

THE HIGH COURT

[2022] IEHC 741

[2017 8782 P]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

SC VOLA.RO SRL

AND

(BY ORDER OF COURT OF 8th MARCH, 2019)

YPSILON.NET AG

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 15th day of December, 2022

Introduction

1. This judgment deals with two motions in the above proceedings. These are:
 - (1) the application by the second named defendant for an order striking out certain paragraphs in the amended statement of claim dated 15th March, 2019 (which paragraphs are set out in the schedule to the notice of motion); and

- (2) the application by the second named defendant for liberty to file an amended defence and, more substantively, a competition law counter-claim against the plaintiff in these proceedings.

Motion to strike out parts of the plaintiff's statement of claim

2. The second named defendant's application seeking to strike out parts of the plaintiff's amended statement of claim against the second defendant was brought by a notice of motion dated 22nd March, 2022. The matter was heard before me over two days on 6th and 7th October, 2022.

3. The notice of motion, at paragraph 1, sought an order in the following terms:

1. *An order striking out the pleadings in the amended statement of claim dated 15th March, 2019 (the "amended statement of claim") set out in the schedule to this notice of motion on the basis that the plaintiff is precluded from advancing such pleadings as against the second named defendant and/or that the court lacks jurisdiction to hear these proceedings insofar as they relate to those pleadings as against the second named defendant on the basis of O.15 r.13 of the Rules of the Superior Courts and/or Article 8.1 of Regulation 12/15/2012. (Emphasis added)*

4. At paragraph 3 of the notice of motion, the second defendant seeks a declaration that the plaintiff is precluded from advancing, in these proceedings, any allegation as against the second named defendant which goes beyond the specific allegations being advanced against the first named defendant or any allegation relating to services alleged to be provided by the second defendant to anyone other than the first defendant.

5. In essence, the second named defendant is seeking to limit the plaintiff's claim (as against the second defendant) to the provision of the second defendant's services to the first

named defendant only rather than, as the plaintiff claims, to the provision of its services to all its clients.

6. The application was grounded upon an affidavit of Mr. Klenz the CEO of the second defendant. He states that Ypsilon is a German company with its registered office in Germany and that it is the provider of information technology and payment solutions for the travel industry.

7. However before embarking on an analysis of the affidavits, it is necessary to set out the background to this application as the proceedings are complex.

The plaintiff's case against the first defendant

8. The plaintiff initiated proceedings against the first defendant on 29th September, 2017 by means of a plenary summons.

9. Ryanair DAC ("Ryanair") is a company incorporated in Ireland with its registered office in Dublin. Ryanair carries on an international business as a low fares airline. It is also a provider through its website ("the Ryanair website") of services in respect of its own flights as well as ancillary services such as accommodation, car hire and insurance services which may be accessed and booked by Ryanair's customers." Ryanair pleads that it earns "significant revenue by allowing other service providers advertise on its website".

10. The first named defendant is a company incorporated in Romania with a registered address in Bucharest, Romania. The first named defendant carries on business as an online travel agent ("OTA") providing an internet search and booking facility in respect of airline flights and other services (such as hotel reservation, car hire). Its business is conducted through a website that it operates.

11. Ryanair pleads in its statement of claim that it has built up very considerable goodwill in its business from its establishment in 1985 as Europe's first low fares airline. It also pleads

that it has become one of Europe's leading airlines currently carrying in excess of 130 million passengers per annum on approximately 2,000 daily flights across 34 countries. It pleads that:

“Ryanair’s sales marketing and business model is based on offering low fares to its customers and the Ryanair website is at the centre of that model and fundamental thereto. The Ryanair website is Ryanair’s chosen primary route to market and is based on the attraction offered by its fares and known reputation as a low cost carrier to attract internet users and ultimately customers in order to sell not only Ryanair flight tickets but also complementary and ancillary products and services”.

12. It pleads that the Ryanair website is a key part of its business and constitutes property owned by Ryanair, that over 99% of Ryanair bookings are made through the Ryanair website and that, owing to the importance of its website, Ryanair has spent significant sums of money in the design, operation and maintenance of the Ryanair website so as to ensure that it operates in an efficient and user-friendly manner.

13. Ryanair also pleads that it maintains exclusive online distribution rights to the general public in respect of the offering for sale of Ryanair flights so as to ensure that Ryanair flights are offered for sale and sold to consumers at the lowest price thereby preserving Ryanair's identity and reputation including its reputation on the internet as a premier low fares airline.

14. Ryanair also pleads that, as part of its business model, it presents third party products to internet users such as car hire, accommodation, etc which generate substantial revenue for Ryanair.

15. Ryanair also pleads, at paragraph 6 of its statement of claim, that “fundamental to the present and future operations of Ryanair is the promotion and consolidation of direct contact between Ryanair and its customers”.

16. The statement of claim also sets out what it calls the “front end” and the “back end” elements of the website located at the domain name www.ryanair.com and related matters.

17. Paragraph 8 of the statement of claim sets out a summary of the alleged wrongful acts of the first named defendant, its servants or agents and states as follows:

“The Ryanair website is the property of Ryanair. Ryanair is the creator, author, and owner of the Ryanair website. The defendant is engaging in screen scraping activity (as more fully described at para. 12 below); is taking and/or utilising data from, trespassing and/or converting the Ryanair website, and the data, information and property comprised therein; and is engaged in passing off the defendant’s website as being associated with Ryanair shall be described below. In so doing the defendant’s 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. Further, the activities of the defendant, its servants and/or agents are restricting, limiting and/or impeding Ryanair’s development and/or expansion and depriving Ryanair of the ability to grow its business in accordance with the Ryanair business model. At all times the defendant, its servants or agents knew or ought to have known and/or were put on notice that the defendant’s activities, the subject matter of these proceedings were unlawful and/unauthorised, and they continue to be unlawful and/unauthorised. The defendant is bound by the Ryanair website’s terms of use (as more fully described at paras. 9 to 11 below) and is in breach of same.

18. At para. 9 of the statement of claim Ryanair pleads that:

“At all material times, admission to and use of the Ryanair website has been subject to the Ryanair website terms of use (“terms of use”) which in accordance with accepted internet practice are made available for inspection on the Ryanair website via a hypertext link.”

19. Ryanair pleads that the first defendant, as a user of the Ryanair website, is bound by its terms of use, paragraph 1 of which provides:

“By using this website or its contents, whether directly or through its third party, you agree to be legally bound by and act in accordance with these terms of use. In particular you agree not to do the acts prohibited under paras. 3 to 5 below. If you disagree with these terms of use, you are not permitted to, and agree not to, use this website or its content”.

20. Paragraph 2 of the terms of use provides that the website is the “only website authorised to sell Ryanair flights whether on their own or as part of a package”.

21. Paragraph 3 provides under the heading “Permitted Use”:

“You are not permitted to use this website (including the mobile app and any webpage and/or the data that passes through the web domain at Ryanair.com) its underlying computer programmes (including application programming interfaces, domain names uniform resource locators, databases, functions, or its content other than for private non-commercial purposes. Use of any automated system or software whether operated by a third party or otherwise extract any data from this website for commercial purposes (“screen saving”) is prohibited.

22. Paragraph 4 provides that all of the information, data, computer programmes etc are subject to copyright, trademark rights, database rights and/or other intellectual property rights belonging to Ryanair.

23. Paragraph 7 provides that:

“It is a condition precedent to the use of the Ryanair website including access to information relating to flight details, costs, etc that any such party submits to the sole and exclusive jurisdiction of the courts of the Republic of Ireland and to the application of the law in that jurisdiction...”

24. The statement of claim in the proceedings against the first defendant is lengthy and complex. It runs to some 33 pages, 70 paragraphs and seeks four pages of reliefs.

25. The plaintiff's causes of action as set out in the statement of claim against the first defendant are as follows:

1. breach of contract;
2. infringement of copyright;
3. infringement of Ryanair's data-base rights;
4. trademark infringement;
5. conversion;
6. trespass to goods and/or property;
7. infliction of economic loss;
8. misrepresentation;
9. passing off; and
10. negligent and/or wrongful infringement with the economic interests and/or contractual relations of Ryanair.

26. These are collectively called the "screen scraping causes of action".

27. It is also of significance, in my view, to consider the orders which the plaintiff is seeking in its case against the first defendant and in particular the injunctive relief which the plaintiff is seeking against the first defendant.

28. The plaintiff in its plenary summons and its statement of claim seeks:

1. An injunction restraining the defendant, its servants, or agents from using the Ryanair website in breach of its terms of use;
2. an injunction restraining the defendant, its servants, or agents from infringing the registered trademarks of Ryanair;

3. an injunction restraining the defendant, its servants, or agents from infringing the database rights of Ryanair;
4. an injunction restraining the defendant, its servants, or agents from using and/or utilising data and/or information extracted from the Ryanair website or regarding services provided by Ryanair on any and all websites owned, controlled and/or operated by the defendant;
5. an injunction restraining the defendant from infringing Ryanair's copyright in the Ryanair website;
6. an injunction restraining the defendants from passing off its search and booking services or its business generally as being connected with Ryanair;
7. an injunction restraining the defendants from misrepresenting to users of the defendant's website that it has obtained the authority from Ryanair to offer for sale and sell Ryanair flights;
8. an injunction restraining the defendants from adding unauthorised or concealed charges to the cost of Ryanair's services in such a manner as to give the impression that such charges are imposed by Ryanair;
9. an injunction preventing the defendant trespassing in respect of Ryanair goods and/or property;
10. an injunction preventing the defendant from converting Ryanair's goods and/or property;
11. a *Quia Timet* injunction restraining the defendant from further breach in the terms of use of the Ryanair website;
12. a *Quia Timet* injunction restraining the defendant from using Ryanair's trademark; and

13. a *Quia Timet* injunction restraining the defendant from further infringing Ryanair's database rights or copyright.

29. Ryanair also seeks damages for breach of contract, misrepresentation, passing off, trespass, conversion and related reliefs. Ryanair also seeks various declaratory orders.

30. It can be seen from the above recital of the claims in Ryanair's claim against the first named defendant that Ryanair has set out significant number of causes of action against the first defendant.

The first defendant's application to contest jurisdiction

31. Ryanair delivered its statement of claim against the first defendant on 17th November, 2017.

32. On 1st December, 2017 the first defendant delivered a conditional appearance and on 6th February, 2018 the first defendant issued a notice of motion contesting the jurisdiction of the Irish courts. This motion came on for hearing and was the subject of a lengthy written judgment of the High Court (Ní Raifeartaigh J.) which held that the Irish courts did have jurisdiction. This judgment was delivered on 14th January, 2019 and runs to 62 pages.

