



**THE COURT OF APPEAL
CIVIL**

**Court of Appeal Record No. 2021/36
High Court Record No. 2019/9939 P
Neutral Citation No. [2022] IECA 64**

**UNAPPROVED
NO REDACTION NEEDED**

**Donnelly J.
Haughton J.
Murray J.**

BETWEEN

RYANAIR DESIGNATED ACTIVITY COMPANY

PLAINTIFF/APPELLANT

- AND -

SKYSCANNER LIMITED, SKYSCANNER HOLDINGS LIMITED, AND

SKYSCANNER 2018 LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 16th day of March 2022

Issues

1. The plaintiff is a well-known airline. It makes details of its flights available on its website. It says that it does so with the intent that seats on those flights will be booked through its website. It contends that those accessing information on that site agree not to use it for their own commercial purposes, and that third parties are precluded from exploiting such information so obtained for their own profit.
2. The defendants are members of a group of companies. The group provides what the defendants describe as a '*meta search site*' affording a facility to search for, and compare the prices of, flights, hotels and travel-based services. The defendants include on that website details of the plaintiff's flights. Throughout, the parties describe these details as '*price, flight and timetabling*' information ('PFT'). That information as presented on the defendants website, is derived from the plaintiff's website. Members of the public who obtain this information from the defendants' site may book seats on flights operated by the plaintiff either directly with the plaintiff, or through the agency of various online travel agents ('OTAs').
3. In this action the plaintiff claims that the defendants are acting unlawfully in using the information obtained from its website in this way and, in particular, in deploying it for commercial purposes by allowing OTAs to thus book flights for their customers.
4. Following the institution of the proceedings, the plaintiff sought an interlocutory injunction. That injunction did not seek to prevent the defendants from displaying the plaintiff's PFT for any particular purpose, nor did it seek to prevent the defendants from enabling OTAs to exploit the information contained on the defendants website

and derived from the plaintiff's website. Instead, it sought to require the defendants to prevent certain OTAs from providing what the plaintiff describes as '*false*' e-mail addresses for travellers on whose behalf they book flights with the plaintiff. As expressed in this application, the plaintiff's basic complaint is that when some of the OTAs book a flight with the plaintiff for a customer they do not give the plaintiff the e-mail or telephone number of that customer. Instead, they provide an e-mail address or telephone number created or operated by the OTA itself. The plaintiff claims that this causes confusion and difficulties for the customer and for the plaintiff. In this application the plaintiff seeks – essentially - to oblige the defendants to require these OTAs to furnish the plaintiff with the personal email address or telephone number of the passenger on whose behalf they book flights with the plaintiff.

5. Twomey J. refused that application ([2020] IEHC 399). For reasons I explain in the course of this judgment, the resolution of this appeal from that decision reduces itself to two core issues. First, whether the plaintiff has established that it has a strong case that is likely to succeed in that the actions of one or other of the defendants in affording access *via* the internet to the plaintiff's PFT information with a view to exploiting it for their own gain is unlawful having regard to the terms of use ('TOU') of the plaintiff's website. Second – and if so - whether the balance of justice favours the grant of orders of the kind sought in this application.

Context

6. The background is somewhat involved. The plaintiff styles itself as providing low cost air travel, deriving a significant proportion of its income from the sale of seats on its flights. It also obtains substantial income from the sale to its passengers of what are

termed ‘*ancillary services*’ such as car hire, hotel bookings, insurance, events, tours and other activities. The importance of the income the plaintiff obtains from the sale of these ancillary services is evident from the relationship it bears to its revenue from the sale of seats on its flights: according to its 2019 annual report the average price of a fare was €37 per passenger while that from the sale of ancillary services to those passengers was €17.15 per passenger. The plaintiff suggests in its evidence in this application that its income from these ancillary services assists it in providing low cost flights and it contends that by reason of the number of users of its website it is in a position to obtain good rates for its customers in respect of these third party products.

7. The vast bulk of the plaintiff’s bookings – 99% - are made *via* its website, the balance being purchased *via* its call centre, at the airports themselves or through licensed providers. Customers who purchase flights *via* the plaintiff’s website must provide the plaintiff with their personal e-mail addresses or mobile telephone numbers. In that way the plaintiff is enabled to make direct contact with its customers both for the purposes of informing them of any matters relevant to their flight, but also to offer the ancillary services to them. One of the plaintiff’s key commercial objectives is ensuring that the purchase of seats on its flights is effected exclusively through its website, while also obtaining the personal e-mail addresses or mobile telephone numbers of those travelling with it.

8. The commercial activities of OTAs have the capacity to frustrate both of these aims. These undertakings provide – as their description suggests – web-based platforms which list flight options by multiple airlines and on which customers can compare and book flights including trips involving a number of different carriers. Usually, they will also offer short term rental accommodation, car hire, travel insurance and other similar

travel related services. They offer the sale of the plaintiff's flights on their websites, charging customers a premium on the cost of the flight. Where travellers purchase seats on the plaintiff's flights in this way, what has been termed in this application '*the merchant of sale*' is the OTA who acquires the flight ticket from the plaintiff's website in the customer's name. When they do this, however, some of the OTAs do not provide the plaintiff with the traveller's personal e-mail address or telephone number, instead providing an address or phone number of the OTA itself.

