola's defence is virtually a complete traverse of the amended statement of claim. Its counterclaim is set out briefly over two pages, and seeks a declaration that certain acts of Ryanair constitute an abuse of what Vola contends is Ryanair's "dominant position"; it seeks an injunction "restraining such further acts by Ryanair" and a license "to use of such monopoly rights of Ryanair and on such terms as to this

Honourable Court shall seem fit”. Damages “including exemplary damages” are also sought.

18. The brevity of Vola’s counterclaim elicited the seeking by Ryanair of extensive particulars, and the progress of Ryanair’s efforts in this regard may be seen in the abuse of process judgment and in the particulars judgment to which I refer above. That process has run its course and Ryanair now seeks extensive documentation from Vola by way of discovery.

19. By order of 8th March, 2019, this Court directed the joinder of Ypsilon to the proceedings. An amended statement of claim was served, and Ypsilon delivered its defence on 1st November, 2019. The defence is a relatively brief document, in which Ypsilon either denies or pleads that it is a stranger to the vast majority of the allegations in the statement of claim. There are some specific denials: Ypsilon denies that it is “engaging in screen-scraping activity...”; [para. 6] it denies “that the alleged contract or any contract exists as between the Plaintiff and the Second Named Defendant...” [para. 7]; it denies that it is “...bound by the terms of use...of the Ryanair website” [para. 10]; it is denied that Ypsilon, through its website, “...offers for sale ‘Screen Scraping Services’” ... [para. 14]; it is denied that Ypsilon has provided any such services to Vola “...or that it was acting or acts in breach of the terms of use or that such terms of use constitute a contract between the Plaintiff and the Second Named Defendant in the circumstances alleged or at all...” [para. 18]. At para. 16, Ypsilon pleads that “...to the extent that the activities of either of the Defendants breach the Terms of use (which is denied) it is expressly pleaded that the Plaintiff has at all material times been well aware of same, has profited from it and has waived any entitlement to rely on the Terms of Use in this regard”. The various

allegations in relation to trade mark infringement and the various other causes of action pleaded in the statement of claim are denied.

20. Ryanair delivered a reply and defence to counterclaim in the case of Vola, and a reply to the defence of Ypsilon. A notice for particulars was raised by Ryanair in relation to Ypsilon's defence, and Ypsilon has replied to this notice.

21. While the various exchanges as to particulars have amplified the case being made by all three parties, I do not propose to canvass the particulars at this stage. To the extent that replies to particulars are relevant to the various categories, I will deal with them below.

Flightbox issue

22. As the categories of discovery refer, not just to the parties to the present action, but also to the entity known as Flightbox Sp. z o.o. ("Flightbox"), it is necessary to say something about the involvement of that company in the issues between the parties. Its role in the proceedings is set out in a letter for the solicitors for the plaintiff to the solicitors for the defendants of 25th May, 2021, and extensive reference to this letter was made by counsel for the plaintiff in his opening of Ryanair's application.

23. As set out in that letter, the involvement of Flightbox may be summarised as follows: -

- The plenary summons issued on 29th September, 2017 against Vola only;
- by order of the High Court (Ni Raifeartaigh J) of 8th March, 2019, Ypsilon was joined to the proceedings;
- both Vola and Ypsilon filed defences denying involvement in screen-scraping Ryanair's website;

- in Ypsilon's replies to particulars of 20th December, 2019, it asserted that a Polish company (Flightbox), provides "certain IT - related services" to Vola;
- by letter of 28th January, 2020, Ypsilon disclosed that Flightbox is its 100% subsidiary;
- on 28th February, 2020, Ryanair issued separate proceedings in this jurisdiction against Flightbox;
- it transpired that, on 6th November, 2019, and prior to its name being disclosed by Ypsilon in the Irish proceedings, Flightbox had issued proceedings in Poland against Ryanair. There appeared to have been two failed attempts to effect service on Ryanair of these proceedings, but Ryanair ultimately received a translated package of the proceedings on 15th March, 2021, summoning it to court in Poland on 14th April, 2021;
- during the course of 2020, Ypsilon on a number of occasions asked Ryanair to release it from the proceedings. On Ryanair refusing to do so, Ypsilon suggested that it would issue a motion to be let out of the proceedings. On being urged by this Court to make a decision whether or not to do so, Ypsilon confirmed by letter of 17th December, 2020 that it had decided not to issue such a motion;
- Ryanair's request for voluntary discovery encompassed the emergence of Flightbox into the issues between the parties; in Ypsilon's replying affidavit in relation to Ryanair's discovery motion against it, Mr. Hans-Joachim Klenz, in an affidavit filed on 26th March, 2021, disclosed at para. 12 that Ypsilon would divest Flightbox "imminently";
- by letter from Ypsilon to Ryanair of 23rd March, 2021, it was intimated that the divestment had completed on 4th March, 2021;

- by letter of 19th March, 2021, Ryanair wrote to Ypsilon, Vola and Flightbox in relation to the divestment issue and its relevance to the discovery motions. *Inter alia*, it was suggested in that letter that “...it appears to us that Ypsilon is attempting to artificially and disingenuously use the corporate identity of Flightbox as a means of withholding documents pertinent to the Vola proceedings from Ryanair. This is in circumstances where Mr. Klenz essentially had, during the time period relevant to the discovery motions in the Vola Proceedings, full control of both Ypsilon and Flightbox. It is also clear that Ypsilon has the power to procure documents from Flightbox...We call on Ypsilon to make a request to Flightbox, if it has not already done so, to take possession of any documents in Flightbox’s possession or power of procurement which might be relevant to Ryanair’s Discovery Request of Ypsilon in the Vola proceedings...”
- Ypsilon’s solicitors replied by letter of 23rd March, 2021, repeating Ypsilon’s position as stated in the defence “...that it is not responsible for the alleged screen-scraping of Ryanair’s website, but that it understands that Flightbox, its subsidiary company (as it was then) is”. The letter strongly denied that Ypsilon had involved Flightbox as a means of withholding documentation in the action. The letter went on to state that “...our client is well aware of its duties and responsibilities in relation to its discovery obligations. For the avoidance of doubt our client is already subject to a litigation hold notice in relation to the proceedings and will comply with any Order for discovery in the terms directed by the Court regarding documents in its power, possession or procurement. To the extent that our client itself holds any documents generated by Flightbox that are responsive to the final categories of discovery,

our client will disclose them...in so far as Ryanair is seeking confirmation from Ypsilon regarding discovery of documents not within its power, possession or procurement, this is not a reasonable request. To be absolutely clear, our client has no power whatsoever to procure documents from Flightbox...”.

24. The letter of 19th March 2021 maintains that it is “abundantly clear” that the fact that Flightbox has admitted to screen-scraping in the Polish Flightbox proceedings is a relevant piece of the procedural history set out in the letter, and will be relevant to the context in which the discovery motions are heard. An application was made to this Court on 24th March, 2021 for liberty for the correspondence referred to above to be put on affidavit, and that liberty was granted.

25. An application was subsequently made at the call-over of the present applications to Allen J in relation to the service of an affidavit referring to the admission of screen-scraping by Flightbox in the Polish proceedings commenced by Flightbox against Ryanair. By the time the applications for discovery came before me, the solicitors for Vola indicated that they had no objection to the filing of an affidavit in relation to the Polish proceedings provided the proceedings themselves were exhibited. The solicitors for Ypsilon indicated that they had no objection to the affidavit being filed, subject to reserving their position in relation to the relevance of the Polish Flightbox proceedings to the present proceedings.

26. Accordingly, an affidavit of 25th May, 2021 of Thomas McNamara, Director of Legal Ryanair DAC, was sworn and was opened to the court on the hearing of the discovery applications. Mr. McNamara averred that he had inspected the English translation of Flightbox’s statement of claim of 6th November, 2019 in the Polish

proceedings. He avers that the first relief sought by Flightbox is that it be established that: -

“[Flightbox] is entitled, for the purposes of providing commercial services on the domestic and European market, to use [Ryanair’s] website with the domain name ryanair.com, by downloading its content concerning the conditions and prices of the flights offered by the defendant and booking flights through it by means of the screenscraping method which involves the creation of a flight search engine and making it publicly available on the internet allowing the users to compare prices and conditions of flights offered by the airlines operating on both the domestic (Polish) and European markets, despite the express prohibiting in this respect provided for in point 3 of the ; ‘Terms of Use of the Ryanair Website (Permitted Use)’,...”.

27. Mr. McNamara goes on to aver that the following appears on p.3/45 of the statement of claim: -

“As one of its main products, [Flightbox] offers air ticket reservation systems (low-cost and scheduled airlines) which enables simultaneous search, comparison and on-line booking of flights. The system operates, among things, using a screen-scraping method which is based on the automated extraction of data available on a specific website. This also applies to the content available on [www.ryanair.com], including the conditions and prices of the flights offered by [Ryanair]. As a result of [Flightbox’s] systems, this information (particularly the price and flight date) is extracted and then compared in a structured manner with information from other sources (*e.g.* websites of other carriers operating on a given route). On this basis, the end customer receives a summary of the most favourable offers concerning the

route in question. Importantly, such systems are made available on the internet as comprehensive, (*i.e.* covering the entire existing network of flights) flight search engines and thus enable [Flightbox] to provide commercial services on both the domestic and European market” [emphasis added by deponent].

28. Mr. McNamara avers that the statement of claim acknowledges that “the screen-scraping method on [www.ryanair.com] always constitutes a violation of the prohibition mentioned in the terms of use and therefore a risk of legal action being taken by [Ryanair]”. He refers to other references in paragraphs of the statement of claim to the “screen-scraping” method.

29. Counsel for Ryanair laid considerable emphasis on the relationship between Ypsilon and Flightbox and the apparent admission of Flightbox, not only that it carries on screen-scraping activities in relation to Ryanair’s website, but that it is entitled to do so. While obviously I will deal with Ryanair’s application for discovery against Ypsilon separately, counsel urges that these matters are also relevant to the documentation that it seeks from Vola, and in particular in relation to any dealings it may have had with Flightbox.

The applications generally

30. It has to be said that the four applications before the court generated an extraordinarily detailed level of debate: extensive correspondence in advance of the motions, affidavits setting out at length the positions of the parties, extremely detailed written submissions from both sides in relation to each of the motions, and three days of argument from very experienced senior counsel on behalf of each party.

31. I have reread all of the foregoing material, including the transcripts of all three days of the hearing of the applications. All of this material has been taken into account in the conclusions to which I have come and which are set out below.

However, rather than attempting to summarise the various submissions of the parties at the outset, I propose to deal with the submissions of the parties in the context of each category of documents as it arises in the course of this judgment. I think that this is a more helpful way of focusing on what the specific dispute was in relation to each category.

General Legal Principles

32. At the start of its written submissions, Ryanair brought together a helpful summary of the general principles from the case law relating to discovery. As counsel for Vola expressly indicated his agreement to paras. 5-10 of the summary – I do not think that paragraphs 3 and 4 were regarded as controversial - it would be worthwhile to set out the submission in full, notwithstanding its length:

“3. Discovery will not be ordered unless the documents sought are relevant, and necessary for disposing fairly of the matter, or for saving costs (O.31, r.12(1), (2)(a), and (5)).

4. Relevance In *Ryanair v. Aer Rianta* [2003] 4 IR 264, 275 it was held that the test for relevance was that set out in *Peruvian Guano* (1882) 11 QBD 55, namely that ‘documents which would support or defeat an issue that arises in the existing action’ are discoverable. The application of that test has been refined here, and documents will be discoverable if it is probable, not merely possible, that they are relevant to the issues to be tried (*Hannon v. Commissioner of Public Works*, [2001] IEHC 59, pp. 3 - 4).

5. Documents will not be discoverable where they are simply relevant to facts surrounding the case (*e.g. Guinness Limited v. Murray* (Unreported, Supreme Court, *ex tempore*, 23rd May, 2003, 6; *Brooks Thomas Ltd. v. Impac Limited* [1999] 1 ILRM 171, 176-177). Relevance is determined on the proceedings

(*Word Perfect Translation Services Limited v. Minister for Public Expenditure and Reform* [2020] IESC 56, para. 8.2), which encompasses the pleadings (*BAM v. NTMA* [2015] IECA 246, para. 37) and replies to particulars (*Susquehanna Ltd. v. Needham* [2017] IEHC 706, para.18), but not facts in affidavits (*Hannon v. Commissioner of Public Works*, p.4)

6. **Necessity.** This involves striking a balance between the litigious advantage that the documents would confer on an applicant, and the prejudice to the respondent. ‘Necessity’ has been applied in three different contexts, but these are not closed (*Tobin v. Minister for Defence* [2019] IESC 57, para. 7.13-7.16).

7. First, where alternative means of proof are available to an applicant, documents may not be ‘necessary’ (*Ryanair v. Aer Rianta*, 277). For example, where evidence can be gathered by ordinary inspection (*PJ Carroll & Co. Ltd. v. Minister for Health* [2006] 3 IR 431, para. 17), where it is more likely that the issue which the documents were sought to prove would have to be proved by expert evidence (*Handsfield Developments v. Irish Asphalt Limited* [2009] IESC 4, p.12 *et seq.*), or where the information could be obtained via interrogatories or notice to admit facts (*Tobin v. Minister for Defence* [2018] IECA 230, para. 51), documents might not be “necessary”. However, not all potential alternatives would be appropriate *e.g.* if it involved subpoenaing many witnesses and introducing many documents into evidence ‘on the blind’ (*Tobin*, para. 7.14).

8. Second, where there is no proportionality between the extent of discovery and ‘the degree to which the documents are likely to advance the case of the

applicant’, it will not be necessary (*Framus v. CRH plc.* [2004] 2 IR 20, para. 76).

9. Third, discovery may be refused where it is likely that the documents will contain confidential information. In *Telefonica v. Commission for Communications Regulation* [2011] IEHC 265, Clarke J. noted that confidentiality will not be a bar to discovery of relevant documents but “the court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attached [thereto] (para. 3.3; also *Tobin*, para. 7.10).

10. Though it remains the default (*Tobin*, para.7.16, 7.21) a ‘relevant’ document is not always a ‘necessary’ document (*P.J. Carroll & Co. Ltd*, para. 18; *Dome Telecom Ltd v. Eircom Ltd* [2008] 2 IR 726, para. 100; *Tobin*, para. 7.13). However, the two concepts are related; in *Boehringer Ingelheim v. Norton (Waterford) Ltd* [2016] IECA 67, the Court of Appeal held that where there was potential overlap, any decision on necessity should take into account ‘the nature and potential strength of the relevance’ of the document (para. 40).”

The “information deficit” and the jurisdiction judgment

33. Ryanair complains generally of its “information deficit”; it knows that screen-scraping is taking place, but cannot determine definitively how it is carried out or by whom. It maintains that the very nature of the defendant’s activities is clandestine, and that this should incline the court to take a broader view of what should be discovered. As Ryanair puts it in its initial letter to Vola requesting discovery of 9th October, 2020: -

“In all the circumstances there is, at best, confusion or, at worst, concealment on the part of the defendants as to the relationship(s) between Vola, Ypsilon, and Flightbox and a dispute as to what services Ypsilon provides, in general, and whether it has provided any services to Vola and the extent to which Flightbox is involved. Little or no attempt has been made by the defendants to actively plead as to their role in, or knowledge of the activities of which Ryanair complains. The dispute remains stuck at Ypsilon seeking to be let out of the proceedings, on foot of assertions made in correspondence which do not correspond with Vola’s averments.”

34. In his oral submissions, counsel for Vola took fundamental issue with the prosecution that there was an evidential deficit on the part of Ryanair as to the manner in which its website is accessed. He referred at length to the jurisdiction judgment, in which Ní Raifeartaigh J had to decide whether or not the court had jurisdiction to entertain Ryanair’s claim against Vola. Ryanair’s claim as advanced for the purpose of that application was premised on the proposition that Vola was using the Ryanair website and must therefore have gone through the process of accepting Ryanair’s terms and conditions, which contained a jurisdiction clause in favour of Ireland. Vola contended however that it “did not in fact interact with the Ryanair website in any way, but rather sourced Ryanair data from third party service providers who obtained this information legitimately from Ryanair”. [Paragraph 3 judgment].

35. It is suggested by counsel for Vola that this was “the challenge that Ryanair sought to overcome in this application”. It is apparent from the judgment that the court was conscious of the difficulties of assessing fact in an application to determine jurisdiction:

“5. The court is mindful that it must be careful not to conflate issues of jurisdiction and substance; and that it should not go beyond the appropriate parameters of fact-finding when the issue arising is one of jurisdiction. Nonetheless, it seems to me that this is one of those cases in which it is inevitable that the Court must engage in some degree in fact-finding before applying the relevant principles of law to the facts so found. The facts include some technical matters relating to the Ryanair and Vola websites”.

36. The contention of Vola is that the judgment of Ní Raifeartaigh J demonstrates the level and extent of evidence put forward on behalf of Ryanair to establish that screen-scraping had taken place, and that Ní Raifeartaigh J accepted on the evidence that this process had been undertaken. Counsel sought to demonstrate this by referring to the detailed evidence referenced in the court’s judgment which was proffered, successfully as it happened, to establish that screen-scraping had taken place.

37. The findings of fact made by Ní Raifeartaigh J are set out at paras. 58 to 63 of her judgment. She prefaces her findings by stating that “...I have sought to make only such limited findings of fact as are necessary to determine the issue relating to jurisdiction on this motion and not to enter upon the substantive matters in the case” [Paragraph 57]. The court went on to find that: -

“58...I am satisfied on the balance of probabilities for present purposes that Vola does not typically make bookings through third parties and that a Vola customer would typically book through the Vola website, which operates in the manner described by Ms. Daly [a senior project manager of Ryanair Labs Limited, who swore an affidavit outlining a test she did involving Ryanair’s and Vola’s websites], who made an experimental or test booking through the Vola website and provided descriptive and documentary detail of this.

...59. I am also satisfied that the technical traces left by Ms. Daly's experimental booking through the Vola website show that the Vola website *does* interact with the Ryanair website when dealing with a booking. These 'technical traces' were described in detail by Mr. Hurley, Chief Technology Officer with Ryanair as described above and included: (a) the engagement of the Ryanair.dotRezAPI during such a booking; (b) the engagement of a Ryanair server during the booking; (c) the Ryanair 'web logs' evidence; (d) the IP address recorded by Skyspeed; and (e) the credit card information."