33. In her judgment, Ní Raifeartaigh J. stated at paragraph 1 that the application before her at that time raised issues relating to Regulation 1215/2012 ("The Regulation"). The first defendant claimed that Romania, its domicile, was the proper jurisdiction to hear all of the plaintiff's claims following the general rule under Article 4 of the Regulation which provides that the defendant should be sued in its place of domicile. However, Ryanair sought to displace the general rule in Article 4 and sought to rely on Article 7 (1), Article (7) (2) as well as Article 25 (1) (a) and (c) of the Regulation.

34. Ní Raifeartaigh J. refused the relief sought in the first defendant's motion and held that the Irish courts did have jurisdiction to hear Ryanair's claim.

The plaintiff's motion to join the second defendant - the joinder application

35. On 1st February, 2019 Ryanair brought an application to join Ypsilon.net AG as a second named defendant in these proceedings. This application was brought pursuant to O.15 r.13 of the Rules of the Superior Courts (“R.S.C.”) The plaintiff also sought an order granting leave to amend the plenary summons in the within proceedings in terms of the draft plenary summons appended to the notice of motion. This application was grounded upon the affidavit of Thomas McNamara (solicitor and Head of Legal in Ryanair) dated 31st January, 2019 (i.e., some two weeks after the judgment of the High Court (Ní Raifeartaigh J.) had been delivered).

36. In this affidavit at paragraph 13, (having set out the background to the claim against the first defendant, the use of the Ryanair website, the terms of use of the Ryanair website and the various claims which Ryanair had against the first defendant, Mr. McNamara stated:

“In addition to the within proceedings in their current form as initially instituted against the defendant solely, the notice of motion herein relates to the unlawful use by Ypsilon of the Ryanair website. Further to information averred by the defendant in these proceedings regarding Ypsilon’s activity on the Ryanair website and as detailed at paras. 22 to 25 below, Ryanair believes it also has screen scraping causes of action as against the proposed second defendant Ypsilon.” (emphasis added).

37. Mr. McNamara of Ryanair stated in his affidavit that, in the application to contest jurisdiction brought by the first defendant, Mr. Truica of the first defendant had sworn an affidavit in which he stated that the first defendant (Vola) had no interaction with the Ryanair website but rather that it had obtained all this information from third party providers including in particular a company called Ypsilon AG a company based in Germany.

38. At paragraph 22 of Mr. McNamara’s affidavit in the joinder application he quotes Mr. Truica as follows:

“Vola relies on information provided by legitimate third-party providers who produce details of flight availability and information for a whole range of airlines including Ryanair via ARI arrangements which Vola has in place with these third-party providers. These third-party providers are (up until very recently) Travel Fusion Ltd (an entity based in the UK) and Ypsilon AG (an entity based in Germany)”.

39. At paragraph 23 of his affidavit in the joinder application Mr. McNamara said:

“The defendant asserts that Ypsilon interacts ‘legitimately and lawfully’ with Ryanair’s flight information booking systems and does so other than by ‘screen scraping’. The defendant’s assertion in this regard is incorrect and misconceived as Ryanair has not authorised nor consented to the defendant or for that matter Ypsilon (i) using its website for commercial gain or otherwise or (ii) screen scraping from the Ryanair website.”

40. Mr. McNamara also drew attention to the fact that Mr. Truica on behalf of the first defendant swore a supplemental affidavit on 24th April (in the jurisdiction challenge) in which he again stated that the first defendant obtained Ryanair flight data and booking functionality from third party suppliers such as Ypsilon. Mr. McNamara then stated at para. 24 of his affidavit:

“I can confirm to this court that Ryanair does not consent to Ypsilon using the Ryanair website or Ryanair flight data in the manner suggested by Mr. Truica or indeed at all. Accordingly, if what is averred to by Mr. Truica is correct then Ypsilon is unlawfully using the Ryanair website and Ryanair stands entitled to pursue screen scraping causes of action against Ypsilon”. (emphasis added).

41. Mr. McNamara also stated in his affidavit that as a result of the above admissions and confirmation by the defendant - that the first defendant sources Ryanair flight data from

Ypsilon - that Ryanair now sought to add Ypsilon as second defendant in the within proceedings.

42. At paragraph 26 of the joinder application Mr. McNamara stated:

“Ypsilon.net AG is, I believe a corporation limited by share ownership and registered in Germany ... Ypsilon purports to be a ‘global provider of internet travel technology for airlines, consolidators, travel portals and travel agencies’ that ‘connects to all major GDS and CRS and offers full low cost carrier content as well as car, hotel, rail, insurance, charter, and tour operator content’. Ypsilon conducts its business through the website <http://Ypsilon.net/> and such other websites as Ryanair is not yet aware of (“the Ypsilon website”). Ryanair believes that the Ypsilon website offers for sale various online and computer software programmes designed for and intended to be used by online travel agents and other corporate clients (including the defendant) (“OTAs”) to facilitate the sale of various modes of transport and accommodation services.

27. Unlike the defendant, Ypsilon does not directly offer internet users the option to search for and book travel options, such as flights (including Ryanair flight tickets) directly through the Ypsilon website. In order to provide this honourable court with a description of the business model of Ypsilon or insight into how it operates (according to Ypsilon), I accessed the Ypsilon website on or about 31st January, 2019 and captured screenshots of my perusal of the Ypsilon website. In this regard I beg to refer to copies of screenshots of the Ypsilon website upon which marked with letters and numbered “TMCN2” I have signed my name prior to the swearing hereof.

28. At page 4 of exhibit TMCN2 Ypsilon states inter alia as follows:

‘Content is the most vital asset of any travel company. Ypsilon not only accesses all major GDS but also provides content from 180 low cost carriers,

charters, hotel, rental car, rail, and insurances content. By aggregating content from different sources, Ypsilon offers a one stop shop for retailers searching for multi-content booking engines...

We connect suppliers to distributors and customers. Airlines and travel content providers can access thousands of agencies and customers worldwide through Ypsilon.net, providing an efficient distribution platform for their inventory. Content made available through Ypsilon can be deployed instantly and distributed globally providing scheduled and low cost carriers, hotels, and car hire companies a highly profitable alternative distribution platform'

29. As can be derived from the above, Ypsilon is in the business of providing data including flight data from airlines (including low cost airlines) to its clients and OTA such as the defendant. The defendant has admitted that it obtains Ryanair flight data from Ypsilon. The above extract from the Ypsilon website is consistent with the descriptions given by the defendant as to the services provided by Ypsilon.....

however, I say and reiterate that Ryanair does not consent to nor authorise Ypsilon to reuse data or flight data the property of Ryanair”.

43. At paragraph 37 Mr. McNamara states:

“However, Ryanair does not wilfully provide its flight data to Ypsilon, nor does it consent to Ypsilon using, processing, or selling Ryanair data including flight data. It follows that arising from the defendant’s stance or admissions, Ryanair also has screen scraping cause of action (as pleaded in the within proceedings) as against Ypsilon.”

44. At paragraph 38 Mr. McNamara states:

“Therefore, I say and believe that a fundamental factual issue of dispute between the parties herein relates to the manner in which the defendant interacts and/or uses the

Ryanair website. I say and believe that it is necessary to resolve that factual dispute in order to properly assess the matters at dispute in the within proceedings. I say and believe that this honourable court cannot resolve that factual dispute without assessing the claims of the defendant that it is Ypsilon from whom the defendant sources or accesses Ryanair data and flight data. I say and believe that it is necessary to join Ypsilon to the within proceedings so as to enable this court to effectually and completely adjudicate on the matters between the parties. In short, having regard to the case that the defendant has made heretofore, this court cannot determine who in fact is engaged in the unlawful use of the Ryanair website absent the joinder of Ypsilon as a defendant to these proceedings". (emphasis added)

It was on the basis of this affidavit evidence that the application was made to join the second defendant to the proceedings.

45. The application to join the second defendant was heard on 8th March, 2019 and on the same day the High Court (Ní Raifeartaigh J.) made an order joining Ypsilon as a co-defendant to this case.

46. It should be noted that the High Court order recites that the court ordered the joinder of the second named defendant "on reading the said notice and the affidavit of Thomas McNamara grounding same filed on 1st February, 2019 and the documents and exhibits referred to therein including the draft amended plenary summons".

47. It should also be noted that the High Court judge who granted this order was the same judge who made the decision on the jurisdiction motion in respect of the first named defendant and was therefore familiar with the issues involved.

The plaintiff's claim in the amended plenary summons and statement of claim against the second defendant

48. The plaintiff then served the amended plenary summons and the amended statement of claim on the first and second named defendants on the 14th and 15th March, 2019.

49. It is instructive to look at the amended plenary summons and the amended statement of claim and to set out the plaintiff's case against the second defendant.

50. In the amended plenary summons Ryanair seeks

1. a declaration that the terms of use of the Ryanair website are binding on the defendants, their servants or agents (i.e. the only change is to seek the relief against both defendants);
2. a declaration that a contract was entered into between the plaintiff "Ryanair" and the defendants, their servants and/or agents in respect of access and/or use of the Ryanair website and/or use of the information contained thereon;
3. an order by way of prohibitory injunction restraining the defendants, their servants or agents from using the Ryanair website in breach of its terms of use thereto;
4. an order by way of a prohibitory injunction restraining the defendants, their servants or agents from infringing the European Union registered trademarks of Ryanair including (but not limited to) by the use of Ryanair's trademarks on any and all websites own, controlled and/or operated by the defendants, their servants or agents;
5. an order by way of prohibitory injunction restraining the defendants, their servants or agents from infringing the database rights of Ryanair;
6. an Order by way of prohibitory injunction restraining the defendants, their servants or agents from using and/or reutilising data and/or information extracted from the Ryanair website or regarding services provided by Ryanair

on any and all websites owned, controlled and/or operated by the defendants, their servants or agents;

7. an order by way of a prohibitory injunction restraining the defendants, their servants or agents from infringing Ryanair's copyright in the Ryanair website.

51. In other words, the amendments made in the amended plenary summons are to seek similar relief against both defendants instead of just the first defendant.

52. There is also a reference to Article 8 (1) and Article 8 (3) of the Regulation. I will revert to this matter later in my judgment.