9. The plaintiff says that this can result in disruption for the individual passengers, as they may find themselves unable to pass the security identification procedure on the plaintiff's website or the plaintiff's call centre where the passenger does not know the e-mail address or telephone number that was given when their flight was booked. However, this practice also both prevents the plaintiff from offering the ancillary services to the customer and allows the OTA (which will have the customer's e-mail address) to do so itself. While the plaintiff disputes that the sale of the ancillary services is a '*key driver*' of this application, the affidavit evidence delivered by it for the purposes of its application for interlocutory relief makes it clear that the fact that the plaintiff does not have e-mail addresses or phone numbers for some of those customers who book a flight through an OTA is of concern to it because this '*allows OTAs to monopolise sales of ancillary products to those passengers*'.¹

10. The commercial wrangle arising from this context has provoked litigation in a variety of jurisdictions between the plaintiff and OTAs (the trial judge described it as a '*world-wide war*' by the plaintiff seeking to stop all OTAs from selling Ryanair flights (at

¹ Second affidavit of Thomas McNamara at para. 60.

para. 127). However, the plaintiff (at least under the law of this jurisdiction) has no immediately obvious and conventional ongoing contractual relationship with the OTAs,² there is no clear legal authority establishing that it enjoys intellectual property rights in the PFT information, the formulation of a legal claim in tort or unjust enrichment against the OTAs would be novel, and for whatever reason the plaintiff has not sought to prevent OTAs from purchasing seats on its flights *via* the defendants' website. However it did at one point - and claims that it still does - have a contractual relationship with at least one of the defendants.

The relevant legal relationships

11. The papers do not illuminate the precise relationship between the three defendants and, for the purposes of this judgment, I will refer to them collectively and without distinction between them. They are also a successful commercial operation hosting a large number of service providers and travel intermediaries. As with other travel 'meta' marketplaces, they aggregate travel offers from direct service providers and from OTAs. So, using the defendants' website (on which they have over one hundred million active users per month) a member of the public can obtain flights, accommodation and indeed other methods of travel. The defendants thus collate and make available information about those services. Some of the information is (in ways that are not fully explained by the defendants) ultimately derived from the relevant service providers, while some of it comes from OTAs. Where the defendants' customers access the services of an OTA *via* their website, the defendants obtain a

² Although for reasons that I elaborate upon later the plaintiff has a strong basis for claiming that OTA's who obtain its PFT from or otherwise interact with its website do enjoy a contractual relationship as a result of the provisions of the TOU of the plaintiff's site.

commission from the OTA. As of the hearing in the High Court, between sixty and sixty-five per cent of the defendants' revenue derives from the OTAs.

12. In April 2011 the plaintiff and the defendants entered into what is termed a '*price comparison licence agreement*'. The overall effect of this agreement was to enable the defendants to access the plaintiff's flight data and list flights on the plaintiff's website, but in a context in which the defendants redirected all flight sales to the plaintiff's website. The agreement granted the defendants access to the plaintiff's website *via* an '*application programme interface*' (an 'API'). This is a computer programme enabling communication between two computers, and it allowed the defendant to access the plaintiff's PFT information. The licence agreement provided that it could do so '*for the sole purposes of comparing Ryanair's flight prices with those of other airlines*'. The agreement prohibited any unauthorised selling of the plaintiff's services and required the defendants to re-direct all sales and passenger enquiries to the plaintiff's website from which the plaintiff could then engage directly with the prospective customer. The plaintiff says that it was thus clearly understood and agreed between the parties that the defendants were not permitted to hamper the exclusive and direct delivery by the plaintiff of its low cost fares and related products to its customers or to impede in any way the plaintiff's ability to communicate directly with its customers. It says that there was an implied term in the agreement between them to that effect. So, and in compliance with this agreement, if prior to November 2019 a customer wished to purchase a seat on a Ryanair flight identified on and through the defendants' website, they would be re-directed to the plaintiff's site from which the booking could be made.

13. The licence agreement provided that it could be terminated by either party giving the other notice of seven days after a material breach of its terms or by giving notice of thirty days without cause. The defendants say that this agreement terminated with effect from 11 November 2019, while the plaintiff says that the agreement remains extant.

14. Whether or not the agreement was in force after 11 November 2019, it is clear that since that date the defendants have not accessed the plaintiff's website using the API. It is evident that they or someone with whom they have a relationship of some kind has accessed the site, given that the defendants make the plaintiff's PFT available to the public on their website.

15. They then apply that information in one of two ways. First, if a customer chooses a flight for sale by the plaintiff the defendants refer the customer directly to the plaintiff's website where he or she can proceed to book a flight in the ordinary way. Alternatively, and second, if the customer wishes to acquire a flight offered by an OTA, the defendants refer the customer to the OTA which then books the flight on the plaintiff's site. In either scenario the defendants say that they do not themselves presently sell seats on the plaintiff's flights (an aspect of the factual background that is stressed by the defendants but disputed by the plaintiff) but they instead (as the trial judge put the matter), *'provide[] the environment in which the booking is made with either Ryanair or with the OTA'* (at para. 30). The first scenario does not pose any issue, for obvious reasons.

The proceedings and this application

- 16.** The second does. In this situation, the OTA is the ‘*merchant of sale*’, the defendants’ role being to provide the platform or environment in which the user and merchant meet and transact and through which the user’s details are passed to the merchant. The plaintiff adopts the position that the defendants ought not to use the PFT information they have obtained from the plaintiff’s website for the purposes of enabling any other person to sell seats on the plaintiff’s flights and, it is clear that by engaging with the OTAs, the defendants facilitate the sale by them of such seats.
- 17.** In this regard the plaintiff focusses upon how the defendants obtain the PFT. It says that the information appearing on the defendants’ website pertaining to the plaintiff’s flights is obtained by ‘*screenscraping*’ which the plaintiff contends is, having regard in particular to the TOU of its website, an unlawful activity. The evidence describes ‘*screenscraping*’ as ‘*the use of an automated system or software that facilitates and/or enables a party to access a website and its underlying computer programs and databases and to extract and reutilise the information therefrom*’. The defendants deny that they engage in screenscraping – although they are strikingly coy about how precisely they obtain the plaintiff’s PFT information as it appears on their website.
- 18.** This aspect of the application assumed some importance in the course of the hearing both in the High Court and in this court. The plaintiff has averred that the information as it appears on its website can be accessed in only two ways – either through the API, or by interacting with the plaintiff’s website. As I have noted, it is clear that the former is not happening. As to the second, the defendants did not (as the trial judge put the matter) ‘*provide any clarification to this Court of how it manages to provide Ryanair flight information on its site (e.g. if it uses a third party to screenscrape the information*

from the Ryanair website) (at para. 79). All the defendants said was that they did not engage in screenscraping, although clearly they did (as the judge again put the matter) *'interact[] with the Ryanair website regarding its flight data'* (at para. 80). As the judge put it (at para. 80):

'At no point does Skyscanner explain how it currently gathers the data necessary for it to facilitate the display and subsequent sale of Ryanair flights on its website'.