38. In her conclusions, Ni Raifeartaigh stated as follows:

"83...I am of the view that although the evidence and facts are slightly different to those pertaining in the *On the Beach* case, the reasoning of the High Court (Laffoy J.) in that case (approved on appeal by the Supreme Court) applies with equal force, and the conditions of Article 25(1)(c) [of Regulation (EU) 1215/2012, dealing with 'prorogation of jurisdiction'] are satisfied i.e. there was in this case an agreement as to jurisdiction between the parties which was effected through a click-wrapped agreement, this being a form of agreement which accords with a usage in international trade or commerce of which the parties are aware or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contacts of the type involved in this particular trade or commerce."

39. Counsel for Vola submitted that Ryanair would at trial want to prove that the contract for which it contended, and which it alleged the defendants had breached, had been concluded; that Vola had access to the Ryanair website and thereby agrees to be bound by its terms and conditions, which it then proceeded to breach. Counsel submitted that such evidence had already been led in the jurisdiction application, and

had convinced the court not to accede to Vola's application. In such circumstances, there were alternative methods of proof of its case available to Ryanair, such that the probative value of the documents sought by Ryanair in the present application were "minimal, ...negligible, or largely irrelevant given the directive evidence that they have that they can lead". [Transcript, day 1, p.119, lines 18 to 20].

40. I mention this submission as a matter on which counsel dwelt in some detail, as underpinning a general submission that much of what was sought by Ryanair in discovery, while it might be relevant, could not be deemed to be necessary in accordance with the principles referred to at para. 32 above and which were accepted by Vola.

41. Before embarking on an analysis of each category, I should say that, in all four motions, the parties sought to achieve a measure of agreement. The categories ultimately considered by the court either had been modified from the original request in correspondence, or could not be agreed at all. Sadly, there were very few instances in which the parties reached agreement as to the order to be made.

A. RYANAIR'S MOTION AGAINST VOLA

Category 1

1(a) All agreements including any and all agreements which were in place/force, either expressly, or impliedly or by practice between Ypsilon and Vola, and/or FlightBox and Vola, in relation to the provision of products and/or services by Ypsilon to Vola, and/or by FlightBox to Vola, for use, or used, in connection with Ryanair flights in the period 1 September 2017 (beginning of month plenary summons issued) to date; and

(b) all documents relating to any assistance and/or facilitation by Ypsilon of:

(i) Vola's activities vis-à-vis Ryanair; and/or

(ii) FlightBox's interaction(s) with Ryanair's website.

42. The reference to "Flightbox" in the categories sought is due to the contention of Ypsilon, as expressed at para. 4.1 of its replies to particulars of 20th December, 2019, that: -

"The second named defendant does not provide any services to the First Named Defendant, whether of the type coming within the category considered in para. 1.1 above or at all. To the best of the Second Named Defendant's knowledge, a Polish registered company, Flightbox is a provider of certain IT-related services to the First Named Defendant".

43. In a letter of 28th January, 2020 from Ypsilon's solicitors, Ypsilon contended that it had never provided services to Vola; that services provided for Flightbox to Vola were a matter to be raised with those parties; and that Flightbox was a 100% subsidiary of Ypsilon at that time. In his affidavit of March 2021 filed in response to the Ryanair motion against Ypsilon, Mr. Hans-Joachim Klenz, Chief Executive Officer of Ypsilon, avers at para. 12 that "...Ypsilon is in the process of divesting Flightbox. I say and believe that the sale to a third party will be completed imminently". He avers that the companies are "entirely separate legal entities" and states that he is advised that Ypsilon "does not have access to Flightbox's documents or information".

44. In relation to para. 1(a) above, the documents sought are clearly relevant to the issues between the parties. Indeed, this is not seriously disputed by Vola, whose main objection is to the requirement that discovery be made "to date"; Vola's position is that discovery of documents cannot be sought beyond the date upon which Ryanair set out its case in the amended statement of claim, and proposes making discovery of this

category to 31st March, 2019, which is the last day of the month in which the amended statement of claim was served.

45. In my view, it is more appropriate that discovery be ordered to the date of swearing of the affidavit of discovery. The amended statement of claim makes it clear that Ryanair complains, not just of historical matters, but of an ongoing state of affairs. Paragraphs 3 to 15 of the reliefs in the statement of claim seek either prohibitory or *quia timet* injunctions in relation to what Ryanair claims is continuing wrongdoing on behalf of the defendants, or wrongdoing which it is reasonable to anticipate will occur in the future. I think that, in these circumstances, the cut-off date proposed by Vola is unrealistic and would not provide a full picture of the commercial relationship – if any – between Ypsilon and Vola, or between Flightbox and Vola.

46. As regards the documents sought at para.1(b) above, there has been no agreement or amendment by the parties to this category. While Vola refuses to make discovery of the category as sought, it has offered to disclose “technical instructions provided to and/or used by Vola to avail of services provided by Ypsilon and/or Flightbox vis-à-vis Ryanair flights in the period 1 September, 2017 to 31 March, 2019”. It contends that the category as defined by Ryanair is impermissibly broad, and objects in particular to use of the term “relating to” as constituting a general discovery and what amounts to a “fishing expedition”.

47. In his affidavit of 24th February, 2021 resisting the discovery application, Daniel Truica, the “Administrator” of Vola, at para. 8 of his affidavit avers as to the practical difficulties caused by the very general requests for discovery as follows: -

“(a) Vola’s main application has over a dozen databases, with a total size of circa. 1TB (terabytes). There are an additional circa. 1.2TB of files and documents, add to which mailbox data of around a further 1.5TB.

- (b) Vola does not have one central database which can be searched easily.
- (c) Vola's IT system/filing system has changed over the years such as for files, documents, and mail system. Vola has been migrating its self-hosted environment to the cloud. Historic data may not have been retained during such changes.
- (d) It would be difficult to gather the potential documents from these different sources, and the extent of this would depend on the breadth of 'query' of the discovery involved. The more general and open the 'query', the greater the likelihood to generate thousands of 'results'. This is particularly so where, 'all documents relating to' some proposition are sought.
- (e) Databases are located in different countries, particular Vola's main application, files, documents, and emails.
- (f) Potentially relevant documents may be stored across a range of departments and separate companies/external services."

48. Ryanair has a particular difficulty with the offer by Vola of "technical instructions" only. Mr. McNamara contends at para. 24 of Ryanair's grounding affidavit that it is "not clear what Vola intend to be covered by the vague term 'technical instructions', although this would appear to be narrower in scope than 'documents' as defined by Ryanair".

49. In the jurisdiction application, Mr. Truica in his grounding affidavit of 6th February, 2018 on behalf of Vola stated unequivocally that "...Vola has not and is not engaged in any 'screen-scraping' of Ryanair's website. Vola has no interaction with Ryanair's website". He went on at para. 8 of that affidavit to aver that "...Vola relies on information provided by legitimate third-party providers, who provide details of flight availability and information for a whole range of airlines, including Ryanair, via

API arrangements which Vola has in place with these third-party providers. These third-party providers are (up until very recently) Travelfusion Ltd (an entity based in the UK) and Ypsilon AG (an entity based in Germany) ...”. These averments led to Ypsilon being joined to the proceedings by Ryanair. Vola therefore denies screen-scraping, but maintains that it avails of third-party IT services provided by Ypsilon. In replies to particulars by Ypsilon, that company denies providing any services to Ryanair, but confirms that Flightbox is a provider of IT services to Ryanair.

50. This, then, is the net position in which Ryanair seeks the documents in Category 1(b). Each of the defendants denies screen-scraping, although Vola accepts that Ypsilon provides IT services to it; it appears from the evidence before the court as to the Polish proceedings that Flightbox does carry out screen-scraping in relation to the Ryanair website, although it is not at all clear that it does so at the behest of Vola. It is clear from the evidence proffered to the court during the jurisdiction motion that Ryanair has been able to find out much about the process of extracting information from its website from its own researches. However, it seems equally clear that it requires further documentation from the defendants to establish who is conducting the process, and how exactly it is done.

51. I accept therefore that Ryanair is entitled to documents from Vola which touch upon the question of whether, and if so the extent to which, Ypsilon is involved in Vola’s activities in relation to Ryanair and/or Flightbox’s interaction with Ryanair’s website. However, Ryanair’s formulation of the category is in my view too general. Almost any document in Vola’s possession, power or procurement relating to Vola, Ypsilon, or Flightbox would fall within the required category. I am also mindful that some of the other categories sought from Vola by Ryanair, and Category 2 in particular, may overlap with Category 1 and help to provide Ryanair with the

documentation it seeks in order to form a full picture of how its website has been accessed.

52. The Vola formulation of the category appears to me to be more limited, precise and to correspond more closely with what is required to serve Ryanair's purposes. However, I accept that "technical" is a vague term which lacks clarity. If the intention is that instructions which relate to retrieval of information be discovered, the formulation "technical or operational instructions" would be clearer.

53. I accept also that not to impose a temporal limitation on this category of discovery would be to impose an unduly onerous burden on Vola. Accordingly, I will order that a similar limitation as ordered in respect of Category 1(a) be ordered in respect of Category 1(b), *i.e.* from 1st September, 2017 to the date of swearing of the affidavit of discovery. An order will therefore be made in respect of Category 1(b) as follows: -

"All documents comprising or containing technical or operational instructions provided to and/or used by Vola to avail of services provided by Ypsilon and/or Flightbox vis-à-vis Ryanair flights in the period 1st September, 2017 to date".

Category 2

In the case of 25 searches for Ryanair flights displayed on Vola's website and bookings thereof (which are averred by Vola to be representative of displays, searches and bookings of Ryanair flights on Vola's website between 19 September 2017 to date):

- (a) all 'public' and 'internal' screenshots of each element of those searches and bookings, recording all options available;

(b) all documents relating to the interactions occurring between Vola's and Ryanair's website, Ypsilon and Ryanair's website and/or third-parties and Ryanair's website, including but not limited to documents relating to instances where Ryanair's TOUs were encountered by Vola, Ypsilon or third-parties;

(c) all documents relating to the display of those Ryanair flights on Vola or Ypsilon's website, or on their automated systems or software, or on the website or automated systems or software of any third-party involved in the display of search for or booking of those flights, including but not limited to documents relating to instances of encountering, taking, using, copying, adapting, making available, extracting, (re)-utilising or caching of the whole or part of Ryanair's website or data; and

(d) if not caught by (a), (b) or (c), all documents relating to the information sent to Ryanair, including but not limited to the contact details for customers, during the display of, search for, and booking of those flights.

54. This category seeks documents held by Vola in relation to Ryanair flights booked through its website. Originally, Ryanair sought discovery in relation to fifty samples; this was subsequently reduced to twenty-five. It is envisaged that the samples would be supported by an averment by the Vola deponent that the samples were appropriately representative. Ryanair suggests that the category is directly relevant to a number of pleas advanced by it against Vola and is necessary to allow it to fully advance its claims. Sub-category (a) is alleged to be necessary to establish the information displayed publicly to customers and internally to Vola when a customer searches for and books a Ryanair flight on the Vola website, to demonstrate the

ancillary services offered to customers by Vola. In his grounding affidavit for the motion, Mr. McNamara expresses the belief that the category “will also establish that Ryanair’s intellectual property is wrongfully taken on the Vola website”.

55. In relation to Category 2(b) Ryanair contends that these documents are directly relevant to the question of whether the Ryanair website terms of use (“TOUs”) are binding on Vola. It is contended that Vola claims that TOUs are not encountered by Vola or Ypsilon when a Ryanair flight is displayed on the Vola website, and Vola cannot therefore be deemed to accept the TOUs, so that there is no contract between Vola and Ryanair. The documents are therefore necessary for Ryanair to ascertain the manner in which its TOUs are encountered, and by which party.

56. The documents in Category 2(c) are directed towards Ryanair’s pleas that its copyright and database rights have been breached by Vola. Ryanair contends that it requires the documents to understand the exact process that takes place when its data is reproduced on Vola’s website, and that this information is within the knowledge of Vola.

57. Mr. McNamara avers in his grounding affidavit that Category 2(d) arises in circumstances where there are documents relating to information sent to Ryanair when the searches and bookings occur which are not otherwise captured by sub-Categories (a), (b) or (c). He contends that Ryanair asserts that where customers book Ryanair flights through the Vola websites, Vola fails to provide Ryanair with the correct email address for that passenger, thereby causing damage to Ryanair. He acknowledges that Vola denies this plea. It is asserted however that the sub-categories are directly relevant to an issue in dispute between the parties and necessary to allow Ryanair to demonstrate that Vola “routinely fails to provide Ryanair with the correct email addresses as provided by passengers” [para. 33].

58. In its letter of 19th November, 2020 responding to Ryanair’s discovery request, Vola suggested a sample of one search. Ryanair, in its letter dated 17th September, 2020, offered to reduce the sample to twenty-five searches. In Mr. Truica’s replying affidavit of 24th February, 2021, it was suggested that “...the request to generate documents for the purpose of discovering them with the request for an averment as to samples being representative is simply not a request for discovery pursuant to Order 31 RSC...” [Paragraph 18]. Vola’s position is that the discovery request is inappropriate. There was also a difference between the parties as to what discovery would entail, particularly in relation to the meaning of “internal” screenshots. In its letter of 19th November, 2020, it asserted that there were no “internal” screenshots for Vola to disclose when a passenger makes a booking on the Vola website, as these processes are all automated. While Ryanair does not necessarily accept that this is so, Ryanair’s position is as expressed by Mr. McNamara at para. 34 of his affidavit, *i.e.* that “...the extent to which such ‘internal’ documents exist will be a matter for Vola when complying with any discovery order...”.

59. Counsel for Vola questioned the necessity for this documentation, suggesting that the process by which Ryanair was able to satisfy the court in the jurisdiction application as to the existence of a contract sufficient to establish the jurisdiction of the Irish courts amply demonstrated that Ryanair already has sufficient information in relation to the operation of the Vola website and how it interacts with the Ryanair website, and that it is in a position to prove its case by virtue of the sort of evidence adduced in that application. In particular, counsel submitted that the court in the jurisdiction application was satisfied that acceptance of the terms of use by Vola had been established for the purpose of that application. He urged that the necessity for this category of documents had not been demonstrated. However, he submitted that, if

the court were minded to order discovery in the terms of Category 2, it should be limited to one transaction rather than twenty-five or fifty; it was suggested that the court had not been provided with any meaningful explanation as to why more than one transaction was necessary.

60. While it may be that Ryanair can go a long way through its own researches towards establishing the way in which the Vola website interacts with the Ryanair website, I think it would be unreasonable, in the context of a full plenary action, to deprive Ryanair of documentation which would allow it to fully understand the nature of that interaction, and thus either confirm its suspicions, or demonstrate that its suspicions were unfounded. As Ryanair points out, Vola is solely in possession of the documentation which will demonstrate the workings of the interface between its website and that of Ryanair. I am accordingly of the view that the documentation is relevant and necessary for the fair disposal of the issues.

61. I do not accept that twenty-five such searches are necessary. However, neither do I think that one sample only is sufficient, even with an averment from a deponent that the sample is representative. I think that Ryanair is entitled to see the operation of the process a number of times to satisfy itself that operation of the Vola system is consistent. In my view, six samples should suffice, and I will so order. I am also of the view that the temporal limit suggested by Ryanair is appropriate.

62. It follows from the foregoing that I do not consider that the use of sample documentation is inappropriate. It is used to reduce the amount of documents which would otherwise be discoverable, and is in ease of both parties. It does not require the creation of new documents; I do not accept that a screenshot of an existing record is a “new document” in any meaningful sense. If it is not possible for Vola to produce an

“internal screenshot”, or any other document, it can explain by an appropriate averment why this is so.

Category 3

Save for documents of which the documents discovered under category 2 are a sample, all documents relating to:

(a) the failure to transfer to Ryanair’s website, customers searching for or booking Ryanair flights on Vola’s website, including but not limited to:

(i) failure to offer those customers ancillary products and services (*i.e.* products or services, other than flights) available on Ryanair’s website;

(ii) provision to those customers of travel insurance unconnected with that available on Ryanair’s website; and

(iii) failure to provide Ryanair with the actual contact details of the customer booking on Vola’s website;

(b) the interactions which occur between Vola and Ryanair’s website, Ypsilon and Ryanair’s website, and/or third parties and Ryanair’s website, when Ryanair flights are displayed on, searched for or booked on Vola’s website, including but not limited to all documents relating to the:

(i) accessing, entering on, using or browsing of Ryanair’s website;

(ii) display of Ryanair TOUs beside click acceptance boxes on webpages;

(iii) accessing of Ryanair’s website via the front-end; and

(iv) accessing of Ryanair’s website via the back-end;

(c) the processes involved in the display of Ryanair data on Vola or Ypsilon’s website or on their automated systems or software or on the website or automated systems of third parties, when Ryanair flights are displayed, searched for or booked on Vola’s website, including but not limited to all documents relating to the encountering, taking, using, copying, adapting, making available, extracting, (re)-utilising or caching of the whole or part of Ryanair’s website or data;

(d) the volume/number of searches for Ryanair flights conducted, and/or the volume/number of Ryanair flights booked, through Vola’s and/or Ypsilon’s website(s) or on their automated systems or software or on the website or automated systems of third parties.

63. In his grounding affidavit, Mr. McNamara at para. 39 describes this category as “complementary to Category 2”, and states that the reasons why the sub-categories are relevant to Ryanair’s case and necessary for the advancement of same are “broadly similar” to the reasons advanced in respect of Category 2. It is suggested that the documents in Category 3(a) will demonstrate that Vola “deliberately retained customers on its website when those customers booked a Ryanair flight on Vola’s website...this will demonstrate the ancillary services that are offered to customers by Vola, and which Ryanair is thereby prevented from offering” [Paragraph 40]. It is suggested that the sub-category at 3(b) is “directly relevant to the question of whether the Ryanair website TOUS are binding on Vola” and necessary so that Ryanair “can ascertain when and the manner in which its TOUs are encountered and by which party, in the context of bookings of Ryanair flights with Vola...” [Paragraph 41]. Mr. McNamara refers to “an evidential deficit regarding the mechanisms by which Ryanair flights end up on Vola’s website”, and that such documents are necessary “in

order to clarify the position and to allow Ryanair to advance its claim for breach of contract, among others” [Paragraph 41].