53. It is noteworthy, in my opinion, that a plain reading of the amended plenary summons would indicate to all the parties to the proceedings that the substance of the relief which the plaintiff was seeking against both defendants was various orders restraining both defendants from using the Ryanair website without Ryanair's express knowledge and consent, and damages for breach of contract, misrepresentation, passing off, trespass, conversion, infringement of trademark, infringement of database rights, infringement of copyright and interference with the contractual relations of Ryanair.

54. It is also noteworthy that, on a number of occasions in the amended plenary summons, the paragraphs make reference to the plaintiff seeking injunctions restraining the defendants, their servants or agents from using the Ryanair website "on any and all websites owned controlled and/or operated by the defendants, their servants and/or agents" i.e. it is not limited to the services provided by the second defendant to the first defendant.

55. It is also noteworthy, in my view, that the plaintiff's reliefs as against the second defendant are cast in the same general terms as the reliefs sought as against the first defendant i.e. injunctive reliefs restraining the defendants from using the Ryanair website in breach of its terms of use and/or restraining any infringement of trademark database rights, etc.

56. It is also noteworthy that nowhere in the amended plenary summons does it limit its claim as against the second defendant to the provision of services to the first defendant.

57. In my view, it is clear on a proper reading of the amended plenary summons that the plaintiff is seeking declaratory and injunctive relief against both defendants to restrain both defendants from using the Ryanair website in breach of its terms of use and is seeking injunctive relief to prevent both defendants from infringing the intellectual property rights of Ryanair.

58. Indeed, paragraph 9 of the amended plenary summons specifically seeks an order by way of prohibitory injunction restraining the defendants, their servants or agents from misrepresenting to users of the defendant's website that they have obtained or have authority from Ryanair to offer for sale or sell Ryanair's flights.

59. Again and again one sees in the amended plenary summons a clear intention in the drafting of the plenary summons that the reliefs sought by the plaintiff against the second defendant relate to preventing the second defendant from using the Ryanair website in breach of its terms of use and to prevent the second defendant from infringing any of Ryanair's trademarks on any and all websites owned or controlled by the second named defendant.

60. The clear intention of the amended plenary summons (and amended statement of claim) as against the second defendant is to restrain the second defendant's alleged unauthorised use of the Ryanair website and not just to the marketing of its services to the first defendant.

Analysis of the plaintiff's claim against the second defendant

61. I have set out above, in some detail, the nature of the plaintiff's claim against the first defendant and the various causes of action which it has set out in its statement of claim against the first defendant which it called "the screen scraping causes of action".

62. It is instructive to analyse the plaintiff's claim against the second defendant in the light of that. It is clear from the amended plenary summons and amended statement of claim that the plaintiff has pleaded against the first defendant claims for

1. Breach of contract
2. Breach of copyright and database rights,
3. Trademark infringements
4. Conversion
5. Trespass to goods or property
6. Passing off
7. Misrepresentation; and
8. Unlawful interference with the economic interests of the plaintiff.

63. It is clear that all same causes of action are also now pleaded against the second defendant.

64. It is also clear that the amended plenary summons and amended statement of claim have not pleaded causes of action against the second defendant which are not pleaded as against the first defendant.

65. It is also clear that the amended statement of claim did not go beyond (in the causes of action and reliefs claimed) that which was pleaded in the plenary summons upon which they were given liberty to join the second defendant.

66. The plaintiff claimed in submissions that the essential cause or matter in this case is the unlawful use of its website by the first defendant and by the second defendant.

67. The plaintiff submits that it is clear from its amended plenary summons and amended statement of claim that nowhere did the plaintiff seek to limit its claim to the second defendant's use of its website in providing services to the first defendant only, but instead sought relief against the second defendant to prevent the second defendant's unlawful use of

the plaintiff's website in the provision of its services generally (i.e. to all its clients not just the first defendant).

68. The plaintiffs also submits not unreasonably, that if the second defendant was unsure at any stage it could have written to the plaintiff asking for clarification of the nature of its claim but it did not do so.

Amended statement of claim

69. The amended statement of claim was delivered on 15th March, 2019 pursuant to the order of the High Court dated 8th March, 2019. The amendments in general are those which amend all references to the first defendant with references to the first and second defendants their servants or agents.

70. However there are a couple of specific amendments which relate to the second defendant. Paragraph 3 of the amended statement of claim sets out certain details of the second defendant. It states that:

“the second defendant carries on business as a provider of travel information technology services for airlines consolidators travel portals and travel agencies (including online travel agents (“OTAs) such as the first named defendant) including internet search and booking facilities in respect of airline flights and other services.”

It also pleads:

“The second defendant provides technological systems and services that deliver to the user, for example the first named defendant, access to the websites of travel service providers such as Ryanair as well as searching booking functions in respect thereto. Its business is conducted through a website that it operates; namely Ypsilon.net (hereinafter referred to as the Ypsilon website) although it may operate other websites in respect of which Ryanair reserves its position.”

71. It should be noted that this plea is in general terms and refers to the second defendant providing services for a number of persons “such as the first defendant” or delivering services to the user “for example the first named defendant”.

72. In my view, the use of these expressions i.e. “the first named defendant” mean and must be taken to mean that Ryanair is setting out in its statement of claim that the second defendant provides services to a wide variety of persons including the first defendant -not that it is seeking to limit its claim to the provision of services by the second defendant to the first defendant.

73. The critical plea however is at paragraph 16 of the amended statement of claim wherein Ryanair pleads as follows:

“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 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 directs 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 programmes and/or API 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 defendant does so without the permission of Ryanair.”

74. At paragraph 19 it is pleaded that:

“In addition by providing and operating the aforesaid screen scraping services the second defendant, its servants or agents used the Ryanair website.”

75. At paragraph 26 the plaintiff pleads that:

“The second defendant through the Ypsilon website offers for sale screen scraping services which enable online travel agents such as the first defendant to offer for sale and sell Ryanair flights. Ryanair does not permit the sale of its flights and/or data by the defendants. In (1) offering for sale and selling/reselling Ryanair’s flights and (2) 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.” (emphasis added).

76. At paragraph 30 Ryanair pleads that the defendants - including the second defendant - have breached the contract comprised in the terms of use of the Ryanair website and in particular pleads at para. 30B:

“The second defendant and/or its servants or agents offers for sale and sells screen scraping services on the Ypsilon website which in turn enables third parties such as the first defendant to offer for sale and sell Ryanair flights. This is in breach of Ryanair’s exclusive distribution clause as per para. 2 of its terms of use.”

77. Again, in my view, the amended plenary summons and statement of claim are clear on their face that Ryanair’s cause of action as against the second defendant is to restrain its unauthorised use of the Ryanair website completely (i.e. in the provision of all its services to all of its customers and not just to the first defendant).

78. Nowhere in either the amended plenary summons or amended statement of claim has Ryanair pleaded that its case as against the second defendant was limited to the provision by the second defendant of its services to the first defendant only. Indeed at all times it seems clear in the pleadings that it is the misuse of the Ryanair website in general by all parties (i.e. by the first defendant and the second defendant) that is at the heart of Ryanair’s claim against the first and second defendant.

79. On each and every occasion the plaintiff in its pleadings has set out the unauthorised use by the second defendant of its website for the provision by the second defendant of its services to all of its customers. On a number of occasions it has used the expression “including the first defendant” or “for example the first defendant”. However this cannot be taken as meaning that the plaintiff’s case against the second defendant is restricted only to the provision of its services to the first defendant only.

No Application to set aside the joinder order

80. It is also instructive to note that when this amended plenary summons and amended statement of claim were served on the second defendant, no application was made to set aside this amended plenary summons and/or statement of claim as against the second defendant at that time or thereafter. Thus no application was made by the second defendant to set aside the order joining them as the second defendant in the proceedings or to seek to limit the scope of the amended plenary summons and/or statement of claim at that time to the provision of the defendant’s services to the first defendant.

Further steps in the proceedings

81. On 4th April, 2019 the first defendant served a notice for particulars on the plaintiff and on 26th April, 2019 the plaintiff replied to these requests for particulars.

82. Subsequently on 25th May, 2019 the plaintiff brought a motion for judgment in default of defence against the first defendant. On 7th June, 2019 the first defendant delivered a defence and also delivered a counterclaim in relation to the plaintiff’s alleged abuse of a dominant position.

83. On 20th June, 2019 the second defendant entered a conditional appearance. However it did not bring a motion to set aside its joinder to these proceedings.

84. On 20th September, 2019 the second defendant issued a notice for particulars to Ryanair in respect of its amended statement of claim.

85. On 11th October, 2019 the plaintiff replied to the second defendant's request for particulars.
86. On 1st November, 2019 the second defendant delivered its defence.
87. On 22nd November, 2019 the plaintiff issued its request for particulars in respect of the second named defendant's defence.
88. On 31st January, 2020 the plaintiff filed a reply to the second defendant's defence.
89. On 24th July, 2020 the High Court (Sanfey J.) gave directions in relation to the case management of the proceedings and the modularisation of the trial.
90. Between 9th October, 2020 and 21st February, 2021 the plaintiff, the first defendant and the second defendant exchanged requests for voluntary discovery and replied to such requests. On 3rd February, 2021, the first defendant brought a motion for discovery against the plaintiff. On 5th February, 2021 the plaintiff brought a motion for discovery against the first defendant. On 5th February, 2021 the plaintiff also brought a motion for discovery against the second defendant. Likewise on 9th February, 2021 the second defendant brought a motion for discovery against the plaintiff.
91. Between 2nd June, 2021 and 4th June, 2021 these discovery motions were heard by the High Court (Sanfey J.).
92. On 15th December, 2021 the High Court (Sanfey J.) gave its reserved judgment in respect of the discovery applications.
93. Further case management motions and other applications were issued in this matter.
94. Subsequently on 22nd March 2022 the second defendant issued its motion to strike out part of the plaintiff's amended plenary summons and statement of claim.
95. The second defendant's case is that it only became clear to it in the course of the discovery hearing before the High Court that the plaintiff's claim as against the second defendant was in respect of the provision of the second defendant's services to all of its

clients not just the first defendant. To put it another way, the second defendant says that it only then realised that the plaintiff's case against the second defendant was to restrain the second defendant from using the Ryanair website generally and/or infringing the plaintiff's intellectual property rights in respect of the said website.

96. The second defendant says that when it became aware that this was the true nature of the plaintiff's case, it then issued the application to strike out part of the plaintiff's statement of claim and to restrict the plaintiff's claim against the second defendant to the provision of its services to the first defendant alone - and to ensure that the plaintiff's case against the second defendant did not extend to the provision of those services to all of its other customers.