19. In its plenary summons, the plaintiff claims that these actions of the defendants are (a) in breach of the licence agreement which (as I have noted) the plaintiff says (but the defendants do not accept) remains in force, (b) that the use of the plaintiff's information in this way is a breach of the TOU of the plaintiff's website (from which the information is derived) and (c) that in enabling these transactions with that information the defendants are responsible for a number of legal wrongs comprising negligence, misrepresentation, passing off, trespass to goods, infringement of various asserted intellectual property rights of the plaintiff and/or breach of the plaintiff's rights as guaranteed by the Constitution and EU Charter of Fundamental Rights. The central point is clearly expressed in practical terms by the plaintiff's head of legal, Mr. McNamara, in his affidavit grounding this application. The plaintiff, he says, has invested heavily in its website which it views as a critical part of its business and of its future development. The defendants, he says are *'attempting to hijack [that] investment ... and monetise Ryanair's product for [themselves] and leverage the above investment'*.

20. As I have earlier noted, in this application for an interlocutory injunction the plaintiff does not seek to prevent these transactions. Instead, it seeks more limited relief. It contends that the defendants should only be permitted (pending the trial of this action) to facilitate the sale of seats on its flights by OTA's if they ensure that those OTA's provide the plaintiff with the personal e-mail addresses of the customers on whose behalf they book such flights. The precise relief as sought in the notice of motion is set forth in an appendix to this judgment, but it was summarised as follows in correspondence sent by the plaintiff's solicitors to the solicitors for the defendants shortly before the High Court hearing:

'An interlocutory injunction prohibiting the provision of false email addresses and/or telephone numbers where Ryanair flights are sold on Skyscanner's domain and/or where Ryanair flights are sold via third party domains that are linked from Skyscanner's domain; or

An interlocutory injunction prohibiting the sale of Ryanair flights via the Skyscanner website (on its own domain or via linked domains), where Ryanair is provided with a false email address and/or phone number for its customers'.

21. It was to this formulation that counsel for the plaintiff directed the attention of the court at the hearing of this appeal. To put it in context, the defendants deal through their website with some three hundred OTAs, and the plaintiff says that at the time of the application to the High Court only sixty of these were active on its website. Four (lastminute.com, kiwi.com, trip.com and bravofly.com) provide their own e-mail addresses where they book a seat on a flight for a customer. One of these OTAs (trip.com) is said to have a direct corporate connection with the defendants.

Throughout, the plaintiff describes the e-mail addresses provided to it by the OTAs as 'fake' or 'false' e-mail addresses – although in fact the addresses are real: it is just that they are addresses of the OTA not of the individual customer.

22. However described, there is and can be no doubt but that the defendants' activities cause the plaintiff commercial loss. Because the plaintiff does not obtain e-mail addresses for customers for whom the defendants act as the 'merchant of sale', it loses the opportunity to market its ancillary services to those persons. However, the plaintiff sought to justify this application not solely by reference to that loss, but also having regard to claimed damage to its customers (and thus, indirectly consequent alleged reputational injury to the plaintiff). It asserts that this resulted in various public health and customer concerns so that its application to court was in fact (as it described it in its submissions to this court), 'customer-centric'. This was buttressed by reference not merely to the higher cost of booking one of the plaintiff's flights through an OTA, but also to asserted instances in which the plaintiff had, as a result of not having customer e-mail addresses, provided incorrect information to health authorities during the COVID-19 pandemic and an incident in which the plaintiff was allegedly hampered in dealing with a complaint of a racist incident on one of its flights or with flight cancellations.

The time line and the pleadings

23. The plenary summons issued on the 5 December 2019. On 19 December, the plaintiff issued the motion seeking *inter alia* the interlocutory injunctive relief the subject of

this appeal. The motion came on for hearing in June 2020³ (taking six days), the judgment being delivered on 30 July. Following a second judgment addressing the question of costs on 13 November 2020 ([2020] IEHC 584), the final orders were perfected on 20 January 2021. A notice of appeal was delivered on 18 February 2021. A hearing date was duly fixed in this court for 29 and 30 October 2021. Unusually for an appeal against an order of the High Court refusing a motion for interlocutory injunctive relief, no application was made to this court for an expedited hearing of this appeal: in fact the plaintiff expressly indicated in its notice of appeal that it was *not* seeking a priority hearing of the appeal.⁴ As a result, when the appeal came for hearing fifteen months had passed since the plaintiff knew its application for an interlocutory injunction had been refused. Throughout this period, the defendants continued to include the plaintiff's PFT information on their website, and some of the OTAs continued to take and make bookings for customers on the plaintiff's flights without providing the plaintiff with the actual e-mail addresses or telephone numbers of their customers.