64. Category 3(c) concerns Ryanair’s pleas that Vola breaches Ryanair’s copyright and database rights. Once again, it is suggested that Ryanair “is hindered by the same evidential deficit that is described above in relation to Category 3(b)” [Paragraph 42]. It is suggested that, in the absence of this information, Ryanair is “unable to conclusively prove that Vola and/or Ypsilon and/or a third party accesses Ryanair’s website and takes its data” [Paragraph 42]. In relation to Category 3(d) these documents “concern and will evidence the extent to which Ryanair’s rights have been infringed by Vola...”, and information concerning the amount of Ryanair flights that are searched for, displayed on or booked through the Vola website, and the number of incidences in which same is conducted through the automated processes or software of Vola, Ypsilon and/or third parties “...is directly relevant to assessing the level of damage suffered by Ryanair and is necessary in circumstances where Ryanair does not currently possess information to ascertain same” [Paragraph 43].

65. Vola had several objections to discovery as per Category 3. They characterised it as a “general request for discovery”, and objected in particular to the use of the words “relating to” rather than “evidencing and/or recording”. They also complained that the category had no temporal limitations. At para. 26 of his replying affidavit, Mr. Truica stated that the category “would respond to an indeterminate volume of documents manifestly disproportionate to any litigious advantage it would give Ryanair”. At para. 27, he averred that “[d]iscovery and production of such documents would add enormously to the cost of these proceedings without contributing documents probative, materially or at all, of the matter in dispute and is consequently declined in the form sought”.

66. In its solicitor's letter of 19th November, 2020 responding to the initial request for discovery on behalf of Ryanair, Vola proposed "a without prejudice experts' meeting, the purpose of which would be to produce an agreed note which explains to the Court the necessary mechanics and functionality of the Vola booking system that are relevant to the issues in this case. If your client agrees, in principle, to this proposal, we can liaise further to agree the agenda and scope for such a meeting". In its solicitor's letter of reply of 17th December, 2020, Ryanair stated that it was "agreeable in principle" to the proposal of an expert's meeting on the basis of an agenda that would include the full scope of issues set out in sub-Categories 3(a) – 3(c), but only if the meeting were to be on an open basis, so that if a joint report could not be agreed, Ryanair's experts could produce their own report to the court. The suggestion of an open meeting was rejected by Vola's solicitors in their letter of 21st January, 2021 as "inappropriate and unacceptable".

67. It seems to me that the documents sought in Category 3(a) are particularly problematic. It has no temporal limitations at all, and in using the formulation "relating to" rather than something more specific, it invites a discovery that would be impossibly broad. This is reinforced by the lack of a temporal limitation. The documents set out at Category 3(a), in particular at (i) and (iii) are expressed in negative terms, which seems to me to be unworkable. The documentation is sought for much the same reasons as were advanced in relation to Category 2, and for the same purposes. It is difficult to see much or any difference between the documents sought at Category 2(b) and Category 3(b), other than that Category 3(b) is more specific.

68. Sub-Categories (a), (b) and (c) are all directed towards documents which would establish how Vola accesses Ryanair's website and extracts details from it,

whether with the assistance of Ypsilon, Flightbox or some other third party. Much of this can be established by Ryanair from its own researches, and from the documentation which it will receive from the orders which I propose to make in relation to Categories 1 and 2. The interrogation of the exact methodology by which the Ryanair website is accessed would in my view be better interrogated by a meeting of experts and production of an agreed note as to how this is done. As I have commented in previous judgments in this case, it will be necessary that there be maximum engagement between the technical experts on both sides in order to establish the various matters which are necessary for a true understanding of the case, and which may be necessary for Ryanair to be in a position to prove the allegations it makes, if those allegations are founded in fact. Engagement between experts is in my view a far more efficient and cost-effective way of bringing clarity to the technical issues, rather than ordering voluminous amounts of non-specific documentation which is likely to add great cost to the proceedings without necessarily shedding much light on the technical issues.

69. However, I do not consider that I can order an expert's meeting in the context of the current application, which concerns discovery only. The parties should give some thought as to ways in which an appropriate exchange between experts could be structured, and I will expect progress to be made in this regard, failing which I will consider the exercise of such powers as the court has to bring about as much agreement as possible between the parties as to the technical issues.

70. For the moment, I am not of the view that any discovery should be ordered in respect of Category 3(a), (b) or (c). As regards sub-Category 3(d) Vola's position is that this sub-Category is "not relevant... as it concerns assessing the level of damage allegedly suffered by Ryanair...". Vola insists that, as the present module concerns

liability only, this sub-Category is not appropriate. Notwithstanding this, I note that, in their solicitor's letter of 19th November, 2020, Vola offered "to set out on affidavit the number of Ryanair flights booked by customers using Vola's services in the period 1 September 2017 to 31 March 2019".

71. In its reply of 17th December, 2020, Ryanair's solicitors suggested a modification of Vola's offer. In the letter of 21st January, 2021, Vola's solicitor did not address this modification. Accordingly, Ryanair now seeks the category as claimed in its original letter seeking discovery of 9th October, 2020.

72. Vola offered to set out on affidavit the number of Ryanair flights booked by customers using Vola's services in the period 1 September, 2017 to 31 March, 2019. Ryanair requires that the volume/number of searches for Ryanair flights conducted be included in this category, as it states that the sub-category will evidence the extent to which Vola infringes Ryanair's rights, and is necessary to determine the amount of Ryanair flights that are searched for, displayed on or booked through the Vola website, and the number of incidences in which the same is conducted through the automated processes or software of Vola/Ypsilon/third parties. Vola's present position is that this relates to the level of damage, rather than the causation of damage, and as such is not the subject of the present module. It does seem to me that, notwithstanding that the present module is concerned with liability rather than quantum, it would be helpful to Ryanair's case to be able to demonstrate the extent to which Ryanair flights are booked through the Vola website, whatever the technical details of how that is done. I therefore think it would be appropriate if discovery were to be made of "the volume/number of Ryanair flights booked through Vola's website in the period 1 September 2017 to date". I do not think that documentation in relation to the

volume/number of searches for Ryanair flights is necessary for the fair disposal of this particular module.

Category 4

All documents that evidence and/or record:

(a) the (alleged) waiver by Ryanair, of its entitlement to rely on its TOUs against Ypsilon and/or Vola, including but not limited to all documents that evidence and/or record:

(i) Ryanair’s (alleged) knowledge of the activities of Vola between 2010 and 2017, in relation to its flights;

(ii) Ryanair’s (alleged) demand of Vola to cease the activities complained of in the proceedings;

(iii) Ryanair’s letter(s) dated 19 September, 2017, putting Vola on notice of Ryanair’s Terms of Use and offering it a licence to use Ryanair data for price comparison purposes only; and

(b) if different, the (alleged) estoppel of, or lack of entitlement on the part of Ryanair to rely on its TOUs in support of the equitable relief claimed.

73. In its initial letter requesting discovery, Ryanair states that this category derives from the pleadings and from Vola’s pleas of waiver and estoppel on the grounds of laches, delay or waiver. As the letter puts it “...Vola maintains that Ryanair was aware of Vola’s activities since 2010 but only called on it to cease those activities in 2017...”.

74. After an exchange of correspondence, Vola indicated that it was agreeable to discover the category as originally sought by Ryanair subject to:

“(a) The category being limited to documents that ‘evidence and/or record’ such documents created prior to 29 September 2017 (date of plenary summons).

(b) The category being limited to documents that ‘evidence’ such documents created after 29 September 2017.”

75. Vola submits that it would have to assess all documentation created after the issue of proceedings to establish whether they record waiver by Ryanair of its alleged entitlement to rely on its TOUs, and it would be a waste of resources given that litigation privilege would likely apply to such documents, and that discovery would be manifestly disproportionate to any litigious advantage to Ryanair. As against that, Ryanair does not agree with Vola’s suggestion to limiting discovery to documents that “evidence” such documents created on or after 29th September, 2017 “...as it would permit Vola to discover documents to evidence its position while withholding documents that record the position but do not evidence Vola’s case...”. I am not sure that this justification stands up to analysis; nonetheless, it does not appear to me that there should be any difference between the treatment of documents prior to the date of the plenary summons and thereafter. While it may be the case that litigation privilege would attach to some or all of the documents which came into existence after the date of the plenary summons, this is not a matter which should prevent their discovery.

76. There will therefore be discovery of the documents as set out in Category 4 subject to the categories set out at para. 74 above.

Category 5

Save to the extent already discovered under another category, all documents relating to or that will be relied on by Vola in support of:

- (a) Vola’s plea that Ryanair’s website is not capable of constituting the ‘property’ of Ryanair (Defence, para. 79);**
- (b) Vola’s plea that Ryanair’s website and/or Ryanair’s database, tables and/or compilations, do not constitute original databases, or copyright works (Defence, para. 30);**
- (c) Vola’s plea that Ryanair’s website and/or Ryanair’s database, tables and/or compilations, do not constitute databases and/or that Ryanair is not the owner, or is not substantially invested therein (defence, para. 36);**
- (d) any taking, copying, adapting, making available, extraction, caching, utilising of the whole or part of any Ryanair element, contents, website, data, information, database;**
- (e) Vola’s plea that Vola is not making any substantial portion of the contents of any works or insubstantial parts of any works available to the public, or that any such activity does not conflict with the normal exploitation of such works and/or prejudice the interests of the maker or maker(s) of any such work, nor of Ryanair (Defence, para. 39).**

77. Ryanair states that sub-Category (a) is directly relevant to Ryanair’s claim for conversion and trespass to goods. Categories 5(b) – (e) are stated to be “necessary to permit Ryanair to address Vola’s defences to Ryanair’s claims of breach of copyright and database rights, to address its blanket assertions that the Ryanair Website does not constitute an original database or copyrighted work, and its allegation that Ryanair is not the owner of its website or has not substantially invested therein”.

78. In its solicitor’s letter of 19th November, 2020, Vola states as follows: -

“Vola by its pleading has put Ryanair on proof that it enjoys the copyright and database rights it asserts. Ryanair makes an impossible ask of Vola in this request. Ryanair’s replies to particulars dated 26 April 2019 assert that various matters/facts that go to the root of whether Ryanair enjoys legal protections it contends for are a matter for evidence (see paras 4 to 7). Given that Ryanair refuses to commit to what its pleaded website and alleged databases are and the facts that might give rise to legal rights in respect of them, Vola can for the present only put Ryanair on proof and cannot be expected to identify documents that evidence a negative, let alone documents ‘relating to’ such negatives.”

79. Ryanair denies that it is requiring Vola to “evidence a negative”, but rather is “requesting that Vola discover documents that relate to its denials of various assertions by Ryanair...”.

80. Vola makes criticisms of this category which it makes in relation to other categories: the use of the term “relating to” rather than “evidencing and/or recording”, the absence of temporal limitations etc. Vola specifically makes the point that the discovery of documents relating to negative propositions is “utterly unworkable”.

81. It seems to me that Vola is justified in its assertion that its pleading has put Ryanair on proof of various legal assertions, and that it is unreasonable to require Vola to identify documents which challenge the plaintiff’s assertions. The issue raised in relation to whether or not pleas are sustainable in law is not one that is susceptible to discovery. Ryanair will have to establish its contentions in the normal course of proving its case, and Vola cannot be required to discover documents which merely seek to put Ryanair on proof of its causes of action. I do not propose therefore to order discovery of any of the documents in Category 5.

Category 6

Save for documents of which the documents discovered under category 2 are a sample, all documents relating to:

- (a) the use by Vola of Ryanair's trademarks, on its website;
- (b) Vola's trade, and the goods or services offered during the course thereof;
- (c) steps taken by Vola in the course of its trade to:
 - (i) make clear to visitors of its website that there is no material link, association or affiliation between Vola and the goods or services sold on its website, and Ryanair and the goods and services sold on the Ryanair website; and/or
 - (ii) describe itself, in any way, as linked to/associated with/affiliated with/agent for/representative of/acting for/authorised by, airlines (including Ryanair);
- (d) instances of visitors to Vola's website who search for, or book Ryanair flights thereon:
 - (i) linking Vola's products or services with those of Ryanair;
 - (ii) associating or affiliating Vola's products or services with those of Ryanair;
 - (iii) understanding Ryanair to have authorised Vola to sell Ryanair products or services on Vola's website;
 - (iv) understanding to have searched for or booked flights with Ryanair or Ryanair's website when, in fact, they had booked on Vola's website; or

- (v) discussing Ryanair, or Ryanair’s products or services with Vola (including the quality thereof, the fees charged therefor, the (in)ability to contact or be contacted by Ryanair directly, the failure to be contacted in relation to Ryanair flight details or changes thereto, the (in)ability to purchase the other goods and services apart from flights available on Ryanair’s website *etc.*), including but not limited to all customer enquiries, complaints, submissions, comments, suggestions *etc.* on the items above, and Vola replies thereto;**
- (e) the prices charged by Vola for Ryanair flights (including the charging by Vola of levies on and/or fares for Ryanair flights greater than the fares for which those flights are available on Ryanair’s website);**
- (f) the obstruction of and/or failure to facilitate direct contact between Ryanair and its passengers; and**
- (g) the failure to offer Ryanair’s other goods and services (apart from flights) available on Ryanair’s website, on Vola’s website.**

82. As with other categories, Vola complains that this is “a general request for discovery”, and objects to the use of the phrase “relating to” rather than “evidencing and/or recording”. It also complains of the lack of temporal limitations, and contends that the category as drafted “...would respond to an indeterminate volume of documents, manifestly disproportionate to any litigious advantage it would give Ryanair...”.

83. In relation to sub-categories (a) to (c) in particular, the point is made by Vola that discovery is not Ryanair’s only means of obtaining documents as Ryanair “has at all times been able to carry out (and has carried out) test bookings of its flights using

the Vola website...”. At paragraph 46 of his replying affidavit, Mr. Truica relies on the following paragraphs set out in Vola’s solicitor’s letter of 19th November, 2020: -

“Vola is an online travel agent. The scope of its trade and the goods (if any) and services offered in the course thereof is apparent from the website. The same is true as to any use by Vola of Ryanair trademarks on Vola’s website, steps taken to inform visitors of Vola’s website as to link, association or affiliation between Vola’s goods or services sold and Ryanair and goods and services sold on Ryanair’s website, or any self-description as to any link *etc.* for/by airlines.”

84. It seems to me that these complaints are justified. The sample documents discovered under Category 2 will reveal documentation which responds to these categories, and the level of documentation sought by Ryanair is too general and in all the circumstances is excessive. It is certainly the case that Ryanair can source documentation from its own researches, which it has done in the past. These comments are as applicable to Categories (e), (f) and (g) as they are to sub-Categories (a) to (c).

85. As regards sub-Category 6(d), in its letter of 19th November, 2020, Vola’s solicitors suggested that Vola would make discovery “of all customer inquiries, complaints, submissions, comments, suggestions and Vola’s replies created in the period 1 September 2017 to 31 March 2019 referring to confusion between Ryanair’s services and Vola’s services”. While this suggestion engages with the sub-categories sought by Ryanair at 6(d), the qualifying criterion of “confusion between Ryanair’s services and Vola’s services” is too vague and general. Ryanair maintains that it requires the documentation sought at sub-Category 6(d) “to establish that customers are likely to interpret Vola’s use of Ryanair’s trademark as being indicative of a

material link or affiliation between Ryanair and Vola and to prove Vola's breach of trademark". The Ryanair formulation of this category is more precise than the general category offered by Vola, and seems to me to be relevant and necessary for the fair disposal of Ryanair's case in relation to its allegation of abuse of its trademark. The sub-category requires a temporal limitation however; I propose to order discovery of sub-Category 6(d) subject to a temporal limitation of 1st September, 2017 to the date of swearing of the discovery affidavit. With this sole exception, I do not propose to order discovery or any other sub-category in Category 6.

B. RYANAIR'S MOTION AGAINST YPSILON

86. By notice of motion of 5th February, 2021, Ryanair sought discovery of six categories of documents against Ypsilon. As with the motion against Vola, the categories of documents sought were the subject of prolonged debate between Ryanair and Ypsilon in correspondence, affidavits and written submissions. Categories 2 to 6 were similar to Categories 2 to 6 in the Ryanair motion against Vola, and it will be possible to deal with those categories much more concisely due to the issues having been explored in the context of the motion against Vola.

87. Before dealing with the individual categories, Ypsilon had a number of general comments to make about Ryanair's approach to discovery. These comments were set out in the replying affidavit to Ryanair's application of Hans-Joachim Klenz, which affidavit appears to have been sworn in March 2021 – there is no date on my copy of the affidavit – but was filed in the High Court on 26th March, 2021.

88. At para. 11 of Mr. Klenz's affidavit, he objects to the fact that each of the sub-categories requires discovery of "all documents relating to" the various categories described. It was pointed out that the use of this phrase is generally discouraged in

commercial litigation, and draws attention to para 11.1.1 of the Commercial Litigation Association of Ireland Guide (November 2015) in this regard.

89. Mr. Klenz also objects, at para. 12 of his affidavit, to the fact that Ryanair “has sought to expand its request to include a request for documents relating to Ypsilon’s current subsidiary company, Flightbox, as well as other unnamed and unlimited ‘third parties...’”. (This would appear to place the affidavit as having been sworn prior to 4th March, 2021, as it was intimated in a letter from Ypsilon to Ryanair of 23rd March, 2021 that the divestment by Ypsilon of Flightbox had completed on 4th March, 2021). Mr. Klenz points out that neither Flightbox nor other third parties are parties to the present proceedings, and it is maintained that such documents are irrelevant to/not necessary for the resolution of the present disputes. Ryanair has in fact issued separate proceedings against Flightbox (Record No. 2020/1644), and Ypsilon’s position is that any request in relation to Flightbox can be captured pursuant to those proceedings. Mr. Klenz emphasises that Ypsilon and Flightbox “are entirely separate legal entities. I am advised that Ypsilon does not have access to Flightbox’s documents or information...” [para. 12].