97. Ryanair, by contrast, submitted that the plaintiff's case at all times was to restrain the second defendant from misusing its website and infringing its intellectual property rights in the provision of services to all its customers not just to the first defendant. The plaintiff also says that this was clear and evident on the face of the amended plenary summons and the amended statement of claim from the very start.

98. The plaintiff also argues that, in effect, this application by the second defendant amounts to a collateral attack on the joinder order of the High Court in circumstances where the second defendant did not appeal against the order at the relevant time or indeed seek to set aside the order.

99. The plaintiff also submits that it is astonishing that the second defendant is bringing this application some three years after the court order to join the second defendant in these proceedings (an order which the second defendant never appealed or challenged or sought to set aside in any way).

The request for particulars and replies to particulars

100. The second defendant in its submissions also said that it was not only unclear from the amended plenary summons and statement of claim what the true nature of the plaintiff's case was but that it was also unclear from the plaintiff's replies to particulars raised by the second defendant.

101. The second defendant sent a notice for particulars to the plaintiff in September, 2019. The plaintiff replied to these particulars on 11th October, 2019.

102. At paragraph 71 of the particulars the second defendant made the following request:

1. In respect of the matter set out at para. 16 of the amended statement of claim please:

- 1. Identify with particularity each and every service which the plaintiff alleges that the second named defendant provides which the plaintiff alleges engages in or facilitates or enables screen scraping of the Ryanair website or the selling of Ryanair flights or flight data.*

103. The reply was

“This is not an appropriate request for particulars but rather is an impermissible interrogation of Ryanair's claim as pleaded. Moreover these are matters self-evidently within the knowledge of Ypsilon. The particular raised is not necessary to enable Ypsilon to plead by way of defence to Ryanair's claim. Thereafter this is a matter for evidence at trial.”

104. At para. 73 the second defendant asked the plaintiff to:

“Identify each customer of the second defendant to whom it is alleged that the second defendant has supplied any such service system software computer programme API, service or application.”

105. The plaintiff's reply was:

“This is not an appropriate request for particulars but rather is an impermissible interrogation of Ryanair's claim as pleaded. Moreover these are matters self-evidently within the knowledge of Ypsilon. The particular raised is not necessary to enable Ypsilon to plead by way of defence to Ryanair's claim. Thereafter this is a matter for evidence at trial.”

106. The second defendant submitted to the court that it was not clear to it from this answer that the plaintiff's claim against the second defendant extended to all the services which the second defendant allegedly provided to all its customers rather than being simply limited to the second defendant's supply of services to the first defendant.

107. However the particulars raised by the second defendant asked the plaintiff to identify “each customer of the second defendant to whom it is alleged that the second defendant has supplied any such service” etc. Thus if the plaintiff's claim was limited to the second defendant's supply of services to the first defendant, the plaintiff could easily have said so in its replies to particulars. The fact that it did not do so - and the terms of the reply given - mean that it should have been clear to the second defendant at this stage that the plaintiff's claim was not limited to the second defendant's supply of services to the first defendant but instead extended to any use by the second defendant of the Ryanair website in the supply of its services to any of the second defendant's customers.

108. Moreover paragraph 35 of the request for particulars at (ii) the second defendant asked the plaintiff to:

“identify each and every instance in which it is alleged that the second defendant was required to transfer customers to the Ryanair website for the purposes of booking a flight with Ryanair and failed to do so.”

109. This particular was replied to by Ryanair stating:

“Any online search for, or booking of, a Ryanair flight engaged in and/or facilitated and/or enabled by Ypsilon is an instance whereupon Ypsilon was required to transfer the customer to the Ryanair website”.

110. Again it should have been clear to the second defendant from the terms of this reply that the plaintiff’s case against the second defendant was not limited to the second defendant’s provision of its services to the first defendant but instead related to any use by the second defendant of the Ryanair website and any provision by the second defendant of such services to any of its clients.

The nature of the second defendant’s application

111. The second defendant’s application before the court is an application under O.15 r.13. This rule provides as follows:

“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party.”

112. It is important to note what the second defendant's application is, and what it is not.

113. The second defendant never brought an application to contest the jurisdiction of the Irish courts in this matter. Therefore it must be taken to have accepted that Irish courts have jurisdiction in relation to this matter and/or to have surrendered to Irish jurisdiction in this case.

114. Moreover the second defendant never brought any application pursuant to O.12 r.26 of the Rules of the Superior Courts to set aside the service upon it of the summons or of notice of the summons or to discharge the order authorising such service. Thus the second defendant never sought to set aside the order joining it as a second defendant.

115. Moreover the second defendant never sought in any way to appeal the order joining the second defendant as a party to the proceedings.

116. Thus the second defendant accepts that the order joining it as a second defendant was properly made.

117. There is therefore no doubt that the second defendant has been properly joined to these proceedings. Indeed, since its joinder, it issued a notice for particulars to Ryanair on 20th September, 2019 and it has filed a defence on 1st November, 2019. It has also participated in discovery motions and applications for directions hearings.

118. Indeed it appears that the High Court (Sanfey J.) gave directions to the second defendant that if it intended to challenge the jurisdiction of the High Court, it should do so by certain date, but it chose not to do so.

119. The second defendant's application is, in fact, an application to strike out part of the plaintiff's claim – but curiously, brought as an application under O. 15 r. 13. The parts of the statement of claim which the second defendant seeks to strike out are attached in the Schedule to the second defendant's notice of motion. (However it should be noted that one

paragraph was in fact withdrawn at the hearing of this application following submissions by the second defendant and questions from the court.)

120. However it is clear that the purpose of the second defendant's strike out application is to limit the plaintiff's claim against the second defendant to the second defendant's provision of its services to the first defendant only.

121. Counsel for the second defendant in his submissions confirmed that the application was being brought by the second named defendant pursuant to O.15 r.13 and Article 8 of the Regulation. It is not brought pursuant to the inherent jurisdiction of the court nor is it brought on the grounds that the plaintiff's claim is frivolous or vexatious or bound to fail.

Submissions of the second defendant

122. The first argument made by the second defendant in support of its strike out application is that because the plaintiff discovered that the first defendant obtained its information from the second defendant, and because the grounding affidavit in the joinder application sets this out, that the plaintiff's case against the second defendant must be understood to be limited to the provision by the second defendant of its services to the first defendant. This argument is based on the following submissions:

- (1) The second defendant was joined to the proceedings pursuant to O.15 r.13 of the Rules of the Superior Courts;
- (2) The plaintiff's application to join the second defendant was grounded on the affidavit of Mr. Thomas McNamara sworn on 1st February, 2019;
- (3) Mr. McNamara identified Ryanair's causes of action against the first defendant as being "screen scraping causes of action" which he defined at paragraph 12 of his affidavit (i.e. breach of contract, misrepresentation, passing off, trespass to goods, conversion, infringement of registered trademarks, breach of copyright, negligent and wrongful infringement of the plaintiff's economic interests);

- (4) At paragraph 13 of his affidavit Mr. McNamara averred that “Ryanair believes it also had a screen scraping cause of action as against the second defendant”.
- (5) In making this application the plaintiff relied on the affidavit of Mr. Daniel Truica, a director of Vola, the first named defendant, in which Vola and Mr. Truica claimed that the first defendant had no interaction with the plaintiff’s website but instead obtains Ryanair flight data and book functionality from the second defendant;
- (6) On this basis Mr. McNamara and the plaintiff contended that the second defendant’s “interest” in the proceedings related to a fundamental factual issue in dispute between the parties i.e. to the manner in which the defendant interacts and/or uses the Ryanair website.
- (7) Therefore the plaintiff was clear that the basis on which it made the joinder application was that the first defendant was reliant on the second defendant to interact with the plaintiff’s website, that the first defendant’s activities were unlawful and as a result that the second defendant’s provision of such services to the first defendant was unlawful.

123. However in my view that argument is not sustainable for the following reasons:

- (1) It is clear from the affidavit of Mr. McNamara sworn on the 21st January, 2019 (to ground the application to join the second defendant) that the plaintiff’s intended action against the second defendant related to the unlawful use generally by the second defendant (and the first defendant) of the plaintiff’s website.
- (2) Thus Mr. McNamara at paragraph 9 of his joinder affidavit stated as follows:
“These proceedings relate to the unlawful use by the defendant (and as explained below), the unlawful use by Ypsilon of the Ryanair website. Ryanair alleges that the defendant [the first defendant] its servants and/or agents

engages in a process commonly known as “screen scraping” whereby data (and flight data in particular) the property of Ryanair is taken and/or utilised and/or extracted from the Ryanair website through the use of an automated system or software without Ryanair’s consent and/or on lawful authority.”

(3) At paragraph 13 Mr. McNamara also states:

“In addition to the within proceedings in their current form as initially instituted against the defendant solely, the notice of motion herein relates to the unlawful use by Ypsilon of the Ryanair website. Further to information averred by the defendant in these proceedings regarding Ypsilon’s activity on the Ryanair website, and as detailed at para. 22 – 25 below, Ryanair believes it also has screen scraping causes of action as against the proposed second defendant Ypsilon”.

(4) It should be noted that nowhere in this affidavit is it stated that these screen scraping causes of action against the proposed second defendant are limited to the provision of its services to the first defendant.

(5) At paragraph 23 Mr. McNamara states:

“The [first named] defendant asserts that Ypsilon interacts ‘legitimately and lawfully with Ryanair’s flight information and booking systems and does so other than by ‘screen scraping’. The defendant’s assertion in this regard is incorrect and misconceived as Ryanair has not authorised nor consented to the defendant or for that matter Ypsilon (1) using its website for commercial gain or otherwise or (2) screen scraping from the Ryanair website.”

(6) At paragraph 24 Mr. McNamara states:

“I can confirm to this court that Ryanair does not consent to Ypsilon using the Ryanair website or Ryanair flight data in the manner suggested by Mr. Truica

or indeed at all. Indeed if what is averred to by Mr. Truica is correct then Ypsilon is unlawfully using the Ryanair website and Ryanair stands entitled to pursue the screen scraping causes of action against Ypsilon.”

(7) At paragraph 25 Mr. McNamara states:

“It is on foot of the aforesaid admissions and confirmation [by the first defendant], that the [first defendant] sources Ryanair flight data from Ypsilon that Ryanair now seeks to add Ypsilon as the second named defendant in the within proceedings.”