24. At the same time, the delivery of pleadings in the action (which was admitted to the High Court Commercial List) proceeded. For a commercial court case (not least of one said to require the grant of interlocutory injunctive relief) this occurred at a remarkably relaxed pace. A statement of claim was delivered on 7 February. In addition to the causes of action pleaded in the summons (breach of contract, breach of

³ It is not obvious that the plaintiff bears responsibility for the delay in obtaining the hearing in the High Court: a date was fixed in April, but due to the COVID-19 pandemic only a remote hearing was possible. The plaintiff says that the defendants refused to participate in such a hearing (at the time it was not possible to compel them to do so), asserting that they wished their clients to be present. They did not, it is said, actually attend the hearing in July, instead linking in online.

⁴ The court did not, for this reason, prioritise delivery of its judgment as it would normally have done in such an appeal.

duty, negligence, misrepresentation, passing off, trespass to goods, conversion, infringement of trade mark, '*data base rights*', and copyright, negligent or wrongful interference in economic or contractual relations, causing loss by unlawful means, inducing or procuring breach of contract, and breach of constitutional rights, ECHR rights and EU law property rights), a claim of conspiracy was included.

25. The defendants duly raised particulars on 2 March 2020. These were not replied to until 2 July. A defence and counterclaim was served on 21 October 2020. The defence denied that the TOU gave rise to a binding and enforceable contract between the parties.

26. Moreover, it was pleaded that if and insofar as the defendants had engaged in the activities alleged against them, the plaintiff was precluded from maintaining any cause of action or seeking any relief in respect thereof by reason of an abuse of dominant position by the plaintiff. That plea was further elaborated upon in the counterclaim which alleges a variety of relevant product markets (point of origin/point of destination ('O&D') city-pairs for air transport of passengers, the supply of PFT data for an airline's own point of origin/point of destination route pairs, OTAs for air transport passenger services, online travel meta search sites for air transport passenger services and online sale of products/services ancillary to the purchase of air transport passenger services), together with five relevant geographic markets (O&D city-pairs for air transport of passengers, the supply of PFT data for an airline's own O&D route pairs, OTAs for air transport passenger services, online travel meta search sites for air transport passenger services and products and services which are ancillary to the purchase of air transport passenger services). The defendants, from there, plead dominance by the plaintiff in some of those markets, claim that in consequence of that

dominance the plaintiff has a special responsibility not to distort competition on those markets and assert that the plaintiff is abusing that dominant position by *inter alia* refusing to permit the use of PFT data for purposes other than flight comparison. Its activities are described as ‘*abusive leveraging in the form of self-preferring its own promotion of ancillary products and services*’.

27. The plaintiff had not, as of the time of the hearing of this appeal, delivered any notice for particulars arising from this defence and counterclaim and it had not delivered a reply and defence to the counterclaim. A notice for further and better particulars delivered by the defendants on 14 November 2020 had not, as of the date of the hearing of this appeal one year later, been responded to. Subsequent to the hearing of this appeal, on 22 January 2022, the plaintiff issued a motion seeking to have these proceedings removed from the Commercial List. At the time the appeal had been heard neither party had taken any steps to seek discovery.

The judgment of the High Court

28. The judgment of the High Court refusing this relief is impressive in its detail and range.

For present purposes, the judge’s reasoning can be summarised thus:

- (i) The interlocutory relief claimed by the plaintiff was mandatory in nature and, therefore, it was necessary for the plaintiff to establish not merely an arguable case or fair issue to be tried, but instead that it had a strong case that was likely to succeed.

- (ii) While the plaintiff had established that it had an arguable case that the activities of the defendants were actionable as a breach of the TOU on the plaintiff's website and that they gave rise to an action in unjust enrichment and were cognisable as the torts of negligence, they did not enjoy a strong case that was likely to succeed on these grounds. While the trial judge did not make a finding as to whether the plaintiff enjoyed an arguable case under some of the other headings he found that none of these comprised a strong case that was likely to succeed.

- (iii) The court determined that in the event that an injunction was not granted but the plaintiff succeeded at trial, the damage it would suffer could be quantified and would be an adequate remedy for it. If the injunction were granted, he said, and if the defendants were to prevail at trial, the damage they would suffer could also be quantified, although this might be a somewhat more involved and less precise exercise.

- (iv) Insofar as those aspects of the balance of justice that might be said to have favoured the plaintiff were concerned, the trial judge concluded that the evidence before him disclosed only one incident in which it could be said that a passenger who booked their flight through the defendants' website had suffered prejudice as a result of that booking being made on the basis of the OTA's e-mail address. He felt that there was no evidence to suggest that the passengers did not have their issues resolved, albeit after a delay while the passengers retrieved the relevant e-mail from the OTA. Similarly, he concluded that there was no evidence that (as some of the examples tendered by the plaintiff

suggested) the use of OTA e-mail addresses caused a prejudicial delay in enabling relevant health authorities to locate patients for the purposes of COVID-19 contact tracing. Evidence of the plaintiff being exposed to liability for regulatory breaches by failing to advise passengers timeously of cancellations when the notification was made to the OTA were viewed as less than significant as they predated the alleged termination of the licence agreement and thus did not relate to the factual context in which the proceedings were brought. Moreover, the court concluded that the plaintiff might have a defence under the Montreal Convention 1999 for such breaches if it took reasonable measures to avoid damage to the customer and could claim indemnity from the OTA. A complaint based on an apprehension of damage to the plaintiff's good name as evidenced by an example of where it could not contact a customer to apologise for the racist behaviour of another passenger was dismissed as it predated the alleged termination of the licence, was not proven to have occurred as a result of a booking through the defendants and was a single incident which did not justify an injunction being granted.

- (v) The judge also concluded that the plaintiff delivered a *pro forma* response to, and engaged by way of a 'Chatbot' with, passengers who might experience inconvenience as a result of this practice and who contacted the plaintiff even though an individualised attempt could have been made to confirm their identity by other means. He concluded that when dealing with a passenger whose personal e-mail address was not used in a booking, the plaintiff could have used other identifying information which it had (such as name, expiry date of passport, passport or ID card number, nationality, address, phone number, date

of birth or booking reference) to confirm the passenger's booking. He noted that the injunction would not resolve the issue of which the plaintiff complained as the four OTAs who provide the plaintiff with their own e-mail addresses operated the same model when booking flights on other meta search sites and on their own websites.