90. At para. 14 of his affidavit, Mr. Klenz avers that Ypsilon is a German stock corporation (Aktiengesellschaft), and that he is advised that, as such, “...Ypsilon does not, and cannot, under German law, have access to Flightbox’s information (as sought in categories 1(a), 1(c) and 1(d)...”, and under German law is not permitted to request documents from another company save under certain exceptions, none of which are applicable in the present instance. It is also claimed that, as Flightbox is a limited liability company incorporated in Poland, any flow of information from Flightbox to Ypsilon would be governed by Polish law “...which, I am advised does not give Ypsilon an automatic right of access to Flightbox’s documents...”. Mr. Klenz says

that “these issues will be moot and should not trouble this Honourable Court after the sale of Flightbox is complete” [Paragraph 14].

91. Mr. Klenz also makes the point that certain categories sought include documents which may contain personal data, and obligation to make discovery of any such documents would be subject to Ypsilon’s obligations to comply with German law, which would require the consent of the data subjects. Mr. Klenz avers that this would be disproportionate in the context of the proceedings. [Paragraph 15].

92. Finally, Ypsilon complains of the fact that no temporal limitation has been applied to the categories, and “...as such these categories may encompass documents dating back to Ypsilon’s incorporation. No effort has been made by Ryanair to in any way limit the type of documents requested and such a request for discovery is wholly unnecessary and irrelevant in the context of the proceedings and would be unduly burdensome for Ypsilon” [Paragraph 16].

93. A major theme of Ypsilon’s submissions was the fact that it had stated in its defence that “it is specifically denied that the Second Named Defendant is engaging in the screen-scraping activity” [para. 6 of the defence]. At para. 4.1 of its replies to particulars dated 20th December, 2019, Ypsilon stated that: -

“The Second Named Defendant does not provide any services to the First Named Defendant, whether of the type coming within the category considered in paragraph 1.1 above or at all. To the best of the Second Named Defendant’s knowledge, a Polish registered company, Flightbox... is a provider of certain IT-related services to the First Named Defendant”.

94. During his oral submissions to the court, counsel for Ypsilon made repeated complaint about how the activities of Vola and Ypsilon had been conflated, with Ypsilon being “lumped in” with Vola and allegations being made against it as if it

were an online travel agent. Ypsilon's position is that it has been extremely clear about its lack of involvement with the allegations made by Ryanair, and that it is a matter for Ryanair to interrogate any services provided by Flightbox to Vola in the separate proceedings initiated by Ryanair, rather than treating Ypsilon and Vola and Flightbox as interchangeable entities, with Ypsilon having unfettered access to documentation of Flightbox, a completely separate entity.

Category 1

- (a) All documents relating to Ypsilon's corporate structure, including but not limited to all documents relating to any structural or functional links to Flightbox and/or companies/legal persons, together with Ypsilon's constitution, memorandums and/or articles of association, organisational documentation or German law equivalents thereof;**
- (b) All documents relating to the products and/or services offered by Ypsilon, including but not limited to all documents relating to the nature of the products and/or services offered by Ypsilon to the travel industry, brochures, catalogues, advertisements, and/or internal product descriptions, and all drafts thereof;**
- (c) All documents relating to the provisions of products and/or services by Ypsilon to Vola, and/or by Ypsilon to Flightbox, for use, or used, in connection with Ryanair flights, including but not limited to all agreements between Ypsilon and Vola, and/or Ypsilon and Flightbox, in relation to same; and**
- (d) All documents relating to any assistance and/or facilitation by Ypsilon of:**
 - (i) Vola's activities vis-à-vis Ryanair and/or;**
 - (ii) other operator(s)' (including but not limited to Flightbox's) interaction(s) with Ryanair's website.**

95. In relation to sub-Category 1(a) Ypsilon offered discovery of its constitution, memorandum and/or articles of association by its letter of 19th November, 2020. Ryanair refused this formulation on the basis that the proposal was too narrow. At para. 26.2 of his grounding affidavit of 5th February, 2021 in support of the motion, Mr. McNamara averred that the documents as originally sought “are relevant to the proceedings and are required as Ryanair has no other means of ensuring that it obtains full clarity on the triangular relationship between Vola, Ypsilon and Flightbox...”, although he goes on to acknowledge that Ypsilon, in its letter of 20th January, 2020 denied the existence of any “triangular relationship” and reiterated its proposal.

96. In relation to sub-Category 1(b), Ryanair claims that these documents are necessary “due to the furtive nature of the screen-scraping activities and because Ypsilon have not been forthcoming as to who and how the activities are provided...”. At para. 27 of his replying affidavit, Mr. Klenz avers that “...Ypsilon has been extremely forthcoming at every opportunity. Ypsilon could not have been more clear in its pleadings and correspondence that it is not involved in the activities alleged by Ryanair...at the outset of the proceedings Ryanair made no enquiries and engaged in no pre-action steps with Ypsilon before it joined it as a Defendant to the proceedings”.

97. In relation to sub-Category 1(c), Ypsilon proposed an alternative category of “all documents evidencing the provision or products and/or services by Ypsilon to Vola, for use, or used, in connection with Ryanair flights between 14 March 2019 [the date Ypsilon were joined to the proceedings] and 1 November 2019 [date of delivery of Ypsilon’s defence]”. This proposal was deemed by Ryanair to be unacceptable on the basis that “documents relating to the provision of products and/or services by Ypsilon to Flightbox in connection with Ryanair flights are relevant to the proceedings”.

98. In relation to sub-Category 1(d), Ypsilon in its letter of 19th November, 2020 refused this sub-category in its entirety and claimed that it was not based on the pleadings, and was irrelevant and duplicative of sub-Category 1(c). Ryanair disagreed with this, maintaining that the category stemmed directly from the pleadings “and is tied directly to the words used by Ypsilon in its Replies to Particulars, (namely its allegation that Ryanair is guilty of laches)” [para. 29.2 grounding affidavit].

99. As regards sub-Category 1(a) the category as sought is unacceptably wide, and would comprise all sorts of documents which have no relevance whatsoever to the dispute between the parties. Ypsilon informed Ryanair that Flightbox was wholly owned by Ypsilon, and of the imminent divestment of Flightbox. It subsequently confirmed by letter to Ryanair of 23rd March, 2021 that the divestment had completed. There is no doubt that Ryanair view this development in a sinister light: see the letter of 19th March, 2021 quoted at para. 23 above. Nonetheless, it seems to me that Ypsilon has made clear its link to Flightbox, so that documentation over and above that offered by Ypsilon does not appear to me to be relevant or necessary for the fair disposal of the proceedings. I propose therefore to order discovery of Ypsilon’s constitution, memorandum and/or articles of association, which had been offered by Ypsilon in its letter of 19th November, 2020. I consider it inappropriate to request discovery of “structural or functional links to...other companies/legal persons...”. There is no evidence that any such documentation is either relevant or necessary.

100. In relation to sub-Category 1(b), this category seems to request documentation relating to products or services offered by Ypsilon generally, as opposed to its specific interaction with Vola. The category seems to me to be in impossibly broad terms, and it is difficult to see what relevance “brochures, catalogues, advertisements and/or

internal product descriptions, and all drafts thereof...” could have to the issues between the parties. I propose to disallow this sub-category in its entirety.

101. In relation to sub-Category 1(c), Ypsilon has proposed: “All documents evidencing the provision of products and/or services by Ypsilon to Vola, for use, or used in connection with Ryanair flights between 14 March, 2019 and 1 November, 2019”.

102. This suggested proposal omits any documents relating to the provision of products and/or services from Ypsilon to Flightbox “for use, or used, in connection with Ryanair flights...”. Ypsilon has asserted in replies to particulars that Flightbox provides “certain IT-related services” to Vola, and acknowledges that Flightbox was a 100% subsidiary which, as of 4th March, 2021, it has divested. It seems to me that if there are documents – and there may not be - relating to the provision of products and/or services by Ypsilon to Flightbox “for use, or used, in connection with Ryanair flights...”, such documents are relevant and necessary for the fair disposal of the issues in these proceedings. It may be that such documents will support Ypsilon’s position that it is not involved in screen-scraping; however, if there is such documentation, it should be discovered. Also, the temporal limitation should align with the limitation imposed on categories sought by Ryanair from Vola. I therefore propose ordering discovery of the following sub-Category 1(c): -

“All documents evidencing the provision of products and/or services by Ypsilon to Vola, and/or by Ypsilon to Flightbox, for use, or used in connection with Ryanair flights between 1 September, 2019 to date”.

103. In relation to sub-Category 1(d), I agree with Ypsilon’s submission that this sub-category is duplicative of sub-Category 1(c). The requirement that Ypsilon discover documents in relation to assistance and facilitation of other operators is in

my view inappropriate. Sub-Category 1(c), together with other categories ordered, should provide a full enough picture of Ypsilon's involvement in order for Ryanair to be able to make its case, or accept that its case against Ypsilon has no basis.

Category 2

In the case of 25 searches for Ryanair flights displayed on Ryanair's website and bookings thereof (which are averred by Vola to be representative of displays, searches and bookings of Ryanair flights on Vola's website between 19th September, 2017 to date):

- (a) all 'public' and 'internal' screenshots of each element of those searches and bookings, recording all options available;**
- (b) all documents relating to the interactions occurring between Vola and Ryanair's website, Ypsilon and Ryanair's website and/or third parties and Ryanair's website including but not limited to documents relating to instances where Ryanair's TOUs were encountered by Vola, Ypsilon or third parties;**
- (c) all documents relating to the display of those Ryanair flights on Vola or Ypsilon's website or on their automated systems or software, or on the website or automated systems or software of any third party involved in the display of search for or booking of those flights, including but not limited to documents relating to instances of encountering, taking, using, copying, adapting, making available, extracting, (re)-utilising or caching of the whole or part of Ryanair's website or data; and**
- (d) if not caught by (a), (b) or (c), all documents relating to the information sent to Ryanair, including but not limited to the contact details for customers,**

during the display of, search for, and booking of those flights.

104. In response to a query from the solicitors for Ypsilon by letter of 19th November, 2020, the solicitors for Ryanair by letter of 17th December, 2020 set out the rationale behind seeking this information from both Vola and Ypsilon: -

“...it is envisaged that once the parameters of the sample discovery are agreed with your client, Vola and Ryanair, then the documents discovered by Vola and your client would be generated from the same set of sample bookings. It is proposed that Vola makes the searches for and bookings of Ryanair flights, then any documents requested from your client as per this category of discovery would be limited to those generated from the searches and bookings made by Vola.

The category, which mirrors Ryanair’s voluntary discovery request to Vola (as per Ryanair’s letter to Vola dated 9 October, 2020) intends to capture both the documents generated by Vola and other documents in the possession, power, procurement or custody of Ypsilon which are generated from, and which relate to the sample searches and bookings of Ryanair flights (such sample searches and bookings to be performed by Vola). This category therefore seeks to capture the documents required to establish the entire search and booking process”.

105. In its letter of 20th January, 2021, having had this clarification, Ypsilon’s solicitors expressed the view that “...what is requested mandates our client to create and produce new documentation which is fundamentally at odds with the principles of discovery and our client objects to this category on the basis that it is not a proper request for discovery...”. It is not clear to me how this is the case. What is intended is that, in respect of the Ryanair flights selected as displayed on Vola’s website, Ypsilon

will discover screen shots of each element of those searches and bookings in respect of those flights, to the extent that they exist at all. In other words, if Ypsilon has been involved in generating interactions with the Vola website in relation to the selected flights, public and internal screenshots of Ypsilon's interactions are both relevant and necessary for the fair disposal of these proceedings. If there are no such searches and bookings, then discovery does not arise. If on the other hand, Ypsilon has had an interaction with Vola in relation to those searches and bookings, it is not apparent to me why a screenshot of an existing record cannot be the subject of discovery.

106. In relation to sub-Category 2(b) Ypsilon has offered the following reformulation: -

“All documents evidencing interactions occurring between Ypsilon and Ryanair's website evidencing where Ryanair's TOUs were encountered by Ypsilon between 14 March 2019 and 1 November 2019.”

107. Save for a modification of the time period (19 September, 2017 to date) which would align with the periods in other categories, it seems to me that this formulation is sufficient for Ryanair's purposes.

108. In relation to sub-Category 2(c), Ypsilon proposed the following reformulation: -

“All documents evidencing the display of Ryanair flights on Vola's website *via* Ypsilon's website or Ypsilon's automated systems, including documents which evidence the encountering, taking, using, copying, adapting, making available, extracting, (re)-utilising or caching of the whole or part of Ryanair's website or data from 14 March 2019 to 1 November 2019.”

109. This amendment makes the category specific to Ypsilon, and subject to the modification of the temporal limit (19 September, 2017 to date), it seems to me to be appropriate.

110. In relation to sub-Category 2(d), it seems to me that there is justice in Ypsilon's submission that this sub-category is a fishing expedition. The sub-categories already ordered seem to me to cover any documents which are relevant and necessary to the cases pleaded. Also, Ypsilon points out that it has previously been held by Twomey J in *Ryanair DAC v. Skyscanner Limited* [2020] IEHC 399 that, when a Ryanair flight is booked, Ryanair holds information relating to each passenger, such as name, expiry date of passport/ID card, passport/ID number, nationality, address, phone number, date of birth, and booking reference. In short, Ryanair is already in possession of contact details for customers, and does not require discovery of this information from Ypsilon. I therefore propose not to order any discovery in this sub-category.

111. As regards the category generally, I will restrict the searches required to be carried out to six in number, rather than the twenty-five sought by Ryanair or the one sought by Vola. The discovery to be ordered in respect of sub-Categories (a) to (c) relates solely to these six searches, to be identified by Vola together with an appropriate averment that they are representative generally of the process of booking Ryanair flights through Vola's website.

Category 3

Save for documents of which the documents discovered under category 2 are a sample, all documents relating to:

(a) the failure to transfer to Ryanair's website, customers searching for or booking Ryanair flights on Vola's website, including but not limited to:

(i) failure to offer those customers ancillary products and services (*i.e.* products or services, other than flights) available on Ryanair's website;

(ii) provision to those customers of travel insurance unconnected with that available on Ryanair's website; and

(iii) failure to provide Ryanair with the actual contact details of the customer booking on Vola's website;

(b) the interactions which occur between Vola and Ryanair's website, Ypsilon and Ryanair's website, and/or third parties and Ryanair's website, when Ryanair flights are displayed on, searched for or booked on Vola's website, including but not limited to all documents relating to the:

(i) accessing, entering on, using or browsing of Ryanair's website;

(ii) display of Ryanair TOUs beside click acceptance boxes on webpages;

(iii) accessing of Ryanair's website via the front-end; and

(iv) accessing of Ryanair's website via the back-end;

(c) the processes involved in the display of Ryanair data on Vola or Ypsilon's website or on their automated systems or software or on the website or automated systems of third parties, when Ryanair flights are displayed, searched for or booked on Vola's website, including but not limited to all documents relating to the encountering, taking, using,

copying, adapting, making available, extracting, (re)-utilising or caching of the whole or part of Ryanair's website or data;

(d) the volume/number of searches for Ryanair flights conducted, and/or the volume/number of Ryanair flights booked, through Vola's and/or Ypsilon's website(s) or on their automated systems or software or on the website or automated systems of third parties.

112. This category is the same as Category 3 of Ryanair's request for discovery from Vola. Ryanair urges that it should be read in conjunction with Category 2 "in order to demonstrate Ypsilon's interaction with Ryanair's TOUs".

113. As is apparent from para. 70 above, I was of the view that no discovery should be ordered in respect of Category 3(a), (b) or (c). I take the same view in relation to this request of Ypsilon, and for the same reasons, which apply *a fortiori* to Ypsilon. The category is inordinately broad, and is primarily directed towards the operation of Vola's website. It requires Ypsilon to evidence a negative by discovering documents which evidence a "failure" to transfer customers to Ryanair's website. In my view, this is unworkable. In relation to sub-Categories 3(b) and (c), it seems to me that these achieve the same purpose as Category 2(b) of Ryanair's request. The category once again seeks "all documents relating to" and has no temporal limitation.

114. In relation to the sub-Category 3(d), I note that Ypsilon did agree to this sub-category subject to a reformulated time limit of 14 March, 2019 to 1 November, 2019. Ryanair rejected this temporal limitation. However, for the reasons set out above in relation to Ryanair's equivalent request of Vola, I propose to order discovery of "the volume/number of Ryanair flights booked through Ypsilon's website in the period 1st September, 2017 to date".

Category 4

All documents relating to:

(a) the (alleged) waiver by Ryanair, of its entitlement to rely on its TOUs against Ypsilon and/or Vola, including but not limited to all documents relating to:

(i) Ryanair's (alleged) knowledge of the activities of Ypsilon and/or Vola, which Ryanair claims breach its TOUs;

(ii) Ryanair's (alleged) knowledge of other operators interacting with Ryanair's website for commercial purposes, which Ryanair claims to breach its TOUs;

(iii) profits (allegedly) accruing to Ryanair as a result of the activities at (i) or (ii) and/or breaches of its TOUs (excluding publicly available Ryanair accounts); and

(b) if different, the (alleged) estoppel of, or lack of entitlement on the part of Ryanair to rely on its TOUs in support of the equitable relief claimed.

115. It is notable that, whereas Category 4 sought by Ryanair against Vola relates to "all documents that evidence and/or record" [the various sub-categories], the request of Ypsilon concerns "all documents relating to...". This formulation is impermissibly broad. Ypsilon claims that this category of documents is inappropriate and unnecessary, given that Ryanair's awareness and knowledge of Vola's commercial activities and Ypsilon's activities are within its own knowledge, and can be addressed by way of legal submission.

116. While that may be, if this Court does not order discovery of this category, Ryanair will go into a trial unaware of documentation proposed to be used by Ypsilon

which would strengthen its case that Ryanair has waived its rights, which in turn would potentially damage Ryanair's case. In such circumstances, while the knowledge or awareness of Ryanair is undoubtedly a matter for that party, it seems to me that documentation which Ypsilon proposes to rely on to establish a waiver on Ryanair's part is relevant, and its discovery necessary for the fair disposal of the issues between the parties.