(8) At paragraph 26 Mr. McNamara states:

“Ryanair believes that the Ypsilon website offers for sale various online and computer software programmes designed for and intended to be used by online travel agents and other corporate clients (including the defendant) (‘OTAs’) to facilitate the sale of various modes of transport and accommodation services.”

(9) At paragraph 27 he states:

“Unlike the defendant, Ypsilon does not directly offer internet users the option to search for and book travel options such as flights (including Ryanair flight tickets) directly through the Ypsilon website. In order to provide this honourable court with a description of the business model of Ypsilon or insight as how it operates (according to Ypsilon) I accessed the Ypsilon website on or about 31st January, 2019 and captured screenshots of my perusal of the Ypsilon website.”

(10) At paragraph 29 Mr. McNamara states:

“As can be derived from the above Ypsilon is in the business of providing data including flight data from airlines (including low cost airlines) to its clients

and OTAs such as the defendant. The defendant has admitted that it obtains Ryanair flight data from Ypsilon. The above extracts from the Ypsilon website are consistent with the descriptions given by the defendant as to the services provided by Ypsilonhowever I say and reiterate that Ryanair does not consent to or authorise Ypsilon to use data or flight data the property of Ryanair”.

- (11) At paragraph 36 of his affidavit under the heading “The damage caused by the wrongful acts of Ypsilon” Mr. McNamara states:

“As referred to in para. 8 of the statement of claim herein, Ryanair has invested heavily in human resources and has incurred considerable expense in combatting the wrongful activities of the defendant and, it appears, Ypsilon (i.e. screen scraping in particular) on the Ryanair website. Further I say and believe that Ryanair suffers and continues to suffer loss and damage on a daily basis due to the actions of the defendant and, it appears, Ypsilon in wrongfully leveraging Ryanair’s business and intellectual property for its own commercial gain (in breach of the Ryanair’s terms of use)”

- (12) At paragraph 37 Mr. McNamara states:

“However Ryanair does not wilfully provide its flight data to Ypsilon nor does it consent to Ypsilon using, processing or selling Ryanair data including flight data. It follows that arising from the defendant’s stance or admissions, Ryanair also has screen scraping causes of action (as pleaded in the within proceedings (as against Ypsilon))”.

124. It is clear therefore based on all of the above paragraphs that the intention of Ryanair in making the joinder application was to issue proceedings against the second defendant in respect of its alleged unauthorised use of the Ryanair website generally,i.e. in the provision of

all or any of its services by the second defendant to all of its clients not just the first defendant.

125. It is in that context that paragraph 38 of Mr. McNamara's affidavit has to be considered. At paragraph 38 Mr. McNamara states under the heading "Necessity to join Ypsilon to the proceedings":

"Therefore I say and believe that the fundamental factual issue of dispute between the parties herein relates to the manner in which the defendant [first defendant] interacts and/or uses the Ryanair website. I say and believe that it is necessary to resolve that factual dispute in order to properly assess the matters at dispute in the within proceedings. I say and believe that this honourable court cannot resolve that factual dispute without assessing the claims of the defendant that it is Ypsilon from whom the defendant sources or access Ryan data and flight data. I say and believe that it is necessary to join Ypsilon to the within proceedings so as to enable this High Court to effectually and completely adjudicate on the matters between the parties. In short having regard to the case that the defendant [the first named defendant] has made heretofore, this court cannot determine who in fact is engaged in the unlawful use of the Ryanair website absent the joinder of Ypsilon as a defendant to these proceedings".

126. In my view, it is clear therefore, that it was at all times the intention of the plaintiff (and it is clear from this affidavit to join the second defendant) that the purpose of instituting proceedings against the second defendant and joining them as a second defendant was to prevent the second defendant from unlawfully using the Ryanair website generally both in relation to its services to all its customers as well as to the first defendant.

The second argument

127. The second argument which the second defendant makes is that the plaintiff is simply wrong, that the second defendant has never had any role in respect of the first defendant's alleged activities and that Mr. Truica's averments in that regard were incorrect. It also stated that it did not have any involvement in the first defendant's alleged activities and it expressly denied that it engaged in screen scraping activity. It did however acknowledge that a company called "Flightbox" was a provider of certain IT related services to the first defendant and that Flightbox was a subsidiary of the second defendant but that the second defendant's interest in this company was sold in 2021. It also indicated that there were separate sets of proceedings between Ryanair and Flightbox in Poland and in Ireland in relation to this matter.

128. Ryanair however does not accept this explanation and it has submitted to the court that it believes the second defendant is engaged in such screen scraping causes of action and in an alleged unlawful use of the Ryanair website.

129. In my view, these are matters for the trial of the action and it is not part of my function to seek to resolve such conflicts of evidence at this interlocutory stage.

130. Counsel for the second defendant also submitted that, in the alternative, even if the second defendant were involved in such alleged unlawful use of the Ryanair website that would only arise because of some particular interpretation of the phrase "screen scraping causes of action" and in any event even if it did so, it denied that these were unlawful. Again these are matters for the trial of the action and it is not appropriate for me at this stage to offer a view on them.

The third argument – the claims against the second defendant must be limited to supply of services to the first defendant because of the nature of a joinder application

131. The third argument made by the second defendant is that parts of the statement of claim should be struck out because, it says, the nature of the joinder application (and the

nature of the joinder order) must mean that the only reliefs which the plaintiff can seek against the second defendant are orders seeking to restrain its alleged unlawful use of the Ryanair website in the provision of its services to the first defendant.

132. The plaintiff however rejects this submission. It states that it is clear from the joinder application, the joinder order, the amended plenary summons and the amended statement of claim that the plaintiff is seeking to restrain the second defendant from the unlawful use of its website in the provision of its services to all its clients not just the first defendant and that it is entitled so to do.

133. One of the arguments in the second defendant's submissions is that they say "there is no indication in the application before Judge Ní Raifeartaigh that Ryanair intends to pursue a broader claim against Ypsilon". As set out above, in my analysis of the joinder affidavit of Mr. McNamara and the proposed amended plenary summons, that is simply not the case.

134. It is also clear, in my opinion, that the issue of whether the second defendant has lawfully or unlawfully used the plaintiff's website in the provision of services to any party including the first defendant is one of the central questions involved in the cause or matter. I do not accept therefore that the plaintiff's pleadings can be "blue pencilled" to delete all references to the plaintiff's pleas that the second defendant's alleged unlawful use of the plaintiff's website for the provision of its services to any other clients apart from the first defendant can be deleted. In truth this would make a nonsense of the current proceedings as they are constituted as between the plaintiff and the first and second defendants. It is absolutely clear that the plaintiff is seeking declarations that the second defendant's alleged use of the plaintiff's website is unlawful and various injunctive reliefs in relation thereto. This matter must of necessity be considered and resolved by the court before the court can consider whether the second defendant's use of the Ryanair website in the provision of

services to the first defendant was lawful or unlawful. When put in this way it is clear that these matters, are inextricably linked in the proceedings.

135. I am of the view that the second defendant's argument in this regard is also misconceived. In my view, the essential cause or matter pleaded against the first defendant by the plaintiff is the unlawful use of the plaintiff's website; the first defendant said it obtained all this information from the second defendant; the plaintiff then joined the second defendant to restrain the unlawful use by the second defendant on the plaintiff's website. It is the alleged unlawful use of the plaintiff's website which is the essential cause or matter in this dispute as a result of which the second defendant has been joined. It is of course true, as the second defendant states, and as the plaintiff accepts, that the nature of the plaintiff's claim against the second defendant is to restrain the unlawful use of the plaintiff's website in the provision of its services to all the second defendant's clients (including the first defendant). That however was always the object and intention of the plaintiff's application in seeking the joinder of the second defendant. It is clear from the joinder affidavit which has been set out above; it is also clear from the amended plenary summons which was exhibited to the notice of motion. In the circumstances I am of the view that the joinder application and the joinder order were at all times made to enable the plaintiff to join the second defendant in order to restrain the second defendant from any alleged unlawful use of the plaintiff's website in the provision of services to all its clients including the first defendant.

Review of authorities

136. The second defendant's application is based, in part, on a number of authorities which it has set out in its legal submissions and/or opened to the court.

137. The first of these is *Allied Irish Coal Supplies Ltd v. Powell Duffryn International Fuels Ltd* [1998] 2 IR 519 where Murphy J. held that:

“the words “cause or matter “in O. 15, r. 13 mean the action as it stands between the existing parties (Amon v. Raphael Tuck & Sons Ltd.[1956] 1 Q.B. 357 at p. 369).

Certainly the court has no jurisdiction to refuse to add parties for the purpose of introducing a new cause of action.”

138. The second defendant also relies on the judgment of Laffoy J. in *Powell Duffryn* to argue that the authorities indicate that, in order to pursue allegations against a defendant by way of joinder of that defendant pursuant to O.15 r.3, that these allegations must have been clearly identified on affidavit in the context of the joinder application and that the court has determined that they gave rise to a stateable case against the would-be defendant. Laffoy J. said:

“it seems to me that Counsel for the Plaintiff is correct in asserting that the onus on the Plaintiff is no greater than to demonstrate that it has a stateable case against the [proposed defendant]. Moreover, it seems to me that on an application such as this it is not appropriate to attempt to resolve conflicts of evidence such as the conflicts which arise on the affidavits filed in this matter, and that the proper approach is to determine whether there is a stateable case on the basis that the Plaintiff's version of the disputed facts is the true version.”

139. However, as I have set out above, it is clear from the joinder affidavit of Mr. McNamara that the allegations against the second defendant have been clearly identified on affidavit in the context of the joinder applications; it is also clear that the court decided that *“the presence of the second defendant was necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter”* (O.15r.13) or else the joinder order would not have been made.

140. The second defendant also relies on *O’Mahoney v. Dwyer Properties (In Receivership)* [2018] IECA 263 in which Whelan J. held that:

“O. 15, r. 1 makes clear that joinder of parties is permissible subject to the court being satisfied that the right to relief is in respect of, or arises out of the same transaction or series of transactions as the subsisting litigation and there must be some common question of law or fact.”

141. The second defendant submitted based on the above quote, that “accordingly O.15 r.13 RSC did not provide and could never have provided, a basis for Ypsilon to be joined to the proceedings in order to pursue matters which went beyond Vola’s alleged activities and the role which Ryanair alleges Ypsilon to play in that regard”.