- (vi) At the same time, the court noted a variety of factors which would cause damage to the defendants in the event that the injunction sought were granted. Thus, they would be placed at a competitive disadvantage with other meta search websites that competed with the plaintiff as they would not be subject to such an injunction. This was particularly the case if the defendants found themselves having to exclude certain OTAs from using their website in respect of the plaintiff's flights. The court specifically noted that there might be good reasons why an OTA would use its own e-mail address rather than that of the customer – in the case of a traveller who booked a multi-airline itinerary it might be more appropriate for the OTA to take control of customer service.

- (vii) In this regard the court viewed it as significant that the order sought by the plaintiff might involve ongoing court supervision, as the defendants would be required to monitor on a constant basis the business practices of all 300 OTAs operating on their website so as to ensure that they provide the personal e-mail addresses of passengers to the plaintiff rather than an OTA e-mail address. It was not, the judge said, an answer to this to say (as the plaintiff had suggested) that it would monitor whether OTAs forwarded the e-mail addresses of passengers.

- (viii) The judge also viewed it significant that the application for interlocutory injunctive relief arose in the context of a world-wide campaign against the defendants as proxy for the OTAs as a factor that weighed against the grant of an interlocutory injunction. Referring to the decision in *R. Griggs Group Ltd. & ors v. Dunnes Stores Ireland Co.* (Unreported, High Court, McCracken J., 4 October 1996), the judge concluded that these factors weighed against the grant of an injunction at interlocutory stage on the balance of justice. He was also of the view that it was significant that the plaintiff had other, arguably more direct, means of achieving its aim.
- (ix) The court attached significance to certain conduct of the plaintiff and its likely actions in the event that an interlocutory injunction was granted. In this regard he referred to the fact that having obtained an *ex parte* injunction from a German Court against a German affiliate of the defendant, the plaintiff issued a press release and wrote to the United Kingdom Civil Aviation Authority regarding the order without making it clear that the order had been obtained *ex parte* and calling for the boycotting of the defendants and other (as the press release described them) ‘*screenscrapers*’.

29. So, the plaintiff failed in its application for two essential reasons. First, the relief was mandatory in nature and it had to establish that it had a strong case that was likely to succeed. This it had not done. Second, the balance of justice did not favour the grant of the relief claimed because, in particular and as the High Court judge helpfully summarised at the conclusion of his judgment, (a) the plaintiff could alleviate the

prejudice it claimed was being caused by the provision of OTA e-mail addresses, (b) the injunction was sought against the defendants even though the primary source of the inconvenience were the OTAs and (c) much of the prejudice relied upon related to events pre-dating the alleged termination of the licence agreement.

Relevant principles

30. The principles governing the determination of an application for interlocutory injunctive relief have been re-stated by the Supreme Court in *Merck Sharpe and Dhome v. Clonmel Healthcare* [2019] IESC 65, [2020] 2 IR 1, (*Merck*) that decision being explained and applied by this court in *Betty Martin Financial Services Ltd. v. EBS DAC* [2019] IECA 327, *Ryan v. Dengrove DAC* [2021] IECA 38 and, most recently, *O'Beirne v. Bank of Scotland and anor.* [2021] IECA 282. For present purposes they can be summarised as follows.

31. There is one – and only one – fixed precondition to the grant of an interlocutory injunctive order, this arising from the obvious and uncontroversial requirement that the plaintiff establish (as it is variously described) a *'fair question'* a *'bona fide issue'* or a *'serious issue to be tried'*. Each of these is akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction of the court (*Betty Martin Financial Services v. EBS DAC* at para. 42). Indeed, in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 (*American Cyanamid*) Lord Diplock implied the equivalence of the threshold to dismiss a claim and that for the grant of a prohibitory injunction as requiring that *'the claim is not frivolous or vexatious; in other words that there is a serious issue to be tried'* (at p. 407). Save in the most exceptional

of circumstances, the plaintiff must also establish that if it succeeded at trial a permanent injunction would be granted (*Merck* at para. 64 (1)). After that, the court's focus is upon whether the risk of least injustice lies in the grant or refusal of an order. The case-specific factors relevant to the determination of that issue include the adequacy of damages in the event that the injunctive relief is not granted and the plaintiff prevails at trial, the decision in *Merck* making it clear that this is not a free standing, determinative inquiry (*Ryan v. Dengrove* at para. 49).

32. To assist in that exercise, the law has developed a series of guidelines which will *usually* enable the identification of where that risk of least injustice lies in a particular case. However, these are all subject to the over-riding consideration that the remedy is flexible, and that the underlying objective in the resolution of any such application is to minimise injustice in circumstances where the legal rights of the parties have yet to be determined.

33. In that regard, the following are relevant here - each being subject to the critical proviso that they are statements of the general, and are neither set in stone nor required to be applied without regard to the legal and factual context of a particular claim:

- (i) As the law presently stands in this jurisdiction in a normal case, a mandatory order will be made only if the court is satisfied that the plaintiff has established that it has a strong case that he is likely to succeed at trial (*Maha Lingam v. Health Service Executive* [2005] IESC 89 (at para. 10)).

- (ii) In determining whether an order is ‘*mandatory*’ for this purpose, the court is concerned to identify the substance of the relief sought, the matter therefore not being judged on the basis of the phraseology of the order. Any positive assertion can be expressed as a negative. The converse is also true, so that a technically mandatory order which involves little intrusion on the affairs of a defendant may not fall to be determined by reference to the ‘*strong case*’ test (*Charlton v. Scriven* [2019] IESC 28 at para. 4.6).