117. I will therefore order discovery of this category of documents, subject amending "all documents relating to" to "all documents evidencing and/or recording".

Category 5

Save to the extent already discovered under another category, all documents relating to or that will be relied on by Ypsilon in support of:

- (a) Ypsilon's plea that Ryanair's website is not capable of constituting the 'property' of Ryanair (Defence, para. 29);**
- (b) Ypsilon's plea that Ryanair's website and/or Ryanair's database, tables and/or compilations, do not constitute original databases, or copyright works (Defence, para. 22);**
- (c) Ypsilon's plea that Ryanair's website and/or Ryanair's database tables and/or compilations, do not constitute databases and/or that Ryanair is not the owner of any database right (Defence, para. 24);**
- (d) any taking, copying, adapting, making available, extraction, caching, utilising of the whole or part of any Ryanair database; and**
- (e) Ypsilon's plea that any making available by Ypsilon of insubstantial parts of the contents of any database does not conflict with the 'normal exploitation of the contents of same and/or prejudice any right held by Ryanair in that regard' (Defence para. 27).**

118. This request is broadly similar to the request made by Ryanair of Vola at Category 5, and it seems to me that the same conclusion is appropriate. The pleas to which Ryanair refers at sub-Categories 5(a), (b), (c) and (e) are matters for legal submission, and documents in this regard are neither relevant nor necessary to enable Ryanair to pursue its claim. The documents in sub-Category 5(d) seem to me to be already covered by orders made in respect of Category 2.

119. I therefore do not propose to make any order for discovery of this category.

Category 6

Save for documents of which the documents discovered under category 2 are a sample, all documents relating to:

- (a) the use by Vola of Ryanair's trademarks, on its website;**
- (b) Vola's trade, and the goods or services offered during the course thereof;**
- (c) steps taken by Vola in the course of its trade to:**
 - (i) make clear to visitors of its website that there is no material link, association or affiliation between Vola and the goods or services sold on its website, and Ryanair and the goods or services sold on the Ryanair website; and/or**
 - (ii) describe itself, in any way, as linked to/associated with/affiliated with/agent for/representative of/acting for/ authorised by, airlines (including Ryanair);**
- (d) instances of visitors to Vola's website who search for, or book Ryanair flights thereon:**
 - (i) linking Vola's products or services with those of Ryanair;**

- (ii) associating or affiliating Vola's products or services with those of Ryanair;**
- (iii) understanding Ryanair to have authorised Vola to sell Ryanair products or services on Vola's website;**
- (iv) understanding to have searched for or booked flights with Ryanair or Ryanair's website when, in fact, they had booked on Vola's website; or**
- (v) discussing Ryanair, or Ryanair's products or services with Vola (including the quality thereof the fees charged therefor, the (in)ability to contact or be contacted by Ryanair directly, the failure to be contacted in relation to Ryanair flight details or changes thereto, the (in)ability to purchase the other goods and services apart from flights available on Ryanair's website *etc.*), including but not limited to all customer enquiries, complaints, submissions, comments, suggestions *etc.* on the items above, and Vola replies thereto;**
- (e) the prices charged by Vola for Ryanair flights (including the charging by Vola of levies on and/or fares for Ryanair flights greater than the fares for which those flights are available on Ryanair's website);**
- (f) the obstruction of and/or failure to facilitate direct contact between Ryanair and its passengers; and**
- (g) the failure to offer Ryanair's other goods and services (apart from flights) available on Ryanair's website, on Vola's website.**

120. Ryanair does not plead breach of trademark against Ypsilon. It's view is that Ypsilon may have documentation captured under this category, which has been

sought against Vola. Ryanair also queries whether, in providing services to Vola, Ypsilon provides documents containing Ryanair trademarks. However, Ypsilon has already agreed in Category 1(c) to provide documents it has in relation to the interaction between its website, Vola and the Ryanair website. As I have accepted that discovery should be made in this regard, it does not seem to me that any further discovery is necessary.

121. There will therefore be no order for discovery in relation to Category 6.

C. VOLA'S MOTION AGAINST RYANAIR

122. By a notice of motion issued on 3rd February, 2021, Vola sought discovery from Ryanair of 40 different categories of documents set out in a schedule appended to the notice of motion. A number of these categories have been agreed, but the parties have not been able to reach agreement on most of the categories.

123. The Vola motion is grounded upon the affidavit of Tessa Robinson, a solicitor in the firm representing Vola. A replying affidavit is sworn by Thomas McNamara on 3rd March, 2021 on behalf of Ryanair. As with the Ryanair motions, there was extensive correspondence between the parties in which the categories were discussed. Vola and Ryanair have each made substantial written submissions, and provided helpful spreadsheets of the categories with summaries of the arguments made by the parties in their respective affidavits.

Category 1

All documents relating to the “Ryanair business model” as defined at paragraph 8 of the amended statement of claim and the critical affect [sic] which it is alleged the acts of the Defendants have on the Ryanair Business Model.

124. At paragraphs 6-8 of the amended statement of claim Ryanair sets out in considerable detail narrative in relation to the development of its business and its

business model, with particular concentration on the operation of the Ryanair website, the way in which customers interact with it, and the degree to which Ryanair maintains that it is fundamental to the present and future operations of Ryanair. In its defence, Vola simply pleads that no admission is made to the matters pleaded at para. 6 of the statement of claim, and states that paras. 7 and 8 are denied.

125. Vola argues that Ryanair alleges that the acts of the defendants are critically affecting the Ryanair business model and are thereby causing damage to Ryanair, and that Vola has put this in issue in its defence. It claims that Vola has no means of obtaining access to the documents, which are necessary for the fair disposal of the action.

126. Ryanair criticises Vola's reasons as "generic and vague". It is contended that Vola does not identify with precision any disputed elements of Ryanair's business model. Ryanair characterises the category as "a fishing exercise" and states that it is more a matter for evidence, including expert evidence. It is also suggested, that to the extent that the activities of Vola have a "critical affect" on Ryanair's business model, this relates to the question of quantum and is therefore not relevant to the present module.

127. It seems to me that Ryanair's objections to this category are well founded. The category is expressed in unacceptably wide terms, and indeed almost any document which Ryanair possesses could be said to come within the category as defined. The question of exactly what Ryanair's business model comprises is, in truth, either a question of evidence or a matter more relevant to particulars. I will therefore make no order in relation to this category.

Category 2

All documents relating to Ryanair’s reliance on information provided by its customers through their use of the Ryanair website.

128. In relation to this category, Vola maintains that it is entitled to understand precisely how Ryanair uses information provided by its customers through their use of the Ryanair website, and to understand the alleged nexus between such use of information and the alleged damage caused by Vola. Ryanair however argues that the significance of direct contact between Ryanair and its customers – which, as Ryanair points out, is set out in detail at para. 8 of the statement of claim – “cannot feasibly be demonstrated via discovery”.

129. The category, which uses the formulation “all documents relating to” to which Vola repeatedly objected in the course of Ryanair’s motion, is unacceptably wide and imprecise. In any event, Ryanair explain in some detail the basis for its reliance on information provided by customers at para. 8 of the statement of claim. It seems to me that Vola clearly understands the reasons for this reliance and the significance of direct contact between Ryanair and its customers as alleged by Ryanair. In these circumstances, I do not propose to order discovery of this category.

Category 3

The terms of use which Ryanair alleges this defendant agreed to be bound by on each occasion it is alleged this defendant entered into a contract with Ryanair.

130. This category has been agreed by the parties, and discovery of this category will be ordered.

Category 4

All documents evidencing or relating to the “screen-scraping” which it is alleged has been carried out by this defendant.

131. This category, while expressed in very wide terms, is clearly relevant to the disputes between the parties. Ryanair indicated in its letter of 19th November, 2020 that it did not have a principled objection to this category and offered to discover documents to the extent that they are in Ryanair's possession. Ryanair maintains however that, due to the "evidential deficit" which it contends that it suffers due to the lack of disclosure by Vola as to how it searches, and books Ryanair flights, discovery of this category is "likely to be marginal". At para. 32 of Mr. McNamara's affidavit, he avers that Ryanair "suggested that it would be more productive for Vola to set out in more specific terms exactly what it is requesting in relation to this category of discovery; without this, there is no obvious roadmap for the implementation of this category". Vola has not taken up this suggestion.

132. As there is no real dispute as to the relevance and necessity of this category, I will order discovery in its terms. It is a matter for Ryanair to comply with the order, whether the discovery ultimately made is "marginal" or not.

Category 5

133. The parties are agreed that this category concerns quantum, and does not require to be considered further in the context of the present motion.

Category 6

- (a) All documents which evidence that the "Ryanair website" as pleaded constitutes "property" as pleaded;**
- (b) All documents which concern, evidence or refer to the resources spent to verify information and content as pleaded, and how same were applied;**
- (c) All documents which concern, evidence or refer to the assertion that Ryanair maintains exclusive online distribution rights to the general public in respect of the offering for sale of Ryanair flights;**

(d) all documents which concern, evidence or refer to the benefit including financial to Ryanair from the provision of third-party products.

134. As regards sub-Category 6(a), Ryanair argues that the issue of whether the Ryanair website constitutes “property” is not a matter for discovery as it is a matter of law. As Mr. McNamara puts it at para. 34 of his affidavit “...Vola well knows that Ryanair’s website is”. Vola accepts that the question “may be a matter of law”, but Ms. Robinson avers in her affidavit in relation to this category that “...this depends on the evidence and proof of what constitutes the website...Vola is entitled to discovery of documents in advance of trial that goes to evidence of the nature of the website”.

135. I cannot agree. The issue of the “Ryanair website” constituting “property” relates to Ryanair’s claim for conversion and trespass to goods. In my view, there is no mystery as to the nature of the Ryanair website. The contention that it constitutes “property” is a legal one, and not appropriate for discovery. In any event, the sub-category is expressed in unacceptably broad terms and Ryanair is in my view correct in describing it as “unworkable”.

136. As regards sub-Category 6(b) Ryanair states at para. 35 of its affidavit that it does not have a principled objection to the category; it does however object to the “all documents” formulation as disproportionately burdensome and costly. Mr. McNamara contends in his affidavit that discovery would involve searching documentation relating to eleven different departments across seven jurisdictions, involving over one thousand staff members.

137. Ryanair suggests the following alternative: -

“(a) A spreadsheet containing relevant employee staff numbers, departments, and costs;

(b) sample relevant employment contracts; and

(c) relevant invoices and/or credit notes from Ryanair suppliers.”

138. Vola has refused this alternative in correspondence on the basis that it “does not address how resources were applied”. Ryanair argues that Ypsilon agreed to a similar alternative proposal to its analogous Category 1(ii), “...which supports the argument that it is a reasonable solution”. In the absence of a suggestion as to how what otherwise would be a disproportionate and burdensome category of documentation may be limited to “address how resources were applied”, I am of the view that discovery should be ordered in the formulation suggested by Ryanair.

139. In relation to sub-category 6(c) Ryanair objects to this category on the basis that the documents agreed to be produced in relation to Category 3 sufficiently address this requirement. There does not appear to be any response from Vola to this position. In view of the very general way in which sub-category (c) is expressed, and in view of the fact that Category 3 is agreed, I do not propose to order discovery of sub-Category 6(c).

140. Sub-Category 6(d) relates to quantum, and the parties have agreed that it be held over to the quantum module in the event that Ryanair is successful in the liability module.

Category 7

(a) All documents which concern, evidence or refer to any part of the “Ryanair website” pleaded being physical

(b) All documents which concern evidence or refer the location of alleged physical parts of the “Ryanair website” as pleaded (if there are any) and what their respective functions are.

141. This request appears to arise from para. 9 of the statement of claim, which sets out in some detail how the Ryanair website operates, both in relation to “front-end”

and “back-end” elements, which terms apply to the presentation layer to the customer who visits the website on the one hand, and the data access layer on the other.

142. I had some difficulty understanding this category. In the course of oral submissions, counsel for Vola submitted that “...it is [Ryanair] who plead that their website is physical and it is they then who alleged a cause of action for trespass to goods and trespass to property, presumably based on that plea. So if they are going to advance all of these torts they, in our respectful submission, have to deal with the burden of the associated discovery. We should be entitled to see what documents they say they have that will evidence the fact that their database is physical and what consequences arise from that, so that we’re able to mount a meaningful defence to an allegation of say, for example, trespass.” [Day 2, p.98, line 24 to p.99 line 6].

143. The first thing to say about the two sub-categories is that they are expressed in terms which are extraordinarily broad and, in my view, unworkable. The statement of claim is comprehensively pleaded, and nobody reading the statement of claim could be under any doubt as to the manner in which Ryanair alleges that various torts have been perpetrated by the defendants in relation to the website. There will be no doubt expert evidence and submissions from Ryanair in this regard, and it is true to say, as Ms. Robinson does at para. 5 of her affidavit, that submissions must be grounded on facts established and proven by evidence. However, that is not to say that discovery of the physical aspects of the Ryanair website is necessary for disposing fairly of the matter and/or the saving of costs. In the absence of a more particular reason as to why Vola needs documentation in relation to physical aspects or parts of the Ryanair website, I do not propose to allow this category of discovery.

Category 8

(a) All documents which concern, evidence or refer to the commercial relationship between Ryanair and Navitaire;

(b) All documents which concern, evidence or refer to Ryanair permitting any other party to access the Navitaire database.

144. At para. 9 of the statement of claim, Ryanair states that, when a user accesses the front-end of the Ryanair website and makes a flight search, an application programming interface ('API') carries the user's query to the database that contains all of Ryanair's flight information, which is referred to as the "Navitaire" database. Vola puts the contents of para. 9 of the statement of claim in issue, and in response to an application for particulars, Ryanair stated that the matters set out in para. 9 are matters for evidence.

145. Ryanair contends that it does not have a principled objection to "discovery of a category of this nature" [Ryanair letter of 19th November, 2020], but objects to the category as being too broadly worded and lacking "reasoning on relevance and necessity" [affidavit, para. 42].

146. Ryanair's alternative suggestion in its letter of 19th November, 2020 was that Ryanair would disclose "the contract(s) between Ryanair and Navataire, subject to appropriate redactions, whether due to confidentiality/commercial sensitivity, or otherwise". While this is not acceptable to Vola, it does not appear to have detailed why this is so, or proposed an alternative wording.

147. As the formulation proposed by Ryanair goes to the heart of the commercial relationship between Ryanair and Navataire, and as the wording proposed by Vola is far too broad, in that it would encompass a range of documents and correspondence that would be unlikely to be necessary for the fair disposal of the issues between the

parties, I propose to order discovery in the terms suggested by Ryanair in respect of this sub-category.

148. As regards sub-Category 8(b) Ryanair once again does not have a principled objection to the category of this nature, while objecting to the category requested as being too broadly worded and being deficient in terms of relevance and necessity. Ryanair states its letter of 19th November, 2020 that the documentation which it has proffered in relation to sub-Category 8(a) “set out, and will enable your client to ascertain whether, and the terms on which, other parties are permitted to access the Navataire database”. The letter goes on to note that Ryanair “...has already pleaded (para. 28 of the amended statement of claim) as to how it offers licence agreements to use certain flight data comprised in the Ryanair website”. I agree that the documentation proffered by Ryanair in respect of sub-Category 8(a) appears to address the concerns of the documentation sought in sub-Category 8(b), and given that sub-Category (b) is expressed in unacceptably wide terms, I do not propose to order any further discovery in respect of this sub-category.

Category 9

All documents which concern, evidence or refer to the constituent parts of the “Ryanair website”.

149. This request arises from para. 10 of the statement of claim, in which there are pleas as to the constituent parts of the Ryanair website. Ryanair maintains in replies to particulars that its pleas in this regard are matters of evidence. Ryanair complains that the category as drafted is “inadequately reasoned, broad and vague in scope, difficult to search for, virtually un-implementable and could lead to massive over-discovery and delay, and resembles a fishing expedition”. In its letter of 19th November, 2020,

Ryanair comment that "... [the category] would seem to capture every single document which so much as mentions the Ryanair website".

150. These criticisms appear to me to be justified. The category as drafted is hopelessly general and unspecific. Ryanair will require to adduce expert evidence in relation to the workings of its website in order to prove its case, and there is likely to be engagement between the respective experts in advance of the trial. It does not seem to me that the category as sought is relevant or necessary for the fair disposal of the matter and/or for saving costs.

Category 10

(a) All documents which concern, evidence or refer that Vola entered into contract(s) with Ryanair as alleged;

(b) All documents which concern, evidence or refer to any consideration moving from Ryanair under the alleged contract.

(c) All documents which concern, evidence or refer to any allegation that Vola entered into more than one contract with the plaintiff, to include:

- (i) the date on which each of the contracts was entered into;**
- (ii) the date of the offer;**
- (iii) the date of the acceptance;**
- (iv) the consideration passing under each contract;**
- (v) the duration of each contract.**

151. Sub-Category 10(a) has been agreed between the parties, and discovery will be ordered in the terms sought.

152. As regards sub-Category 10(b) Mr. McNamara avers at para. 46 of his affidavit that the category "is too broadly worded, unworkable and inadequately reasoned. In addition, the question as to whether consideration moves from Ryanair

under the alleged contract are matters [sic] of law, and for legal submission, not a matter that can properly be addressed via discovery. This category is also unimplementable; it is not clear how the natural person charged with implementing this category would even search for documentation which, for example, “refer[s] to...consideration moving from Ryanair”, or with which documents this search could even be commenced”.

153. At the hearing, counsel pressed Vola’s claims in respect of this sub-category. He referred in particular to Ryanair’s contention in replies to particulars that the question of consideration was a matter for evidence and legal submission, and commented *inter alia*, that “...if this is a matter for evidence aren’t we entitled to see the documentary evidence that exists that you hold or have to support the consideration that you say, or will have to say, exists for this contract that you plead?...” [day 2, p.101, lines 18 to 22]. It was submitted that Ryanair had delivered a statement of claim which dealt at length with allegations based on breach of contract and seeking injunctions and damages in relation thereto “...and yet will not plead in the most basic way what [Ryanair] say the consideration is for that contract...” [day 2, p.101, line 29 to p.102, line 2]. It was submitted that, if Ryanair were to swear an affidavit which disclosed no documents for this category, *i.e.* documents supporting or evidencing consideration, “...that in itself is something that is of benefit and gives a litigious advantage...to Vola because it allows it to point at the fact that where the fundamental claim made against it is a breach of contract, Ryanair have failed to particularise what the consideration is and can point to no document that evidences any consideration”. [Day 2, p.102, lines 7 to 17].