142. However I do not agree with that submission. It is clear that what has happened in this case is that the plaintiff sought to restrain the first defendant from the alleged unlawful use of the Ryanair website; the first defendant says it obtained all its services from the second defendant and the plaintiff has therefore sought to issue proceedings against the second defendant to restrain the alleged unlawful use of the Ryanair website by the second defendant.

143. I am also of the view that it would be entirely artificial for a court to have to engage in a trial on this issue and to have to consider whether the alleged use of the Ryanair website by the second defendant was unlawful in respect of the provision of its services to the first defendant but not to consider whether it was unlawful in respect of all parties.

144. In any event I am satisfied that the grounding affidavit and the draft amended plenary summons made it clear to the High Court at the time of the joinder application that the plaintiff’s application against the second defendant was to restrain its unlawful use of the plaintiff’s website in all circumstances and not just in the circumstances where it provided its services to the first named defendant. To that extent therefore I am satisfied that the right to relief is in respect of, or arises out of, the same transaction or series of transactions as the subsisting litigation and there are common questions of law or fact.

145. I have also had regard to the decision of the Court of Appeal in *McGuinness v. Kenmare Property Company Ltd & Ors* in which Kelly J. stated:

“The Rules of the Superior Courts confer wide powers on the court to join a defendant who ought to be joined (see for example O. 15, r. 30). The burden of proof on a plaintiff who seeks such an order is a light one. In this regard, the observations of Laffoy J. in Allied Irish Coal Supplies v. Powell Duffryn International Fuels Ltd. [1998] 2 I.R. 519 are relevant. Laffoy J. said:

‘... it seems to me that counsel for the plaintiff is correct in asserting that the onus on the plaintiff is no greater than to demonstrate that it has a stateable case against the [proposed defendant].’”

146. I have also considered *Fannon v. O’Brien* [2021] IEHC 301 where the defendants *inter alia* sought an order pursuant to O.15 r.13 or pursuant to the inherent jurisdiction of the court striking out the plaintiff’s claim against Ulster Bank on the grounds that Ulster Bank’s joinder and presence before the court was not necessary. This application was refused by Keane J. However *Fannon* can be distinguished on the basis that the second defendant has not brought any application that the second defendant’s joinder and presence before the court was not necessary. Indeed it has already consented to its joinder in these proceedings. It only seeks to limit the case against it.

147. I have also considered other authorities in relation to the issue of joinder mentioned by the parties in their submissions including *Wilson v. Balcarres Brooks Steamship Company Ltd* [1893] 1 QB 422, *Amon v. Raphael Tuck* [1956] 1 QBD 357, *Raleigh v. Goschen* [1898] 1 Chancery 73 and *Cunningham v. Springside Property Ltd (In Receivership)* [2009] IEHC 454. These cases however have to do with the joinder or non-joinder of parties to an action and/or appeals against such orders. In the present case the second defendant accepts that it is properly joined in the proceedings. However it seeks - some three years after the joinder - to

narrow the scope of the claim being made against it on the basis it says that it was not clear to it at any stage the true nature of the claim being made against it. The cases set out above are of limited application and of limited assistance in resolving this particular question.

148. The second defendant also relied on *Murray v. Times Newspapers* [1997] 3 IR 97. In that case the plaintiff issued a plenary summons claiming damages for libel against the defendant. The summons was expressed to be made under Article 5 paragraph 3 of the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968. Article 5 paragraph 3 provided that a person domiciled in the contracting state may be sued in another contracting state “in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred”. The defendant had its registered office in the United Kingdom and was the publisher of a newspaper distributed in both the UK and in Ireland in which an alleged libel appeared.

149. In March 1995 the defendant issued a motion to strike out the claim of the fourth plaintiff insofar as this related to loss and damage allegedly suffered outside the jurisdiction on the grounds that Article 5 paragraph 3 of the Convention only conferred jurisdiction in relation to loss and damage suffered within the jurisdiction. The defendant’s motion was refused by the High Court. The defendant appealed to the Supreme Court. The Supreme Court allowed the appeal and held that the plaintiff’s claim expressed to be made under Article 5, paragraph 3 of the Brussels Convention was a claim for libel published in Ireland only. The Supreme Court also held that if the plaintiffs were claiming a wider jurisdiction this should have been clearly stated in the statement of claim.

150. The headnote states: -

“If a defendant through his appearance mistakenly submits to a wider jurisdiction he may seek to strike out the wider claim, but he must do so without excessive delay.

Delay on the part of the plaintiff is also a relevant factor.”

151. Barrington J. in his judgment stated: -

“The statement of claim appears on its face to be consistent with the claim for damages in respect of the publication in Ireland in the Irish and in the English editions of the Sunday Times of material alleged to be defamatory of the plaintiffs”.

And he continued

“But the important point is that the proceedings were brought under Article 5, para. 3 of the Brussels Convention and Article 5, para. 3 confers a ‘special jurisdiction’ the courts for the place ‘where the harmful event occurred’”.

152. Barrington J. then referred to the decision of the European Court of Justice in *Shevill v. Press Alliance SA* [1995] ECR I-415 and continued: -

“In the light of the foregoing it appears to me that the plaintiff’s claim being a claim expressed to be made under Article 5 para. 3 of the Brussels Convention must be regarded as a claim brought in respect of damage alleged to have been suffered in Ireland arising out of the publication in Ireland of the alleged defamatory material. When therefore the defendant entered an appearance to the plaintiff’s claim it must be regarded as entering an appearance for this claim and not to any other”.

Barrington J. also stated: -

“But it appears to me that if a defendant enters an unqualified appearance he only accepts the jurisdiction of the court to entertain the case which has been formulated against him by the plaintiff in his plenary summons or statement of claim. In the present case the defendant entered an appearance to meet a claim under Article 5, para. 3 of the Brussels Convention and it does not appear to me that such an appearance can be held to be an acceptance by the defendant of the jurisdiction of the court to hear claims other than claims under Article 5, para.3 of the Convention.

It is for the plaintiff to formulate his claim. If the plaintiffs in the present case had made clear on the face of their statement of claim that they were claiming in respect of publication made or damage suffered in the United Kingdom, they would have put the defendant on guard as to whether it, the defendant, wished the Irish courts to have jurisdiction to entertain these claims. But no such claim was clearly made by the plaintiffs in the present proceedings. In the circumstances, and in the light of the history of this matter and of the present law, the defendant was entitled to assume that the claim was in respect of a libel published in Ireland. In short, if the plaintiffs wished to go outside the 'special jurisdiction' which they had invoked as a justification for instituting these proceedings in Ireland, they should have made this fact plain on the face of the statement of claim."

153. However, the first point of distinction between the present case and *Murray*, is that it is clear that the Supreme Court in *Murray* interpreted the plenary summons and statement of claim in the light of Article 7(2) of the Brussels Convention as that was the only matter pleaded in the plenary summons. Article 7(2) of the Brussels Convention relates in matters relating to tort the place where the harmful event occurred. It was logical therefore for the Supreme Court to interpret the plenary summons in the light of Article 7(2) and to hold that as a matter of interpretation of the plenary summons in the light of Article 7(2) that the plaintiff only intended to issue proceedings in relation to the libel in Ireland. However in the present case the amended plenary summons is drafted in much broader terms than Article 7(2) alone and is drafted and relies on Article 7(1) and Article 7(2), and Article 25 (i.e. contract and prorogation of jurisdiction).

154. The second point of distinction is that *Murray* was not a case which related to the joinder of a defendant. Times Newspaper Limited was the sole defendant in the case. That is a significant point of distinction to the present case where the second defendant was properly

joined to the proceedings, where the second defendant has accepted the jurisdiction of the Irish High Court and has participated in the proceedings for over three years and yet now seeks to strike out part of the claim against it. That is an entirely different set of facts and legal issues from the *Murray* decision. The *Murray* decision does not seek to interpret O.15, r.13 in its decision and does not appear to have anything to say in relation to this rule.

155. Thirdly, the Supreme Court in *Murray* (after reviewing the chronology of the proceedings) held that there had been considerable delay on both sides of this case in the conduct of the case but that the defendants delay of just over six months in bringing its notice of motion did not appear “so extraordinary”. By contrast the second defendant’s application in this case is brought some three years after the joinder order and whilst the second defendant states that it only became clear to it what the full extent of the plaintiff’s case was during the discovery application, it is nevertheless the case that this application arises three years after the plaintiff sought and obtained an order joining the second defendant to these proceedings which said order was never appealed or sought to be set aside in any way.

156. I would therefore distinguish the *Murray* decision on the above grounds.

The plaintiff’s submissions

157. The first objection made by the plaintiff is that the second defendant is bringing two motions simultaneously: the first seeks to strike out various parts of the plaintiff’s statement of claim as against the second defendant and the second motion is an application to file a competition law claim against the plaintiff, and to plead that Ryanair is abusing its dominant position in relation to its website and the provision of such services. The plaintiff submitted that it would be completely unfair to it if the second defendant were successful in its application to strike out parts of its statement of claim (so that the claim only related to the second defendant’s provisions of services to the first defendant) and the competition claim was allowed in its entirety against Ryanair. However counsel for the second defendant

indicated in open court, on a number of occasions, that if the strikeout application was successful then the second defendant's competition law case would also be limited in scope. I do not believe therefore there is any necessity to deal with this objection in any more detail.

158. The second submission the plaintiff makes is that the second defendant has brought this application to strike out on a very limited basis namely under O.15 r.13. The plaintiff submitted that the second defendant has made no reference to O.19 of the Rules of the Superior Courts or the inherent jurisdiction of the courts to strike out or stay the whole or part of a claim on the grounds that the claim was unsustainable, frivolous or vexatious or that it would constitute an abuse of process (see *Barry v. Buckley* [1981] IR 306). Likewise the second defendant has not brought a claim under O.19 r.27 that the whole or part of a pleading may be struck out where it is unnecessary or scandalous. Likewise the second defendant has not brought a claim that a pleading may be struck out or stayed under O.19 r.28 where it does not disclose a reasonable cause of action or where the claim is frivolous and vexatious.

159. The plaintiff submitted that it is clear from the authorities that the jurisdiction to strike out is exercised sparingly and with caution.

160. However whilst I have considered this submission, and I have noted the cases to which the plaintiff refers, the second defendant's application is only brought under O.15 r.13 and under Article 8 of the Brussels Regulation. I have therefore considered its application under those grounds and in relation to the case law relevant to those two grounds.