- (iii) If all other matters are evenly balanced, the court in deciding whether to grant or refuse interlocutory injunctive relief should lean in favour of the maintenance of the *status quo ante* (*B. & S. Auto Ltd. v. Irish Auto Trader Ltd.* [1995] 2 IR 142, at p. 146 per McCracken J.). This is because it will usually be less unjust to keep the parties in the position they occupied prior to the application, than to enable one to unlawfully disrupt the pre-existing legal relationship between them.

- (iv) The *status quo ante* is also relevant to the standard applied to the grant or refusal of a mandatory order. An action requiring an affirmative step which was being undertaken by the defendant prior to the application may fall to be determined according to the fair question standard because although the injunction may be mandatory in form, it does not require the defendant to do anything it was not already doing (*Ó Murchú t/a Talknology v. Eircell Ltd.* [2001] IESC 15 at p. 6).

- (v) For much the same reason as a higher standard on the merits is usually applied to a mandatory interlocutory order, where the grant of an interlocutory

injunction will determine the case in whole or in part the court will incline against so ordering (*Taite v. Beades* [2019] IESC 92 at para. 28; *Merck* at para. 36).

- (vi) Central to the determination of many applications of this kind is the question of whether in the event the plaintiff does not obtain the interlocutory relief sought but prevails at trial, damages will be an adequate remedy and, conversely, whether in the event that the injunction is granted and the defendant prevails at trial it will be possible to compensate the defendant for any loss caused by the fact of the injunction. This is likely to be a decisive factor in many commercial disputes between solvent parties (*Merck* at para. 64 (4) and (5)). However, as I have noted, this should be viewed not as a free standing test, but as a factor relevant to the assessment of the balance of justice.

- (vii) While in the majority of cases the court is concerned to establish merely that a claim on its merits discloses a ‘*serious issue*’ or (in most applications for mandatory injunctions) a claim that is strong and likely to succeed, there are some categories of case in which a plaintiff who establishes a clear claim on the merits will obtain an interlocutory injunction for that reason alone. This is the position in relation to certain claims for the enforcement of undisputed negative contractual stipulations (see *Dublin Port and Docks Board v. Britannia Dredging Co. Ltd.* [1968] IR 136 and *Merck* at para. 36).

(viii) More generally the court may look to the merits of the case so that in a strong case this may tip an otherwise evenly drawn balance of convenience in favour of one party or the other (*Merck* at para. 62).

(ix) These, of course, are merely the specific factors and presumptions in play in this application: in some cases there will be others, most notably the effect of an intervening public interest in litigation against the State or in litigation engaging constitutionally protected interests of one or both of the parties.

34. In applying this guidance, it is to be noted that while the plaintiff deployed many causes of action in the course of its argument, the High Court judge said that before him the only claims which it was contended were strong (as opposed to arguable) were those based upon the licence agreement and TOU. In the course of his oral submissions to this court, counsel for the plaintiff accepted that this was a correct statement of its position.

Preliminary and ancillary issues

35. The written and oral argument in this application before both this court and the High Court toured a wide terrain. However, it is my view that many of the issues traversed by the parties admit straightforward resolution or are ancillary to the critical issues in dispute (or both). It is helpful to isolate these at the outset.

(i) *Was this an application for mandatory interlocutory relief?*

36. The injunction *was* in substance a mandatory injunction. The law is clear and unsurprising in requiring that in determining whether injunctive relief is viewed as mandatory or prohibitory, the court must (as I have already noted) approach the matter as one of substance and not form, and must accordingly focus on what the injunction requires the defendant to do, not on how the relief sought is framed. As I have also already observed, any positive statement can be rephrased as a negative. This ‘*substance over form*’ analysis follows from the justification for the different test applied to mandatory and prohibitory relief. The reason the cases usually impose a higher standard on a person seeking relief that is properly described as mandatory is that the relief is, for that reason, generally more intrusive, usually imposes a greater burden on the party made subject to it and because it will often be more difficult to undo the consequences of a mandatory order than a prohibitory order, should the defendant prevail at trial. Therefore, the potential for an interlocutory order causing an injustice is increased where the order requires the defendant not to simply desist from an identified course of action, but to affirmatively undertake one (see *Charleton v. Scriven* [2019] IESC 28, at para. 4.8). That risk presents itself whenever the substance of the order requires affirmative action by the defendant, the risk increases the more extensive and irreversible the affirmative action is likely to be, and this is necessarily the case irrespective of how the specific relief is articulated in the plaintiff’s application.

37. In substance, the order sought by the plaintiff here required the defendant to monitor and control the behaviour of a third party by either changing its terms of dealing with the OTAs or enforcing existing terms agreed with those undertakings. Counsel for the plaintiff, in explaining how the orders he was seeking would work in practice, made it

clear that what his clients sought to have put in place was a system whereby the defendant would impose a term on those OTAs availing of its services requiring the OTA to give only customer e-mails and telephone numbers to the plaintiff. That being done, the plaintiff would then advise the defendants when what he described as ‘*an incorrect*’ e-mail address or phone number was furnished to the plaintiff by an OTA that the defendant would have ‘*a week or so*’ to find out if this was so and from there (if such an address had been given) ‘*was obliged to preclude that OTA from furnishing any further e-mail addresses*’. Unless the defendant was going to cease transacting business with OTAs in question altogether (which would have been a substantial burden to impose upon it pending trial, and which the plaintiff significantly did not seek to require it to do), it could only have complied with any order ultimately made of the kind sought by the plaintiff by undertaking the positive act of altering the way it dealt with OTAs, thereby changing its business model, monitoring interactions between the OTAs and the plaintiff, and engaging with the OTAs where they did not comply with the directions that would presumably have to be given to them. The matter was put as follows on behalf of the defendants by Mr. Aitken in his first affidavit (at para. 33):

‘Skyscanner would face the greatest of difficulty, and in fact the impossibility, in practice with verifying the on-going and consistent compliance by OTAs with the terms of the injunction, meaning that the impact of the orders sought would be even more far reaching as in effect they would require the exclusion of all OTAs from the Skyscanner platform in respect of Ryanair flights.’