154. It is of course the case that, as a general principle, if there is no consideration, a contractual promise will be unenforceable at law. Any parties suing on foot of a

contract must show that consideration has moved from that party to the other contracting party. What constitutes adequate consideration in a given case is a matter of law; however, a party will have to show that such consideration exists, or may be inferred from the circumstances.

155. In the present case, Ryanair has agreed to make discovery of “all documents which concern, evidence or refer that Vola entered into contract(s) with Ryanair as alleged”. Ryanair, in order to enforce the contract for which they contend, will have to satisfy the court that consideration was present in the contractual arrangements as a matter of law. It may seek to argue that this is evident from the contractual documentation, or should be inferred as a matter of law therefrom. It is not clear to me that there is or may be documentation separate to the documents described at sub-Category 10(a) which might provide evidence of consideration, the production of which at trial would put Vola at a disadvantage if they had not seen that documentation.

156. Having interrogated the matter with counsel during the course of oral submissions, it seems to me that Vola’s real complaint is that Ryanair maintains that the question of consideration “is a matter for evidence and for legal submission”. Vola is not satisfied with this answer, and seeks to procure a better answer by looking for the documents set out in sub-Category 10(b). However, this sub-Category is, in my view, hopelessly vague, and Ryanair is correct in its contention that it is “unimplementable”.

157. It may be that the documents which Ryanair has agreed to discover in Categories 3 and 10(a) will assuage Vola’s concerns. Even if it did not, it is safe to presume that Ryanair, in advance of any trial, would be making detailed legal submissions, and would require in the course of those submissions to seek to satisfy

the court as a matter of law that the various elements required in an enforceable contract were present.

158. In any event, I do not consider it appropriate to order discovery in the terms sought. I expect that Vola, whether through discovery or some other legal mechanism, will be able to satisfy itself in advance of the trial as to the consideration relied upon by Ryanair in its claim for breach of contract.

159. As regards sub-category (c), it seems to me that any such documents are already captured in Categories 3 or 10(a), which are agreed.

Category 11

160. The parties have agreed that this category concerns quantum, and should be held over until the quantum module, if the necessity for such a module occurs.

Categories 12 and 13

12. All documents which concern, evidence or refer to how Ryanair became aware of the First Named Defendant allegedly acting in breach of Ryanair's Website Terms of Use.

13. (a) A list of current and former licensees; and

(b) the template licence agreement

from 1 September, 2017 to date.

161. The foregoing categories 12 and 13 have been agreed by the parties.

Category 14

162. (a) All documents which concern, evidence or refer to each work in which copyright is alleged to subsist to include the work itself;

(b) All documents which concern, evidence or refer to the author of each such work.

(c) **All documents which concern, evidence or refer to the employment status of each such author.**

(d) **All documents which concern, evidence or refer to the ownership of the copyright alleged to subsist.**

163. Ryanair's pleas in relation to copyright are set out at para. 31 of the statement of claim. The matters set out in this paragraph are put in issue by Vola. In relation to sub-Category 14(a) Ryanair maintains that it does not have a principled objection to a category of this nature, but contends that the category as drafted "has an extremely broad scope, is unworkable in practice and disproportionately burdensome and costly": see para. 48 of Mr. McNamara's replying affidavit. Ryanair proposes an alternative solution in its letter of 19th September 2020: it proposed to discover "a list of the works in which it claims copyright subsists". In the same letter, Ryanair expressed its view that the requests in sub-Categories 14(b) to 14(d) were "excessive, unworkable and in effect fishing expeditions. In the circumstance where all copyright created by employees of our client vests in our client, it is irrelevant to discover the documents sought in Categories 14(B) and 14(C)". Ryanair instead to provide discover of "(a) Sample employment contracts; and (b) Sample IP/NDA contracts". There does not appear to have been any response from Vola to this formulation.

164. In Ms. Robinson's affidavit on behalf of Vola, it is averred that "...if a large number of documents are captured by the request, this is due to the scope of the claim made by Ryanair and its refusal to further particularise asserting that it is a matter for evidence". However, Ryanair is justified in complaining that the "all documents which concern, evidence or refer..." formula is disproportionately burdensome and costly. It is difficult to see why this breadth of documentation is necessary. In these circumstances I propose to adopt Ryanair's formulation. I do so on the basis of Mr.

McNamara's averment at para. 51 of his affidavit that "...all copyright created by employees of Ryanair vests in Ryanair...". In the event that the sample contracts which Ryanair proposes to discover do not bear out this averment, Ryanair should exhibit such documentation as would substantiate Mr. McNamara's averment. If it cannot be established that the copyright created by employees of Ryanair vests in Ryanair, this category would have to be revisited. Also, I am assuming that the contractual documentation which Ryanair proposes to disclose will confirm that any author of documents in which Ryanair claims copyright was, at the time of such authorship, in the employment of Ryanair.

Category 15

(a) All documents which concern, evidence or refer to the content, extend [sic] and scope of the alleged original database.

165. Sub-Categories 15(b) to (f) have all been agreed between the parties. These sub-categories relate to the portions of the original database alleged to have been copied, adapted, cached, and made available to the public, or which concern the "insubstantial parts of the alleged original databases pleaded". In short, Ryanair is prepared to disclose all documents which relate to the specific allegations being made. While there are references in paras. 32 and 33 to the "original database(s)", sub-Category 15(a) is impossibly wide and burdensome, and given the agreement in relation to sub-Categories (b) to (f), unnecessary for the resolution of the issues between the parties. In any event, as Ryanair points out, there will be expert evidence in relation to the manner in which the defendants are alleged to have infringed Ryanair's copyright in the "original database(s)"; for the moment, Vola is to be supplied with all documents relating to the specific allegations against it in this

regard. I will therefore order discovery of sub-Categories (b) to (f), but not of sub-Category (a).

Category 16

166. All of the sub-categories of Category 16, which relate to matters concerning the original databases, have been agreed by the parties in correspondence.

Category 17

167. (a) All documents which concern, evidence or refer to the computer program pleaded,

(b) All documents which concern, evidence or refer to the APIs that are pleaded,

(c) All documents which concern, evidence or refer to the use and utilisation of the pleaded computer programmes and APIs.

168. At para. 36 of the statement of claim, Ryanair pleads that the defendants “have infringed and are infringing Ryanair’s copyright in the said underlying computer programmes and APIs [application programme interface] by using and utilising them in a manner that extends beyond Ryanair’s permitted and/or authorised use and/or Terms of Use and in such a way that is in breach of the permissions afforded to a ‘lawful user’ as defined in section 80(2) of the Copyright and Related Rights Act 2000 (as amended) ...”. Vola denies these allegations, and sought particulars of the programmes and APIs to which the statement of claim refers. In relation to the computer programmes, Ryanair stated as follows: -

“This is not an appropriate matter for particulars but rather is a matter for evidence, in particular expert evidence. Further, it is a matter clearly within the knowledge of Vola.

Without prejudice to the foregoing, Vola infringes Ryanair's copyright in the following computer programmes:-

- (i) The Ryanair availability API (also known [as] the 'Flight Availability API' or the 'get flight API') which permits the user to access flight information/data;
- (ii) The 'Add flight and create session' API which adds the selected flights to an otherwise empty shopping basket; and
- (iii) The add payment API which allows the customer to settle the outstanding balance on any previously selected product(s) within the shopping basket.

The aforementioned APIs are used to complete a booking of a Ryanair flight. However, in addition to the above, Vola may also be infringing upon other APIs of Ryanair throughout its engagement in screen-scraping of the Ryanair website. That is a matter that is within the knowledge of Vola and in respect of which Ryanair will seek disclosure and/or discovery of in these proceedings."

169. In relation to the use and utilisation of the computer programmes and APIs, Ryanair in its replies to particulars stated as follows: -

"This is not an appropriate request for particulars but rather is an impermissible interrogation of Ryanair's claim. By virtue of the manner in which Vola operates it has a peculiar knowledge as to how it uses and utilises Ryanair's website, its computer programmes and APIs. As a consequence of the manner in which Vola operates, Ryanair cannot, at this juncture, definitively identify the precise manner Vola uses and utilises Ryanair's computer programmes and APIs. This will be a matter for evidence at the trial of the action. Ryanair reserves its position in that regard."

170. It will be apparent from the foregoing that Ryanair has identified the computer programmes/APIs in respect of which it alleges that Vola has infringed Ryanair's copyright. It also alleges that Vola is aware of the nature of such programmes/APIs given the manner in which it allegedly extracts information from same. Vola is, of course, adamant that it does not carry out screen-scraping. At the hearing, counsel made the point that, if Ryanair were pleading a breach of copyright in a literary work, the defendant would be entitled to see, in advance of the trial of the action, what the literary work was in order to understand how it was being alleged that copyright had been breached. Counsel contended that it was "fundamentally unfair" that Ryanair would be entitled to claim a breach of copyright and yet not be obliged to disclose documents that evidence the material in which the alleged copyright subsists.

171. It is true to say that a claim for breach for copyright in a work must give details of the work in which the copyright is alleged to inhere. However, that cannot be achieved by bluntly seeking "all documents which concern, evidence or refer to the computer programmes or APIs, or their use and utilisation". Such categories of documentation are too burdensome and, as Ryanair points out, could capture every single email in Ryanair which so much as "refers to" Ryanair computer programmes or APIs.

172. It is certainly the case that expert evidence will be necessary for Ryanair to establish its case. Ryanair has identified the programmes/APIs in respect of which it claims breach of copyright; it has not embarked upon a detailed exposition of how copyright has been breached in these programmes. It does acknowledge that there will have to be expert evidence in this regard. Given that I envisage a full engagement between the respective experts in advance of a trial, and exchange of experts' reports which clarify each side's position, I do not think it is appropriate to order discovery in

the broad terms claimed, or to attempt to fashion some more limited categories of discovery in an area in which the court has no expertise. However, Vola must have a clear understanding in advance of the trial, of exactly how Ryanair alleges its copyright in the programmes/APIs identified in the replies to particulars has been breached, whether as a result of a meeting of experts or otherwise. It is no answer to Vola's request for clarification in this regard – whether by discovery or otherwise – to say that this is a matter within the knowledge of Vola due to “its engagement in screen scraping of the Ryanair Website” [replies to particulars 26 April, 2019, para. 16(a)]. In all the circumstances, I do not propose to order discovery in terms of the categories claimed, at this juncture at any rate.

Category 18

All documents which concern, evidence or refer to investment in obtaining, verifying or presenting the contents of the pleaded database relied upon.

173. This category relates to para. 37 of the statement of claim, which concerns Ryanair's plea that the matters in that paragraph constitute a database under s.321 of the Copyright and Related Rights Act 2000 (as amended). The matters in that paragraph are denied by Vola. Notwithstanding that, the “all documents” formulation is in my view clearly too broadly worded and is any event unworkable.

174. In its letter of 19th November, 2020, Ryanair stated that it did not have a principled objection to a category of this nature, but contended that the exercise of collecting every single document concerning, evidencing or referring to the investment in obtaining, verifying or presenting the contents of the pleaded database relied upon would be disproportionately burdensome and costly. It also contended that much of the salient information regarding Ryanair's investment in its database had already been produced by Ryanair in its replies to particulars. It is certainly the case

that Ryanair gave a lengthy and detailed response to Vola's request for particulars arising out of para. 37 of the amended statement of claim. Ryanair indicated that its proposal in respect of Category 6(b) would sufficiently cover documents in this category. While Vola complains that this alternative does not address how resources were applied, the category itself does not specifically require disclosure of documents in this regard. It is difficult to see how such documentation would be necessary for disposing fairly of the cause or matter or for saving costs. I therefore do not propose to order discovery in respect of this category.

Category 19

All documents which concern, evidence or refer to the portions of the pleaded database that are claimed to be extracted.

175. This category arises from Ryanair's pleas in relation to extraction of information from the Ryanair website regarding to Ryanair's flight schedules and associated data, which Vola in its defence has put in issue. The category sought is overly broad and, in truth, does not make sense. To the extent that the category is intended to establish what documentation identifies portions of the pleaded database from which information is extracted, it seems to me that this is a matter of evidence. In this regard, Ryanair's very case is that the screen-scraping is done in a clandestine manner which clearly is known to the defendants, but not in any detail by Ryanair. To the extent that this category is sought to determine the extent of Ryanair's investigations, it is not in my view appropriate. I do not therefore intend to order discovery of this category.

Category 20

All documents which concern, evidence or refer [to] the portions of the pleaded database it is alleged are reutilised/made available to the public.

176. This category arises from Vola putting in issue Ryanair's pleas at para. 39 of the statement of claim. Ryanair makes the same objections to this category as it did to Category 19 above. For the reasons I have outlined in respect of Category 19, I am similarly of the view that this category should be refused.

Category 21

All documents which concern, evidence or refer to the insubstantial parts of the pleaded database(s) alleged to be extracted, cached and reutilised.

177. These pleas arise from para. 40 of the statement of claim. Ryanair refuses this category of discovery for the same reasons given in response to Categories 19 and 20. This refusal is in my view justified for the reasons which I have set out in relation to Category 19.

Category 22

All documents which concern, evidence or refer to the alleged adverse effect on the function of indicating the identity of the origin of the service of the Ryanair Word EUTM.

178. Ryanair alleges that Vola infringes its registered EU trademark ('Ryanair Word EUTM') in a number of respects, and pleads that use of the Ryanair Word EUTM in the manner alleged adversely affects the function of the Ryanair Word EUTM in a number of ways as set out at length at para. 44(b) of the statement of claim. These allegations are denied by Vola in its defence, and when Vola sought particulars as to the adverse effect for which Ryanair contends, it was met with the contention that the adverse effect on the function of indicating the identity of the origin of the service of the Ryanair Word EUTM was "ultimately one which will be addressed by evidence, including expert evidence and/or legal submissions. Discovery

in respect of this category is, accordingly, not relevant and necessary in order to decide on the issue”.

179. Paragraph 44(b) sets out a wide range of effects which Ryanair alleges arise from the use of the Ryanair Word EUTM which it alleges Vola makes. While it may be that there are documents relating to the consequences which Ryanair allege flow from Vola’s supposed use of the Ryanair Word EUTM, the matters set out at para. 44(b) of the statement of claim do appear to comprise in the main conclusions drawn by Ryanair as to the manner in which the alleged use by Vola of the Ryanair Word EUTM adversely affects various functions associated with it. As such, it seems that expert evidence will have to be adduced at the trial of the action by Ryanair in order to substantiate the conclusions that it draws at para. 44(b). While Vola denies the allegations in that paragraph, it seems to me that it is in a position to contest, by its own expert evidence, the conclusions which are set out at para. 44(b).

180. In any event, to the extent that experts propose to rely on documentation, I would envisage that there would be full disclosure of any such documentation in advance of trial. In this way, Vola will not be taken by surprise and the category of documents which it has sought – which in any event is extremely broad and probably unworkable – will not be necessary for the trial of the issues between the parties. I do not therefore propose to order discovery of this category.

Category 23

All documents which concern, evidence or refer to the way the alleged use is asserted to suggest an economic/business link/connection between the first defendant and Ryanair.

181. This category has been agreed in correspondence by the parties.

Category 24

All documents which concern, evidence or refer to the matter of alleged use being “vague” as pleaded.

182. Ryanair alleges at para. 44(b)(iii), and at other paragraphs of the statement of claim, that the Vola website is “vague to such an extent on the origin of the service at issue that normally informed and reasonably attentive internet users are unable to determine...whether [Vola] is separate and distinct to Ryanair, or on the contrary, economically linked to or associated with Ryanair...”.

183. This allegation is put in issue by Vola in its defence. In its letter of 19th November, 2020, Ryanair have stated that this is a matter for expert evidence and legal submissions. Vola contend that any such expert evidence “must be based on proof and evidence of the primary facts alleged”. While this is undoubtedly true, the allegation by Ryanair that the Vola website is vague in the manner alleged is essentially a value judgment which would have to be substantiated by evidence at trial. It is difficult to see what documents, if any, might be available to substantiate this allegation, and the category as phrased would cause difficulty in terms of retrieval of documents.

184. To the extent that the value judgment expressed by Ryanair as quoted above is to be substantiated by expert evidence, I envisage that an exchange of expert evidence in advance of the trial will enable Vola to know what case it has to meet. In the circumstances, I do not consider an order for discovery of this category appropriate.

Category 25

All documents which concern, evidence or refer to the alleged adverse effect on the “quality function” Ryanair alleges.

185. This category has been agreed in correspondence. Accordingly, I will order discovery of this category.

Category 26

All documents which concern, evidence or refer to the associations and messages brought to the minds of consumers by the Ryanair Word EUTM.

186. In its letter of 19th November, 2020, Ryanair stated that it did not have a principled objection to a category of this nature, but objected to the category as sought on the basis that it would be “disproportionately burdensome and costly”. The category is certainly too broadly worded, and probably unworkable. In its letter, Ryanair suggested discovering “the results of all Ryanair customer satisfaction surveys from 2017 to date”. It maintains that it would be disproportionate for Ryanair to provide individual responses to surveys, feedback forms, complaints *etc.* in circumstances where it carries 150 million passengers per year and has, since 2017 when the proceedings were issued, flown close to 400 million passengers.

187. In circumstances where the category as sought is vague, unworkable and unduly burdensome, I will order discovery of Ryanair’s proposals as set out in the letter of 19th November, 2020.

Category 27

All documents which concern, evidence or refer to flights bought through Vola’s website are “charged at inflated prices”.

188. This category has been agreed in correspondence, and I will order discovery accordingly.

Category 28

All documents which concern, evidence or refer to the value to Ryanair of advertising “other goods and services” on Ryanair’s website.