161. The plaintiff submitted that it is also notable that all of the authorities (except *Murray v. Irish Times*) upon which the second defendant relies are appeals against judgments refusing an application under O.15 r.13 i.e. they are all cases in which the court considered the joinder or non-joinder of specific parties to specific actions at the time of joinder not some three and a half years later. I agree with this submission.

162. The plaintiff also submitted that O.15 r. 13 is concerned with the addition, striking out and/or substituting of parties and it is not concerned with applications to strike out parts of a pleading. In my view, there is considerable force in that submission. The second defendant does not challenge the joinder and has accepted that it is validly joined in these proceedings.

163. The plaintiff also submitted that the court could not, and should not, make any order under O.15 r.13 RSC striking out parts of the claim because the application of O.15 r.13 in these proceedings was exhausted. The plaintiff submitted that it made its application to join the second defendant on 8th March, 2019 and the court made an order joining the second defendant as co-defendant on 8th March, 2019. I agree with this submission.

164. The plaintiff also submitted that this order joining the second defendant was not appealed by the first named defendant and the second defendant did not apply to set aside the service of the summons under O.12 r.26 RSC or otherwise. Likewise the plaintiff submitted that the second defendant did not challenge jurisdiction and actively participated in the proceedings for a period of three years before bringing its current application. In effect, the plaintiff submitted the current application by the second defendant to strike out part of the plaintiff's claim against the second defendant amounts to a collateral attack on part of the joinder order. I am of the view that this submission is well made. It is difficult to conceptualise the current application by the second defendant to strike out part of the plaintiff's claim as anything other than an application to somehow limit the plaintiff's claim against the second defendant - three years after the joinder order has been made.

165. I am of the view that it is difficult to see how O.15 r.13 can be used as a basis for an application to strike out some of the claims which the plaintiff seeks to make against the second defendant in circumstances where the second defendant was validly joined. While such applications could of course be brought pursuant to the court's inherent jurisdiction (or on the basis that such certain specific claims were unreasonable frivolous or vexatious or

bound to fail or an abuse of process) such claims are not made in the present case for obvious reasons. They are clearly not unreasonable, frivolous or vexatious.

166. The plaintiff also submitted that there is no basis to suggest that the claims against the second defendant “go beyond” the claims against Vola. I agree with this submission. As is clear from the analysis I have set out above, the plaintiff has pleaded the same causes of action against the second defendant as it has pleaded against the first defendant. Its fundamental cause of action against the first defendant is that the first defendant has unlawfully used the Ryanair website; the fundamental cause of action against the second defendant is that the second defendant has unlawfully used the plaintiff’s website.

The argument on discretion

167. The plaintiff also submitted that insofar as the court has any discretion in relation to O.15 r.13 that such discretion should be exercised against granting the relief sought for a number of reasons. The first reason according to the plaintiff is that, in substance, the second defendant’s motion to strike out is a form of summary disposal of a case or to obtain an early determination on a point of fact or law and the court should be very reluctant to strike out pleadings at this interlocutory stage. I agree with this submission.

168. The second submission of the plaintiff was that the second defendant had delayed significantly in issuing this motion. The plaintiff pointed out that this motion was only brought some three years after the joinder application and joinder order and that no proper reason has been given for the delay. I agree with this submission also.

169. The third argument the plaintiff made was that in substance this application was a collateral attack on the joinder order made by the High Court and that it purported to seek to limit that order by seeking to limit the nature of the case which the plaintiff could bring against the second defendant. As such the court should exercise its discretion against making the strike out order sought by the second defendant. I agree with this submission also. In my

view the second defendant's application is, in substance, a collateral attack upon the joinder order brought some three years after the joinder order was made and seeking to limit the nature and effect of such a joinder order.

170. Based on all of the above I have concluded that, insofar as I have any discretion in this matter under O.15 r.13, I would exercise my discretion to refuse the application sought by the second defendant.

The policy argument

171. The plaintiff also submitted that the court should be slow to strike out part of the plaintiff's claim in the light of the statements of the Supreme Court in *Aer Rianta Cpt v. Ryanair Ltd* [2004] IESC 23. In that case Denham J. giving the judgment of the Supreme Court stated:

“Quite apart from the plain meaning of the clear words of O. 19 r. 28, I am satisfied that to develop what Aer Rianta has referred to as a "blue pencil" jurisdiction would have inappropriate consequences. It would have the potential of initiating a whole new jurisdiction of interlocutory applications whereby parties sought to blue pencil (strike out) portions of Statements of Claim or Defences. It could herald a whole new list in the High Court where parties would fight on the pleadings. Such an approach is contrary to the policy of expeditious litigation. It would involve further cost and raise that consideration also. In addition it would involve motions which could be time consuming; as if part of a pleading is to be sought to be struck out, the probability is that at least one party will seek to have the issue analysed in the context of the whole pleading. Thus the entire pleading would be considered by the court. Indeed, there may be great difficulty in analysing a part of a pleading independent of the rest of the pleading.”

172. I note that these statements were also considered by the High Court in *Christian v. Symantec* (Stack J.) [2022] IEHC 397 in which Stack J. stated at para. 19 of her judgment:

“In considering the application in this case, I am acutely conscious that, regardless of its merits, it can, at best, remove only a limited part of the extremely lengthy statement of claim that has been filed. I note the comments of the Supreme Court in Aer Rianta c.p.t. v. Ryanair Ltd as to the undesirability of applications in respect of part of the pleadings, and the consequences of such applications for the courts which could, as outlined by Denham J. at para. 24 of that case, have the potential of initiating a whole new jurisdiction of interlocutory applications whereby parties sought to “blue pencil” (i.e., strike out) portions of statements of claim or defences, and it could herald a whole new list in the High Court where parties would fight on the pleadings. The Supreme Court was clear that such an approach would be contrary to the policy of expeditious litigation, would involve further costs, and that such motions could be time consuming and difficult.

It therefore seems to me that the inherent jurisdiction of the court should only be exercised in relation to part of the proceedings in very rare and clear cases, where that part of the claim constitutes an abuse of process even though the remainder of the claim is properly brought, or where the defence of that particular aspect of the claim would prove oppressive for the defendant over and above any difficulties presented by the defence of the proceedings as a whole.”

173. I am of the view that the comments of Denham J. and of Stack J. are particularly apposite to this case. These proceedings are already enormously complex and the pleadings alone fill almost two lever arch volumes. In addition this application took two days in the High Court and many days to read all the papers and to prepare the judgment. It is clear that

the Supreme Court has indicated that such fights on the pleadings are “contrary to the policy of expeditious litigation”.

174. However although I have noted the comments made above, I have not found it necessary to rely upon them because I am of the view that the joinder order, the joinder affidavit and the amended plenary summons made it clear to the High Court judge and to the second defendant that the true nature of the plaintiff’s case was to seek declaratory orders and injunctive reliefs to restrain the second defendant from its alleged unlawful use of the Ryanair website at all times and in all circumstances and thereby to prevent the second defendant from unlawfully using the plaintiff’s website for provision of its services to any of its customers including the first named defendant.

The Article 8 argument

175. The second ground upon which the second defendant is seeking to strike out part of the plaintiff’s claim is based on an argument in relation to Article 8 of EU Regulation No. 1215/2012 on the jurisdiction and recognition of enforcement of judgments in civil and commercial matters (“the Regulation”).

176. Article 8 provides that a person domiciled in a member state may also be sued:

“(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting proceedings.”

177. The amended plenary summons before the court at the joinder application contained the following paragraph:

“This honourable court has apparent jurisdiction to hear and determine this claim under the provisions of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12th December, 2012 on jurisdiction and the recognition and

enforcement of judgments in civil and commercial matters (recast) and in particular pursuant to Articles 7 (1) (a), 7 (2), 8 (1), 8 (3) and 25 (1) thereof.

178. The figures 8 (1) and 8 (3) were underlined in red to illustrate the fact that the plenary summons was being amended to add Article 8 (1) and Article 8 (3) as further grounds under the Regulation.

179. Article 8 (3) provides that:

“A person domiciled in a Member State may also be sued:

...

(1) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending.”

180. It is clear therefore that the plaintiff’s proceedings against the first defendant were issued in reliance on Articles 7 (1) (a), 7 (2) and Article 25 of the Regulation. It is also clear that the plaintiff’s claim against the second defendant was also based on Article 7 (1) (a), 7 (2), Article 25 and in addition Article 8 (1) and Article 8 (3) of the Regulation.

181. In the second defendant’s legal submissions at paragraph 29 it states as follows:

“The limitations placed by O.15 r.13 RSC on the matters which Ryanair could pursue against Ypsilon through being joined in its existing proceedings against Vola have already been considered in paras. 18-26 above. Accordingly, Ryanair could not seek to justify maintaining claims against Ypsilon in the proceedings which went beyond Vola’s alleged activities on the basis either that those claims against Vola were:

(a) Related to a contract and that the place of performance of the obligation in question was Ireland; or

(b) Related to tort delict or quasi delict and the alleged harmful event had occurred or may occur in Ireland. If that were the case, then the limitations inherent in O.15 r.13 RSC would effectively be disapplied since the matters being pursued

against Ypsilon would go beyond those matters which were necessary for the court to determine proceedings, as they stood, between Ryanair and Vola. Accordingly neither Article 7 (1) nor Article 7 (2) could ever have been a relevant basis for the court having jurisdiction in respect of any of the allegations against Ypsilon going beyond its alleged role in Vola's alleged activities."

182. Whilst this submission is complex and difficult to understand, the substance of it is the second defendant is contending that any claims as between the plaintiff and Ypsilon have to be limited to the provision of services by Ypsilon to Vola and not to Ypsilon's provision of services to any other party.

183. However, in my view, such a submission fundamentally misunderstands the true position. The position, in summary, is that the plaintiff issued proceedings against Vola based on its unlawful use of the Ryanair website. This claim was based in contract, Article 7(1)(a), and in tort, Article 7 (2), i.e. the "screen scraping causes of action" involved breaches of contract and all the various torts pleaded by Ryanair. Vola pleaded that it had not unlawfully used the Ryanair website and that it had obtained all its information and services from Ypsilon. As a result Ryanair issued proceedings against Ypsilon for unlawful use of its website both as a breach of contract and also in tort. In the circumstances Ryanair's amended plenary summons against Ypsilon is also based on Article 7 (1) (a), 7 (2) and Article 25 of the Brussels Regulation.