38. That being so, the trial judge was in my view correct in his characterisation of the order sought. The relief claimed was mandatory, and the plaintiff had to either meet the

standard of establishing more than a ‘*serious issue to be tried*’ or alternatively to identify and substantiate a basis on which it could be concluded that the normal test for a mandatory injunction should not be applied on the facts, before it could obtain the interlocutory relief sought.

(ii) *The status quo ante*

39. The identification and categorisation of the *status quo ante* does not, in this case, significantly advance the plaintiff’s position. Generally, the *status quo ante* is the state of affairs prevailing at the point immediately before the commencement of the action or, in the event that the application is unreasonably delayed between the issue of the summons and the hearing of the motion, the position as at the point of application (Bean ‘*Injunctions*’ (13th Ed. 2018) at para. 3.23). The plaintiff says that thus viewed, the *status quo ante* was that the defendant did not facilitate the sale of the plaintiff’s flights through the OTAs on its website, as this was the position that prevailed as of 10 November 2019 – the day prior to the communication from the defendants that they viewed the licence agreement as terminated.

40. However, the inquiry as to what the *status quo ante* is must be defined by the relief being sought by the plaintiff. The relief sought to impose on the defendants an ongoing obligation to take a series of positive steps which, as of the date of the issuing of the proceedings, they had never previously undertaken. The effect of the orders sought would, if granted, have been thus to impose upon the defendants a fresh legal obligation and to adopt on foot of that obligation measures they had never before had to adopt.

41. At first glance the plaintiff's response to this – essentially that the lesser is included in the greater – may seem attractive. The argument is that given that it could have but did not seek to prevent the defendant from enabling OTAs to use its website at all, then it should not face greater difficulty in imposing a lesser burden. However, I think that this suggestion is illusory. The plaintiff has *not* sought that more drastic relief and if it had, the extent of the burden imposed upon the defendant and degree of intrusion into its business entailed by such an order would be so substantial as to present (at the very least) a significant risk that the relief would not be granted. Whatever the reason it has not sought that relief, its failure to do so should not affect the legal analysis.
42. There are two other reasons I would reject the case advanced by the plaintiff under the rubric of the *status quo ante*. There is, it must be repeated, no hard and fast rule easing the burden on a plaintiff who seeks interlocutory relief directed to the maintenance of the *status quo ante*. Everything depends on the facts. In *B&S Auto Ltd. v. Irish Auto Trader Ltd.* McCracken J. described recourse to the *status quo* as ‘*a counsel of prudence ... not a fixed rule*’. Here, the *status quo* was fixed by an agreement which the defendants says they had terminated. As I next explain, the plaintiff's argument that the agreement had not been validly terminated is not a strong one. To hold the defendant to the factual position as it prevailed before the termination of that agreement would, in effect, amount to the grant of a mandatory order enforcing that agreement on the basis of a case that does not meet the legal test for the grant of such orders. It would involve predicating a version of the *status quo* that assumed that the agreement was in force when the plaintiff could never have obtained a mandatory injunction on that assumption.

43. Second, whatever about the position as of the date of the hearing in the High Court, the fact is that as of the hearing in this court, a very substantial period has elapsed since the defendants began their dealings with the OTAs giving rise to this application. It was, as I have noted, open to the plaintiff to seek an expedited hearing of this appeal. It did not do so but instead expressly recorded that it was not seeking a priority date. This cannot be ignored by the court. As of the hearing in this court the defendants had been conducting business with the OTAs in a manner which the plaintiff seeks to disrupt, and have been doing so for two years. The defendants' evidence further suggests that some OTAs had been selling the plaintiff's flights for almost one year prior to the termination of the licence, and that OTAs had not been providing the plaintiff with passenger e-mail addresses or telephone numbers. To suggest that the *status quo* is one according to which they were not dealing with OTAs at all *via* the defendants site would defy reason. It is clear that '*if there has been a lengthy delay in seeking an interlocutory injunction, it may be the status quo at the time immediately preceding the motion seeking the interlocutory injunction which is of relevance*' (Kirwan '*Injunctions: Law and Practice*' (3rd. Ed. 2020) at para. 6-256). The same logic must apply where an injunction is refused in the High Court and a lengthy but avoidable period passes before the appeal is heard.

(iii) *The strength of the case arising from the breach of the licence agreement.*

44. The argument advanced by the plaintiff insofar as the licence agreement was concerned was based upon clauses 2.1 to 2.3 thereof. I have summarised the effect of these provisions earlier – there was a right to terminate with immediate effect upon material

breach (on seven days' notice) and a right to terminate without cause (upon the giving of thirty days' notice). No notice of any kind having been served, the plaintiff says, the agreement remains extant.

45. While all of this may be true, it ignores the sequence of correspondence between the parties in October and November 2019. That had its origin in the plaintiff's claim that the information provided by the defendants on their listings as to CO2 emissions from Ryanair flights was inaccurate. Those CO2 emissions listings were introduced as part of a 'Greener Choices' strategy introduced by the defendants. Various e-mails were exchanged between the parties regarding this issue in late October and early November. Then, on 4 November the plaintiff wrote to the defendants detailing its complaints regarding that information, and recording as follows:

'Please confirm that Skyscanner will update the CO2 filter so it presents accurate results or turn it off until such time this is possible. Otherwise we will be making the API connection unavailable from Monday Nov. 11.