189. This refers to an allegation at para. 44(b)(viii) of the statement of claim, in which Ryanair alleges that the use by Vola of the Ryanair Word EUTM adversely

affects the investment function as the Vola website “denies Ryanair the ability to sell not only its flights but all other goods and services available on the Ryanair website...”. This is put in issue by Vola in its defence.

190. Once again, the matters set out at para. 44(b)(viii) appear to me to be a conclusion drawn by Ryanair as to what flows from the alleged misuse by Vola of the Ryanair Word EUTM. This seems to me to be primarily a matter of expert evidence and legal submissions, and I envisage that any documents upon which such expert evidence is based will be shared by the parties in advance of the action. As formulated, the category as it stands is too vague and wide, and in my view unnecessary for the fair disposal of the issues between the parties. I will therefore not order discovery of this category.

Categories 29 and 30

29. All documents which concern, evidence or refer to instances or reports of being misled on the part of any consumer on account of the matters alleged against Vola by Ryanair including but not limited to attempts on the part of Ryanair to identify any such alleged instances.

30. All documents which concern, evidence or refer to instances or reports of confusion, on the part of any consumer on account of the matters alleged against Vola by Ryanair, including but not limited to attempts on the part of Ryanair to identify any such alleged instances.

191. These sub-categories are agreed by the parties, save that they have agreed that the documents are to comprise a “reasonable representative sample”. I will therefore order discovery of the sub-categories on this basis.

Categories, 31, 32 and 33

31. All documents which concern, evidence or refer to instances of detriment to the alleged distinctive character and reputation of the Ryanair trademarks caused by the alleged activities of Vola including but not limited to attempts on the part of Ryanair to identify such instances.

32. All documents which concern, evidence or refer to the pleaded use of the Ryanair design EUTM by Vola.

33. All documents which concern, evidence or refer to unfair advantage being taken of the Ryanair Trade Marks.

192. All of the three foregoing sub-categories have been agreed in correspondence.

I will therefore order discovery in those terms.

Category 34

All documents which concern, evidence or refer to the taking, appropriation, use and/or conversion of any physical goods and/or property including where same is located and what their respective functions are.

193. This category relates to Ryanair's pleas of conversion and of trespass to property at paras. 55 to 57 of the statement of claim. These pleas are put in issue by Vola in its defence. The category is unacceptably broad, referring as it does to the "use...of any physical goods and/or property...". Ryanair points out that this "encompasses all documents held by Ryanair concerning the use of property..."

194. Ryanair has offered to disclose "documents which concern, evidence or refer to the taking, appropriation, use and/or conversion of any physical goods and/or property". Any such documents are likely to indicate "where same is located and what their respective functions are...". Issues as to whether, as a matter of law, conversion or trespass to property has in fact taken place will in any event be a matter for

submissions. In the circumstances, I propose to order discovery in the formulation offered by Ryanair rather in the terms of the category suggested.

Category 35

All documents which concern, evidence or refer to the alleged reputation or goodwill attached to the search and services of Ryanair (as distinct from the provision of flight travel).

195. This category relates to the “international reputation and goodwill” which Ryanair alleges at para. 68 that it has generated “through its business as a pioneer in the provision of low cost flights. In the 32 years that have passed since its inception Ryanair has become Europe’s leading low fares airline and carries more international scheduled passengers than any other carrier in the world”. While Ryanair alleges at para. 69 that Vola “is engaged in passing off its search and booking services as being connected with Ryanair...”, it does not appear to me that Ryanair contends for a “reputation or goodwill attached to the search and services of Ryanair...”. As such, the category as sought does not appear to me to be either relevant or necessary for the fair disposal of the issues between the parties. I will therefore not order discovery of this category.

Category 36

All documents which concern, evidence or refer to the alleged price sensitivity on the low-fares airline market as pleaded.

196. This category relates to para. 73 of the statement of claim, in which Ryanair makes a number of complaints about the manner in which Vola approaches the question of price on its website in respect of Ryanair flights, stating that “...the low-fares airline market is extremely price sensitive”. This is put in issue by Vola.

197. The “all documents” formulation is hopelessly broad and unworkable. As Ryanair comment “...given that Ryanair’s entire business model revolves around providing customers with the lowest fares, the level of discovery in respect of such a category would be immensely vast and unduly burdensome for Ryanair to produce...”.

198. In any event, the question of price sensitivity is not in issue between the parties; Ryanair refers to it as an element of its complaint as to the way in which Vola presents prices on its website in relation to Ryanair flights. In my view, there is no basis upon which discovery of this category of documents could be ordered, and it is not relevant or necessary for the fair disposal of the issues between the parties. In those circumstances, I do not propose to order discovery of this category.

Categories 37, 38 and 39

199. The parties are agreed that each of these categories concerns quantum rather than liability, and as such may be held over until the module on quantum, if that is necessary.

Category 40

To the extent not already covered by any other category, all documents that will be relied upon by the Plaintiff to support its claim.

200. This category is expressed by the parties to be “agreed” and consequently I will make an order for discovery in the terms as set out.

201. However, there is a slight caveat in the letter of 19th November, 2020 from Ryanair’s solicitors which does not find expression in either Mr. McNamara’s affidavit or in the agreed spreadsheet dealing with this motion. In that letter, Ryanair’s solicitors state as follows: -

“Our client is agreeable to this category of discovery. However, while our client is agreeable to discovery of all documents it currently intends to rely on to support its claim, the non-discovery of any document should not act as a bar to that document being relied upon subsequently in the proceedings. Accordingly, our client expressly reserves its right to produce and rely upon documents which are not discovered in response to this category.”

202. This is a somewhat equivocal statement. The category as ordered should be of considerable comfort to Vola; the clear purpose of it is to ensure that it is apprised of all documentation on which Ryanair will rely at the trial, and that it will not in any sense be taken by surprise. In any event, once discovery of this category is ordered, Ryanair is under an ongoing obligation to discover any further documentation which emerges on which it proposes to rely at trial, and which is not included in the original discovery affidavit.

203. I infer from the paragraph quoted above that what is intended is to provide for a situation in which a document, which during the course of the trial emerges as both relevant and necessary but which has not previously been discovered, may be used and will not be subject to the objection that it has not previously been discovered.

204. It is of course always possible for a court at trial to permit a document to be adduced in evidence notwithstanding that it has not previously been discovered, provided an acceptable explanation for the lack of discovery has been furnished, and the justice of the case requires the document to be adduced. However, I trust that the paragraph quoted above is not a legalistic caveat which would be relied upon to introduce swathes of hitherto undiscovered documentation at the trial. In circumstances where I have refused discovery to Vola of many specific categories of discovery, I take comfort from an order in the terms of Category 40 above as ensuring

that Vola will not be taken by surprise at the hearing, and I trust that the agreement which Category 40 represents will be interpreted by the parties in this spirit.

D. YPSILON'S MOTION AGAINST RYANAIR

205. By a notice of motion issued on 9th February, 2021, Ypsilon sought discovery from Ryanair of thirteen different categories of documents set out in a schedule appended to the notice of motion. There has been agreement in relation to some of these categories, as I will outline below.

206. The Ypsilon motion was grounded upon the affidavit of 8th February, 2021 of Erika O'Donnell, a solicitor in the firm representing Ypsilon. Mr. McNamara swore a detailed replying affidavit on 3rd March, 2021 on behalf of Ryanair. As with the other motions, the parties have each made substantial written submissions and provided helpful spreadsheets of the categories which summarise the arguments made by the parties in their respective affidavits and correspondence. Detailed oral submissions were made by counsel in relation to the categories at the hearing.

Category 1

All documents recording and/or referring to and/or evidencing:

- (i) A breakdown of the proportion of the Plaintiff's bookings that are made through the Ryanair Website in spreadsheet and/or list format from 1 September 2017 onwards.**
- (ii) (a) A spreadsheet containing relevant employee staff numbers, departments, and costs;**
 - (b) sample relevant employment contracts; and**
 - (c) relevant invoices and/or credit notes from Ryanair suppliers.**

(iii) A list of the third parties who have/had agreements in place whereby those third parties' products are or were advertised and/or sold through the Ryanair website with the plaintiff from 1 September 2017 to date.

207. These sub-categories have been agreed by the parties. I will therefore make an order for discovery in the terms sought. A sub-category 1(iv) set out in correspondence is no longer being pursued.

Categories 2, 3, 4 (ii) – 4 (vii), 5, 11 and 12

208. A common position applies to these categories, which are as follows: -

2. All documents recording and/or referring to and/or evidencing the alleged agreement by the Second Named Defendant to be bound by the Terms of Use (TOU) of the Ryanair website.

3. All documents recording and/or referring to and/or evidencing the alleged accessing by the Second Named Defendant of the Ryanair website for its own commercial purposes.

4. All documents recording and/or referring to and/or evidencing:

(i) the alleged breaching by the Second Named Defendant of the terms of use of the Ryanair website;

(ii) the alleged engagement in by the Second Named Defendant and/or offering for sale and/or selling of “screen-scraping services” by the Second Named Defendant;

(iii) the alleged taking of and/or utilising data from, trespassing and/or converting the Ryanair Website and the data, information and property allegedly comprised therein by the Second Named Defendant;

(iv) the alleged creation and/or production and/or design and/or maintaining and/or developing and/or using and/or authorising and/or procuring and/or directing and/or controlling and/or benefitting from and/or owning and offering for sale and selling to its customers by the Second Named Defendant of an automated system or software to enter into the Ryanair website and extract information from the Ryanair website, including information as to flight schedules, for the purposes of providing the said information to customers of the second named defendant's alleged "Screen-Scraping Services" as made available on the Second Named Defendant's Website;

(v) the alleged taking, appropriating or utilising of scraped property in the form of data, information URLs, computer programmes or Ryanair APIs from the Ryanair Website by the Second Named Defendant and thereafter using it;

(vi) the alleged using and/or utilising of computer programmes and/or APIs that are allegedly the plaintiff's own intellectual creation against the plaintiff, allegedly in contravention of the terms of the use of the Ryanair Website; and

(vii) the alleged generation of new IP addresses in order to circumvent Ryanair's Shield system.

5. All documents recording and/or referring to and/or evidencing any contractual relationship or relationship based on the supply of services (including but not limited to the alleged "Screen-Scraping Services") between the Second Named Defendant and the First Named Defendant.

11. All documents recording and/or referring to and/or evidencing:

- (i) the alleged failure and/or refusal and/or neglecting by the Second Named Defendant to transfer customers to the Ryanair Website for the purposes of booking a flight with Ryanair; and**
- (ii) the alleged enabling and/or facilitating by the Second Named Defendant of the booking of Ryanair flights without the requirement for the passenger to engage with the Ryanair Website.**

12. All documents recording and/or referring to and/or evidencing:

- (i) any misrepresentation by the Second Named Defendant to its customers that it has an association and/or affiliation with the Plaintiff by virtue of its facilitation of the sale of the Plaintiff's flights and/or flight data and/or Screen-Scraping Services and/or that the Plaintiff has an arrangement with the Second Named Defendant in respect of the searching and booking of the Plaintiff's flight services or is otherwise associated with the Plaintiff in a way which is not actually the case;**
- (ii) any misapprehension on the part of internet users, members of the public and/or customers of the Plaintiff in this regard; and**
- (iii) any damage to or loss of the Plaintiff's goodwill and brand identity by the public being led to believe that the Plaintiff has directed or controlled the manner in which services are allegedly presented and charged for by the Second Named Defendant.**

209. The initial request for discovery by Ypsilon's solicitors was effected by letter of 9th October, 2020. A detailed response was made by Ryanair's solicitors by letter of

19th November, 2020. Ypsilon replied through its solicitors – a new firm by this stage – by letter of 17th December, 2020. In that letter, it stated as follows: -

“2. Documents not in Ryanair’s Possession.

In response to certain of the categories in the Request, your client has refused to agree discovery on the basis that it is not in possession of the documents in issue by virtue of the fact that *inter alia*, the Defendants’ possess the documents due to the ‘furtive nature of the alleged screen-scraping activities’ and citing Ryanair’s difficulties in evidencing activities relating to screen scraping.

Insofar as Ryanair seeks to rely on this position, our client agrees not to pursue the relevant categories further on the understanding that Ryanair does not have any documents which respond to the request in its possession and will not seek to introduce or rely on any such documents at the hearing, save with respect to documents that are produced on discovery by our client or the First Named Defendant. [This] applies, in particular, to documents responsive to categories 2, 3, 4 (ii) – 4 (vii), 5, 11, 12 (i) and 12 (iii).”

210. By letter of 20th January, 2021, Ryanair’s solicitors responded to this issue as follows:

“Regarding your offer not to pursue documents responsive to Categories 2, 3, 4 (ii) – 4 (vii), 5, 11, 12 (i) and 12 (iii), given the evidential deficit of which our client complains and your request that our client ‘*will not seek to introduce or rely on any such documents at the hearing*’, for the avoidance of doubt, this can only apply to our client’s current documentary state. In other words, this agreement could obviously not act as a general bar to our client introducing or relying on documents which it does not currently have in its possession, but

which might have been caught by the above categories if it did possess them now, and which it might come to possess before the trial of the action. Equally, it would not cover documents not yet in existence. On the assumption that this is indeed what you intended to imply, we have used the term ‘NOT TO BE PURSUED FURTHER’ below”.

211. By letter of 29th January, 2021 Ypsilon’s solicitors replied as follows: -

“Preliminary observations.

It is clear from our correspondence that our offer not to pursue the documents in categories 2, 3, 4 (ii) – 4 (vii), 5, 11, 12 (i) and 12 (iii) was save with respect to documents that are produced on discovery by our client or the First Named Defendant. However, the position you adopt in your letter dated 20 January 2021 is fundamentally different from our position as described above in that you appear to be reserving your client’s position in respect of the introduction of, or reliance on, documents corresponding to these categories regardless of whether your client obtains them from discovery or otherwise. In those circumstances, there is no basis to your client’s refusal not to address these categories on affidavit.

First, given your client’s position regarding its intention to rely on such documents which come into its possession, it is clear that your client does not dispute the relevance or necessity of such documents being discovered.

Second, since your client says that it has no documents corresponding to these categories, it would obviously not put any burden on it to swear to that effect on affidavit. It is well-established that the fact that your client might have no such documents is not a valid reason to exclude those categories from discovery.

Third, as you are well aware, discovery is an ongoing obligation. Therefore, if it is the case that Ryanair comes into possession of documents responsive to the above categories, something which your letter clearly suggests that your client envisages, it will be obliged to discover them to our client immediately.”

212. At para. 25 of his affidavit in respect of the motion, Mr. McNamara avers as follows: -

“25. It should be readily apparent that the documents sought by Ypsilon at Category 2 are documents which Ryanair does not have in its possession. Ryanair has stated on numerous occasions that it does not know how Ypsilon accesses its website. Indeed, Ryanair originally initiated the within proceedings against Vola, only. Ypsilon’s involvement came to light only through the affidavit evidence of Mr. Daniel Truica, Company Director of Vola, in his affidavit sworn on 6 February 2018...”.

213. All of the categories to which this particular controversy refers relate to either activities in which Ryanair alleges that Ypsilon engages, *e.g.* “all documents recording and/or referring to and/or evidencing the alleged accessing by the Second Named Defendant of the Ryanair website for its own commercial purposes” (category 3), or matters of which, if the allegation were true, Ypsilon would certainly have knowledge, *e.g.* “all documents recording and/or referring to and/or evidencing the alleged agreement by the Second Named Defendant to be bound by the Terms of Use of the Ryanair Website” (category 2). Ryanair contends that it does not have any such documents, but does not wish to be precluded from producing any such documents at trial in the event that it comes into possession of such documents.

214. Ryanair has in any event concerns about the formulation of the various categories, all of which require discovery of “all documents recording and/or referring

to and/or evidencing...”. As Mr. McNamara puts it in relation to category 2 at para. 27 of his affidavit:

“27. As drafted, this ‘all documents’ category could create very significant practical difficulties. For example, it could require a search of, and could capture, entirely irrelevant and unnecessary documentation (*e.g.* casual emails complaining about Ypsilon’s actions). It could cause Ryanair to unintentionally omit documents if, for example, Ypsilon’s interactions with Ryanair’s website had left ‘electronic traces’ on Ryanair documents, which Ryanair does not know about. In reality, this category requires Ryanair to look out documentation which, if it holds, it does not realise it holds. Further, Ryanair does not contend that it possesses any such documents demonstrating any interaction between Ypsilon and Ryanair’s website. Therefore, discovery in respect of this category is not appropriate, relevant and necessary for any issue in dispute in these proceedings.”

215. The issue generated some heat between counsel at the hearing before me. Counsel for Ypsilon was concerned that Ryanair’s position was that it would readily agree not to make discovery in these categories on the basis that it had no responsive documents, but would not be bound to disclose any documents of which it subsequently came into possession in these categories prior to the trial. Counsel for Ypsilon was concerned that the normal ongoing obligation in relation to discovery would not apply to Ryanair in the event that there was an agreement that it did not need to make discovery in respect of categories in which it stated that it did not have responsive documents.

216. Counsel for Ryanair took the position that Ryanair was simply stating the obvious: as counsel put it “...if the order is made, the obligation to make continuing

discovery comes axiomatically with it. If there is no order, [Ryanair doesn't] have to. That is the simple point being made". [Day 3, p.41, lines 23 to 26]. For his part, counsel for Ypsilon stated that "...if [counsel for Ryanair] is confirming that his client will swear in an affidavit of discovery in respect of these categories [that there is] no responsive document, then I am protected in relation to the ongoing obligation to make discovery, and that's fine". Counsel for Ryanair immediately responded "sorry, that is all we have ever said...". [Day 3, p.17, lines 1 to 6].

217. It does appear from Ryanair's submissions and the averments of Mr. McNamara that it is reluctant to make discovery of these categories for the reasons set out at para. 27 of Mr. McNamara's affidavit quoted above. It is also the case that, if there are any documents in the various categories, they should be documents which are in the possession of Ypsilon in any event. For these reasons, although it is not entirely clear, I take it that Ryanair's preference would be not to make discovery in these categories, but subject to the understanding expressed in its letter to Ypsilon's solicitors of 17th December, 2020 quoted above that "Ryanair does not have any documents which respond to the request in its possession and will not seek to introduce or rely on any such documents at hearing, save with respect to documents that are produced on discovery by our client or the First Named Defendant".