184. In analysing whether Ypsilon has unlawfully used the Ryanair website and thereby committed breaches of contract and tort to provide its services to the first defendant, the court must of necessity consider whether Ypsilon has unlawfully used the Ryanair website. The fundamental issue therefore between the plaintiff and Ypsilon is whether Ypsilon has unlawfully used the Ryanair website. If it has, then its provision of its services to Vola is unlawful. Likewise its provision of its services to any of its other customers is also unlawful.

There is therefore no doubt, in my view, that the central issue in these proceedings against Ypsilon is whether Ypsilon has unlawfully used the Ryanair website. This matter is inextricably linked with the plaintiff's case against Vola. I do not accept the submission therefore that neither Article 7 (1) nor Article 7 (2) could ever have been a relevant basis for the court having jurisdiction in respect of any allegations against Ypsilon going beyond its alleged role in Vola's alleged activities – in circumstances where the fundamental issue pleaded by Ryanair against Ypsilon is that Ypsilon has engaged in an unlawful use of Ryanair's website to provide such services – whether to Vola or to any other party.

185. Ypsilon also sought to rely on Article 25 of the Brussels Regulation. This provides in Article 25 (1) *inter alia* that:

“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.”

186. Ryanair has pleaded that both defendants have, through their conduct, accepted the Ryanair terms of use and the Ryanair contract. The plaintiff has also pleaded that “by accessing the Ryanair website the defendants are bound by the terms of use thereof” (see paragraph 21 of the amended statement of claim). At paragraph 23 the plaintiff pleads “the defendants are therefore bound by the terms of use in the contract between the parties herein as formed”. At paragraph 30 the plaintiff pleads that both defendants have breached the contract comprised in the terms of use of the Ryanair website. Paragraph 13 of the amended statement of claim also pleads that Irish law is the applicable law and the Irish courts shall have jurisdiction. It also pleads that any party to the contract submits to the sole and

exclusive jurisdiction of the courts of the Republic of Ireland and to the application of the law in that jurisdiction.

187. Ypsilon sought to argue (at paragraph 31) of its submissions that Article 25 of the Brussels Regulation could not have provided the basis for claims against Ypsilon which went beyond its alleged role in Vola's alleged activities. However in my view that submission is not correct. Ryanair's claim against Ypsilon is based upon Ypsilon's alleged unlawful use of its website in breach of the contract between the parties, one of the terms of which agreement is that the Irish courts have jurisdiction. Therefore, Article 25 is, in my view, properly involved.

188. However, I would note that it appears to be difficult to see why the plaintiff has added Article 8 as one of the additional bases of the Brussels Regulation against the second defendant. Article 8.1 relates to a situation when a person domiciled in a member state may also be sued where he is one of a number of defendants in the courts where the place where any one of them is domiciled, provided the other conditions are fulfilled. However on the facts of this case neither the first nor the second defendant are domiciled in Ireland and therefore it is difficult to see on what basis Article 8.1 is invoked. However in my view that is a matter to be considered at the trial of the action and not on a strike out application at this interlocutory stage.

189. It is also clear that Article 8 (3) is not relevant because Ryanair did not sue Ypsilon on the basis of a counterclaim.

190. However Ypsilon argue that Ryanair amended the plenary summons to include Articles 8.1 and 8.3 because it submitted that Article 7 (1) (a), 7 (2) and Article 25 of the Regulation could not apply.

191. However it is difficult see how this argument advances the second defendant's application to strike out parts of the plaintiff's claim in this motion. It is clear that the plaintiff

has also based its claim against the second defendant on Articles 7 (1) (a) (i.e. contract) and Article 7 (2) (i.e. tort) of the Regulation.

192. Because Ypsilon has accepted the jurisdiction of the Irish courts under Article 7 (1) and under Article 7 (2), and because it has participated in the proceedings for a period of three years, the issue of whether the plaintiff can also claim jurisdiction under Article 8 is not a substantial point. On the face of it, the second defendant appear to be correct in its analysis. However, in my view, that does not justify the strike out of Article 8 (1) from the amended plenary summons at this stage. This is a matter which can be fully argued at the trial of the action. In any event, even if I were to accede to the strike out of Article 8 at this stage that would not justify the strike out of other claims in the statement of claim by Ypsilon.

193. Moreover Ryanair submitted that it is difficult to see how Ypsilon could rely on the fact that the plaintiff has included Article 8 (1) of the Regulation as a reason to ground its application to strike out part of the plaintiff's statement of claim against the second defendant. I agree with this submission. I do not see on what basis Ypsilon can rely on Article 8 (1) of the Regulation to justify an application to strike out parts of the plaintiff's claim against Ypsilon.

194. Ryanair also submitted that, insofar as Ypsilon contends that because Ryanair added Articles 8 (1) and (3) to the plenary summons, that this could be the only jurisdictional basis for its claim against Ypsilon, that such a contention is clearly not correct. Again I agree with the Ryanair submission. It is abundantly clear from the amended plenary summons that the jurisdictional grounds upon which the plaintiff has issued proceedings against the second defendant are Article 7 (1) (a) and 7 (2) and Article 25. There is no basis upon which Ypsilon could argue that the plaintiff's sole ground of jurisdiction against the second defendant is based on Article 8 (1) or Articles 8 (3) of the Regulation.

195. The plaintiff also submitted that insofar as Ypsilon contended that Article 7 and Article 25 (1) of the Regulation could not give this court jurisdiction to hear the plaintiff's claim against it - due to the operation of O.15 r.13 or otherwise - Ypsilon could not make that argument because in substance it was an inadmissibly late attempt to challenge jurisdiction under the Regulation packaged as this motion. I agree with this submission. It appears to me that the second defendant's argument under Article 8 is misconceived. It not only makes the argument under Article 8 but seeks to link the Article 8 argument with the O.15 r.13 argument to, in effect, mount a collateral attack on the joinder order by seeking to strike out parts of the plaintiff's claim against the second defendant. In my view the Article 8 issue cannot be used to ground any application to strike out part of the plaintiff's claim.

196. In the circumstances therefore and having considered the submissions in this matter, I would refuse the second defendant's application to strike out part of the plaintiff's statement of claim.

The second defendant's application for leave to amend its defence and to file a defence and counterclaim

197. The second application brought by Ypsilon in these proceedings is an application pursuant to O.28 r.1 and/or pursuant to the inherent jurisdiction of the court granting the second named defendant leave to amend its defence and to file an amended defence and counterclaim in these proceedings. The draft amended defence and counterclaim was appended to the notice of motion. The counterclaim itself alleges that Ryanair is in a dominant position in the relevant marketplaces, and that it has abused that dominant position. In essence, the second defendant seeks to bring a counterclaim to allege that even if the second defendant had been engaged or involved in any of the screen scraping activities alleged by the plaintiff (which are denied) the plaintiff would be precluded from maintaining any such cause of action by reason of the abuse of dominance pleaded in the counterclaim.

Order 28 Rule 1 of the Rules of the Superior Courts

198. Order 28 Rule 1 provides:

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

199. The principles to be applied in such an application were recently restated by the Court of Appeal (*Stafford v. Rice* [2022] IECA 47). I have relied on those principles in considering this application.

200. There is however no fundamental difference between the parties in relation to the principles to be applied.

201. I also note the statements of Denham J. in *McCarthy v. McNulty and MIBI* [1999] IESC 70 in which she stated:

“It is desirable to have finality in litigation, multiplicity of suits should be avoided and it is very important to take steps to reduce the costs of litigation. In all the circumstances of the case it appears that the matters can be conveniently disposed of in the pending action and that the justice of the situation favours such an approach.”

202. It is clear that the issues raised in the context of Ypsilon’s competition counterclaim are “real questions in controversy between the parties” in that they “raise or relate to an issue between the parties arising from the subject matter of the proceedings”.

203. It is also clear that if leave is not granted Ypsilon would have to pursue its claim by way of separate proceedings notwithstanding the obvious connection with the subject matter of these proceedings.

204. It was suggested by Ryanair that the second defendant was guilty of culpable delay in bringing this application. However on the facts of this case I do not believe that to be the

case. It is clear that Ypsilon sought and obtained a report from an expert economist to support the bringing of its competition counterclaim and to assist in the drafting of that counterclaim.

205. It was also submitted by Ryanair that if leave were granted this would do “serious prejudice” to Ryanair, on the grounds that if leave were granted it would “bring this action back to the pleading stage”. However I do not accept this submission. These proceedings are complex and are now the subject of case management directions by the High Court (Sanfey J.) that it should be conducted on a modular basis. The first module is the liability issue; the second module is the first defendant’s competition law counterclaim. If leave is granted to the second defendant to issue and serve its amended defence and counterclaim there is no reason why orders cannot be given in relation to the expedited delivery of pleadings in the Ypsilon counterclaim to enable this competition law counterclaim to catch up with Vola competition counterclaim. In this regard I note that the proceedings are still at the discovery stage.

206. Moreover a fundamental plea in the amended defence and counterclaim is the second defendant’s plea that if the second named defendant had been involved in any of the screen scraping activities, the plaintiff would be precluded from maintaining any cause of action or seeking any relief by reason of the abuse of dominance pleaded in the counterclaim. This is clearly now a fundamental issue in the proceedings. It also means that the counterclaim is inextricably linked to the defence of the second defendant. In these circumstances the interests of justice clearly require that the second defendant is given leave to amend its defence and counterclaim.

207. Moreover the court must also have regard to the limited resource of court time. It would make no sense for the court to refuse to allow Ypsilon to file its amended defence and counterclaim as this would of necessity require that Ypsilon would have to issue new proceedings with all of the extra expense and costs of litigation which would ensue. Proper

case management of these proceedings require that the court should grant leave to the second defendant to file its amended defence and counterclaim.

208. Thereafter the court will make such further orders on expedited pleadings as may be necessary to ensure that the Ypsilon competition counterclaim catches up with the Vola counterclaim.

209. It is clear that if Ypsilon were not permitted to file its amended defence and counterclaim it would suffer significant prejudice in its defence of these proceedings brought against it by Ryanair.

210. In summary therefore I am of the view that granting leave to Ypsilon to file its amended defence and counterclaim will not cause any significant prejudice for Ryanair whereas by contrast a refusal to grant such leave cause significant prejudice to Ypsilon and would not be in the interests of the administration of justice.

Conclusion

211. In conclusion, therefore:

- (i) The second defendant's application to strike out parts of the plaintiff's statement of claim is refused;
- (ii) the second defendant's application to file an amended defence and counterclaim is allowed.