218. This however, leaves Ypsilon in an uncertain position in relation to documents responsive to these categories which may come into Ryanair's possession between the date of the discovery request and the hearing itself. It seems to me that this concern could be addressed by requiring an undertaking on behalf of Ryanair not to introduce or rely on documents responsive to any of the categories at issue at the hearing without swearing an affidavit of discovery in relation to any such documentation as soon as it comes into the possession of Ryanair. Such an undertaking would also

address the concerns that Ryanair has about its ability to make a full discovery in respect of these categories.

219. The parties will need to consider this suggestion. If such an undertaking is not forthcoming, my inclination would be to order discovery of the categories sought, notwithstanding that they are expressed in very wide terms, given Ryanair's assertion that it does not have any documents responsive to these categories. As I intend to give the parties an opportunity to address the precise form of order to be made in each of the four motions the subject of this judgment, the parties can engage in the meantime as to what they consider to be an appropriate order.

220. As regards sub-category 4(1) the parties have agreed that discovery should be made in these terms. Ryanair has expressed a caveat that, due to the "evidential deficit" which it alleges exists in relation to Ypsilon's alleged activities, "...it is not possible to demonstrate each occasion of Ypsilon's alleged interaction with the Ryanair website and due to this caveat, the discovery will likely be marginal...". In any event, I will order discovery in the terms of this sub-category.

Category 6

All documents recording and/or referring to and/or evidencing that the Second Named Defendant, its servants or agents had agreed, knew or ought to have known and/or and were put on notice:

- (i) that the activities in which it is alleged to have been engaged were unlawful and/or unauthorised and that those alleged activities continue to be unlawful and/or unauthorised;**
- (ii) that it was not authorised to use, utilise, interfere with and/or extract components and/or data from, the Ryanair Website; and**

(iii) of the lengths to which the Plaintiff had gone to protect the Ryanair Website and its property rights from alleged wrongful and/or authorised interference (including, but not limited to, the establishment of Shield).

221. In correspondence, Ryanair has refused to agree to sub-category 6 (i) and (ii) on the basis that any documents captured under category 2 of Ypsilon's request for discovery would sufficiently address these sub-categories. As we have seen, Ryanair's position in relation to category 2 is that it does not in any event have documents which respond to the request in that category.

222. It seems that Ryanair makes the case that the agreement which it alleges on the part of Ypsilon to be bound by the terms of use of the Ryanair website (category 2) forms the basis of its allegation that Ypsilon either knew or was on notice that the activities alleged against it were unlawful and/or unauthorised, and in particular that it was not entitled to extract components and/or data from the Ryanair website. Ryanair is effectively saying that, due to the furtive or clandestine manner in which it alleges Ypsilon carried on its activities, it does not have any documentation in this regard.

223. I propose therefore to regard categories 6 (i) and (ii) as akin to the categories 2, 3, 4 (ii) – 4 (vii), 5, 11 and 12 discussed above, and therefore that a suitable undertaking from Ryanair may suffice as discussed above, failing which an order for discovery will be made.

224. As regards category 6(iii), I do not see how documentation in the possession of Ryanair in relation to the state of knowledge of Ypsilon as to "the lengths to which the plaintiff had gone to protect the Ryanair website and its property rights..." is either relevant to the proceedings or necessary for the fair disposal of the issues between the parties or as to costs. It is clear that Ryanair implements security systems

to safeguard its website and data. Ypsilon's knowledge, or imputed knowledge, of such systems is not an issue in the proceedings. Ypsilon either carried out the activities which are alleged against it, or it did not, and this will be the subject of detailed evidence at the hearing of the action. In the circumstances, I do not propose to make discovery in terms of sub-category 6(iii).

Category 7

All documents recording and/or referring to and/or evidencing: -

- (i) A spreadsheet containing relevant employee staff numbers, departments, and costs;**
 - (ii) Sample relevant employment contracts;**
- [a third category is not being pursued].**

225. These categories are agreed, and an order will be made for discovery in the terms sought.

Category 8

All documents recording and/or referring to and/or evidencing that the Ryanair Website (save for the computer programmes that are used in the making or operation of the database elements/components of the Ryanair website) and/or the database, tables and/or compilations comprising of the sub-components of the Ryanair Website constitutes an "original database" for the purposes of Section 2 of the Copyright and Related Rights Act 2000 (the 'Copyright Act').

For the avoidance of doubt this category includes but is not limited to all documents recording and/or referring to and/or evidencing an employer-employee relationship between the author or authors of the said databases, tables and/or compilations and/or the assignment of the copyright in the said databases, tables and/or compilations from the said author or authors.

226. This relates to Ryanair's allegation that its website constitutes an "original database" for the purposes of s.2 of the Copyright Act and that Ryanair owns the copyright therein. Ryanair makes the allegation on the basis that Ryanair is the employer of the author or authors of the said databases, tables and/or compilations and/or has received the assignment of the copyright in the said databases, tables and/or compilations from the said author or authors. At para. 42 of his affidavit, Mr. McNamara avers as follows: -

"This category is particularly burdensome (which I understand goes to necessity), in circumstances where Ryanair is asked to provide an analogous, but not identical, category of discovery to Vola. Accordingly, in an attempt to avoid the unnecessary cost of providing two large but separate discoveries, and in an attempt to discover identified documents which go to the rood [sic] of the category, Ryanair has sought to streamline the approach by providing the documents it has offered to discover to Vola, to Ypsilon also."

227. The documents offered include (a) a list of works in which is claimed copyright subsists, and (b) sample employment contracts. At para. 171 above, I accepted that this was an appropriate discovery in relation to a similar category (category 14) sought by Vola. Ryanair also offers to Ypsilon the sub-categories 15 (b) to (f) which it offered to Vola, and in respect of which I considered it appropriate to make an order.

228. I propose to adopt Ryanair's formulation, and to make an order in this regard. The category sought by Ypsilon is extremely general and could certainly be unduly burdensome. While I am prepared to order discovery in terms of Ryanair's formulation, I would draw attention to my comments at para. 164 above in relation to category 14 of Vola's motion for discovery against Ryanair regarding the sample

contracts which Ryanair proposes to discover. While my comments in that paragraph were directed to Mr. McNamara's averment that "all copyright created by employees of Ryanair vests in Ryanair" the same rationale should apply to this category. In this regard, I note Mr. McNamara's averment at para. 43 of his affidavit that "...contrary to Ms. O'Donnell's suggestion at paragraph 47 of her affidavit that Ryanair's proposal conflates copyright and database rights, the documents proposed by Ryanair includes documents pertaining to both copyright and database rights as per the above list" and to the extent that any of the sample contracts do not confirm that the database rights of the employees vest in Ryanair, Ryanair should exhibit such documentation which demonstrates that it does.

Category 9

All documents recording and/or referring to and/or evidencing that the Plaintiff enjoys copyright in the computer programmes which it alleges underlie the Ryanair Website (including APIs) including (but not limited to) the alleged standing of the said computer programmes as literary works pursuant to section 17(2)(a) of the Copyright and Related Rights Act 2000.

229. At para. 34 of the statement of claim, Ryanair "as author of the computer programmes underlying the Ryanair website (including APIs) contends that it enjoys copyright in the computer programmes "...as same can constitute literary works pursuant to section 17(2)(a) of the Copyright and Related Rights Act 2000 (as amended)".

230. Ryanair alleges that Ypsilon violates its copyright rights, and Ypsilon therefore contends that documentation in relation to exactly what is comprised in the Ryanair website and the authorship of its programmes is both relevant and necessary for the fair disposal of the issues in the action.

231. Ryanair on the other hand was of the view that category 9 was sufficiently similar to categories 14 and 17 of Vola's request for the discovery it proposed in respect of those categories to be sufficient in respect of Ypsilon's category 9. Accordingly, Ryanair offered discovery of the documents it had offered to Vola in respect of category 14 *i.e.* a list of works in which it is claimed copyright subsists; sample employment contracts; and sample IP/NDA contracts. Ryanair argues that there was no reason for a separate discovery for each of the defendants in respect of copyright, as there is no distinction in how this issue impacts on the two defendants.

232. Ypsilon makes the point that a similar category was raised at particular 22 of Ypsilon's notice for particulars, which Ryanair refused on the basis that it was a matter for evidence. Ypsilon alleges that Ryanair is attempting to roll back and depart from its response to this particular that inquiries in this regard were "a matter for evidence, including expert evidence and thereafter legal submission...". Ypsilon's position is that the evidence required to substantiate Ryanair's allegations must be grounded in documentation, and that Ypsilon cannot be refused documentation that is relevant to Ryanair's copyright claim. In particular, it alleges that Ryanair cannot now contend that the question of copyright is a matter only for expert evidence – as opposed to factual evidence grounded on documentation – and legal submission.

233. It is the case that the category as expressed is in extremely wide terms, such that a full discovery of documents in this category would be likely to be extremely difficult and costly. It seems to me that the comments I made in relation to category 17 of Vola's application for discovery against Ryanair at paras. 171 and 172 above apply also to this category. I am conscious also, that given that Ryanair proposes to rely on expert evidence in support of its claim in respect of rights under the Copyright Act, a full statement of Ryanair's case in this regard, together with any documentation

upon which they rely, will be made available to Ypsilon in advance of the trial. If there were to be any doubt about Ryanair's obligation to provide such documentation, I would consider ordering discovery in terms similar to category 40 of the categories proposed by Vola in its request to Ryanair.

234. While I am determined to ensure, insofar as possible, that no party will be taken by surprise in relation to any document on which any of the parties proposes to rely at trial, I do not wish to impose an extremely costly, unnecessary wide-ranging and burdensome category of discovery on any party at this stage. It may be that important documentation on which Ryanair seek to rely at trial emerges only at the stage of experts' reports. However, for the moment I consider it sufficient to order discovery in respect of category 9 in the terms offered by Ryanair, *i.e.* the same terms as those offered in respect of Vola's categories 14 and 17.

Category 10

All documents recording and/or referring to and/or evidencing that the Ryanair Website (save for the computer programmes that are used in the making or operation of the database elements/components of the Ryanair Website) and/or the database, tables and/or compilations comprising of the sub components of the Ryanair Website constitutes a "database" for the purposes of section 2 of the Copyright Act.

For the avoidance of doubt this category includes but is not limited to all documents recording and/or referring to and/or evidencing any investment made by Ryanair in presenting the contents of the said database(s).

235. The category is extremely wide-ranging and general; the comments above in relation to category 9 in this regard apply equally to category 10. Ryanair contends that discovery of this formulation of documents would involve searching through

documents relating to eleven different departments spanning across seven jurisdictions and including over one thousand staff members. It offers a “streamlined discovery” of documents which it contends “go to the root of the category”.

- (a) a list of works in which is claimed copyright subsists;
- (b) sample employment contracts;
- (c) sample IP/NDA contracts;
- (d) a spreadsheet containing relevant employee staff numbers, departments, and costs; and
- (e) relevant invoices and/or credit notes from Ryanair suppliers.

236. Ryanair describes this as “a pragmatic compromise to providing two large but separate “all documents” discoveries [which] should be sufficient for the purposes identified by Ypsilon”.

237. Ypsilon is unsympathetic to the “two discoveries” argument; as Ms. O’Donnell avers at para. 62 of the grounding affidavit “...Ryanair chose to include Ypsilon in the proceedings and cannot refuse to discover documents purely because it is ‘faced with two extensive discovery requests’. This is not an appropriate response to a request for discovery and Ypsilon is entitled to discovery of Category 10”. It is argued that streamlining a discovery response may be appropriate where there is “a clear overlap of documentation”, but not when it is “detrimental to and seeks to penalise Ypsilon or deprive it of the discovery to which it is entitled”.

238. It seems to me that the same rationale which I have outlined in respect of category 9 applies in respect of category 10. The court is required to strike a balance between what is “relevant and necessary for the fair disposal of the issues in the proceedings, and for saving costs”, and a situation where compliance with this

formula would result in an inordinate, burdensome and excessively costly discovery if all of the documents in a particular category required to be discovered.

239. I will order discovery of the “streamlined” documentation offered by Ryanair. The comments which I have made above in relation to documentation on which Ryanair proposes to rely at the hearing of the action, and the necessity for production of same and the avoidance of surprise for any of the parties, apply equally to this category.

Category 11

All documents recording and/or referring to and/or evidencing:

- (i) the alleged failure and/or refusal and/or neglecting by the Second Named Defendant to transfer customers to the Ryanair Website for the purposes of booking a flight with [Ryanair]; and**
- (ii) the alleged enabling and/or facilitating by the Second Named Defendant of the booking of Ryanair flights without the requirement for the passenger to engage with the Ryanair Website.**

240. This category stems from para. 59 of the statement of claim, which is as follows: -

“Further, or in the alternative, by failing and/or refusing and/or neglecting to transfer customers to the Ryanair Website for the purposes of booking a flight with Ryanair and/or by providing Screen Scraping Services that enable and/or facilitate the booking of Ryanair flights without the requirement for the passenger to engage with the Ryanair Website, the Second Named Defendant is unlawfully interfering with the economic and/or contractual interests of Ryanair and/or the Ryanair Business Model”.

241. This allegation is denied by Ypsilon in its defence. Ypsilon claims that it is “...a stranger as to the precise process by which flights with Ryanair are booked by Internet users and whether this occurs through engagement with the Ryanair Website or otherwise. In these circumstances, the documents sought are relevant and necessary in order to establish whether the customers in question have in fact been ‘transferred’ to the Ryanair website or not and whether the booking by those internet users of the flights in question has occurred through engagement with the Ryanair Website or not”. [Paragraph 67, grounding affidavit].

242. However, Ryanair maintains that it cannot ascertain when or how Ypsilon accesses its website and screen-scrapes its data, and that any of the documents sought would be in the possession of Ypsilon. Ryanair points out that it sought the discovery of these documents from Ypsilon at category 3 of its own request; however, as is clear from para. 114 above, I refused to order discovery of this documentation as against Ypsilon. A main objection to that category was that it required Ypsilon to evidence a negative by discovering documents which evidence a “failure” to transfer customers to Ryanair’s website. This applies equally to the present category 11 in Ypsilon’s request. Whatever about Ypsilon having such documentation, it is extremely unlikely that Ryanair would have such documentation. I will therefore refuse discovery of this category.

Category 13

All documents recording and/or referring to and/or evidencing any inability on the part of the Plaintiff to provide notification to passengers in accordance with Article 5 of Regulation 261/2004 attributable to the alleged conduct of the Defendants.

243. At para. 77 of the statement of claim, Ryanair alleges as follows: -

“Pursuant to Regulation 261 Ryanair, as a Community air carrier, owes a number of duties and obligations to its passengers. In the event of a flight being cancelled Ryanair is obliged to compensate its passengers, unless it notifies its passengers in accordance with Article 5 of Regulation 261. Ryanair is prevented from obviating this obligation as the First Named Defendant, through its actions, fails to provide Ryanair with a point of contact for the passenger. As a result, Ryanair may be in breach of its notice requirements under Article 5 and thus would be liable to compensate the passenger through no fault of Ryanair”.

244. Ypsilon contends that it is a stranger as to whether any such event has ever occurred, but that it is reasonable to assume that if it had, correspondence would have been generated between Ryanair and the relevant customer or the relevant enforcement agency responsible for enforcement of the regulation. Ryanair offers a “reasonable representative sample” in its letters of 19th November, 2020 and 20th January, 2021. Ypsilon rejects this offer in circumstances where Ypsilon is a stranger as to whether any such event has ever occurred and whether such alleged notifications are attributed to the conduct of Ypsilon, and given that the category is both relevant and necessary.

245. Ryanair contends that Ypsilon’s insistence on the full extent of the documentation “...ignores the simple reality that Ryanair has no way of determining which customers, who booked Ryanair flights through an OTA, did so on the basis of data provided by Ypsilon” [replying affidavit, para. 60]

246. That may be so. However, what is sought is documents in relation to the inability of the plaintiff to provide notification to passengers “attributable to the

alleged conduct of the defendants” [emphasis added], *i.e.* because the tickets were bought from the Vola website with the assistance of Ypsilon.

247. It must be the case that, when this happens, the customer contacts Ryanair, and when queried as to the fact that the ticket does not appear to have been bought through the Ryanair website, states that it has in fact been brought through an OTA such as Vola. For Ryanair to be able to substantiate the claim at para. 77 of the statement of claim, one assumes that it would have to show that its inability to notify passengers in accordance with the regulation was due to the acts of Vola and/or Ypsilon. One assumes that there is documentation in which Vola has been identified as the party which sold the Ryanair ticket which has given rise to the obligation to compensate passengers.

248. In these circumstances, it seems to me that the category is relevant and necessary. It is not suggested by Ryanair that the category is unduly burdensome. In those circumstances, I propose to order discovery of this category in the terms sought.

Category 14

249. This category, which was originally sought by Ypsilon, relates to quantum, and the parties have agreed that it can be held over for the quantum module, if that becomes necessary.

Conclusion

250. The foregoing represents my conclusions in relation to the categories set out in the four motions for discovery. I will direct that each of the moving parties draw up a draft order reflecting these determinations, and send it to the appropriate respondent in each case for agreement. I will list the matter for mention only at 10.15am on Monday February 7th 2022 to ensure that draft orders have been agreed.

251. I have not addressed in this judgment the question of what exactly constitutes “documents”. The solicitors for Ryanair, in their letter of 9th October, 2020 requesting discovery from Vola, set out their understanding of what is comprised in the term “documents”. In their reply of 19th November, 2020, the solicitors for Vola, on the second page of that letter, sought exclusions of certain types of documents “in the interests of proportionality”. The parties should consider whether it is necessary for the court to express a view as to what comprises “documents”, but I will expect the parties to be reasonable and pragmatic in this regard, and to raise difficulties only where they genuinely arise.

252. In the event that there is a genuine difficulty in relation to the format of the order, I will fix a date for brief argument in this regard. The parties will understand that under no circumstances will attempts to re-argue any of the ordered categories be permitted. My hope is to finalise the four orders quickly and efficiently, so that the parties can press on with what it is becoming increasingly apparent is extremely complex and costly litigation.