Please confirm by close of business on Friday, Nov 8.'

46. Further correspondence ensued with the defendants raising various queries of the plaintiff by letter dated 6 November, and from there complaining by letter dated 11 November that these had not been addressed. There, they said:

'In the circumstances and as the deadline set by you of 5 pm Friday 8 November has passed, we can only take it to be the case that you have now terminated our permission to access the API thus effectively terminating the Agreement'.

47. Whether that exchange presented no more than the defendants calling the plaintiff's bluff and accepting its repudiation of the agreement (as the defendants suggest) or whether (as the plaintiff argues) the defendants were opportunistically availing of the chance to terminate the agreement without complying with the legal formalities stipulated in the agreement, is a matter for the trial. However while the parties have agreed that the plaintiff's claim insofar as based upon the exchange may be stateable (an issue on which I express no view), it cannot be said that in respect of this aspect of its claim the plaintiff has shown that it has a strong case that it is likely to succeed at the hearing of the action. The plaintiff chose in its 4 November letter to present the defendants with an ultimatum and elected to frame that ultimatum on the basis that unless its demands were acceded to the agreement would terminate. Having embarked on that course of action it is to my mind hard to see how there can be a strong case that it can contend that the defendants were legally required to serve a termination notice in order to achieve the end the plaintiff had itself promised. Of course, evidence as to the relevant factual matrix may change that, but viewing the matter at this point in time, the plaintiff's claim insofar as predicated upon this agreement continuing is far from a strong one.

48. Even if it were, I find it difficult to see how the balance of convenience could ever support the grant of a mandatory injunction on the basis of this claim. Were it to be found that the defendants were not entitled to treat the plaintiff's correspondence of 4 November as a repudiatory breach of the agreement, the fact is that were an injunction to be granted as sought, the defendants would have an entitlement to serve a notice terminating the agreement with effect from thirty days after service. The agreement

would, in that circumstance, be clearly and lawfully at an end. This was put to counsel for the plaintiff by a member of the court during the course of argument, and in response nothing was said to identify where the flaw lay in that logic.

(iv) Damages as an adequate remedy.

49. The point was made in *Merck* that save in the simplest of cases both parties to an application for an interlocutory injunction will be able to show that they will suffer *some* damage that cannot be adequately compensated for by an award of damages (see at para. 36). However, viewing the matter at what seems to me to be the appropriate and necessary level of generality this is a case in which damages will be an adequate remedy for the plaintiff if no injunction is granted.

50. As the trial judge found, the plaintiff was in a position to calculate with some precision the revenue lost by not being able to communicate directly by e-mail with the customers in question. The attempts by the plaintiff to attach its claims to the convenience of and avoidance of prejudice to the traveling public were weak and correctly dismissed by the trial judge. I will return to them later; suffice it for present purposes to say that they follow the pattern identified in *Merck* (at para. 38) of emphasising ‘*sometimes peripheral features with a view to establishing the much sought after irreparable harm which may trigger the grant of the interlocutory injunction*’. The fact was that the plaintiff could not produce a single passenger who booked with it through the defendants *via* an OTA who had been personally inconvenienced in any significant way by the provision of OTA e-mail addresses. The central loss was properly characterised by the trial judge as commercial.

51. I also believe that the trial judge was correct when he concluded that were an injunction granted for the time period up to the main hearing but ultimately refused, it would be possible to calculate the amount of money lost by the defendants as a result of the grant of the injunction, albeit that this might be a more involved exercise. As the judge observed (at paras. 193 and 194 of his judgment) if, after the injunction is granted, an OTA refused to provide the passenger's personal email address to the plaintiff, the defendants would then have to stop listing the plaintiff's flights in its search results for that OTA on the defendants' website. In that case the defendants should be able to provide a comparison of its commission revenue from that OTA before and after this change in the defendants business model, to enable an estimate to be made of the monetary damage caused by the interlocutory injunction. Similarly, if after the injunction is granted, an OTA changed its business model by providing the personal email address to the plaintiff, the defendants should be able to provide a comparison of their revenue from that OTA before and after this change in the OTA's business model.

52. However, while the financial impact of the order might be capable of calculation, it follows from what I have said in my discussion of the mandatory nature of the relief claimed that the orders sought would have a consequence for the functioning of the defendants' business that extends beyond the merely financial, and as I also explained that impact is far greater than the equivalent difficulties the refusal of the application are likely to entail for the defendants. I will return to this again later in this judgment.

(v) *The remaining issues*

53. As I have noted, the judge concluded that the plaintiff's claims insofar as they were based on causes of action *other* than the alleged breach of the terms and conditions of use of the plaintiff's website were not strong claims for the purposes of the applicable legal test governing the grant of a mandatory interlocutory injunction. The plaintiff accepted that this was the position. This is why I observed at the commencement of this judgment that the application reduces itself to two issues, (a) has the plaintiff established a strong arguable case that the defendant – having regard to the TOU of the plaintiff's website - acted unlawfully in using its information to facilitate bookings by the OTAs, and (b) if so, where does the balance of justice lie.

The claim based upon the TOU

(i) *The evidence*

54. Clause 2 of the relevant TOU provides as follows:

“[The Ryanair website] is the only website authorised to sell Ryanair Group flights [...], whether on their own or together with any other services. Price comparison websites may apply to enter into a written Licence Agreement with Ryanair, which permits such websites to access Ryanair Group airlines' price, flight and timetable information for the sole purpose of price comparison.”

55. Clause 3 is as follows:

'You are not permitted to use this website ... its underlying computer programs ... 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, to extract any data from this website for commercial purposes ("screenscraping") is strictly prohibited.

56. The evidence was to the effect that those using the plaintiff's website should be familiar with these TOU and that to conduct a search for flights on the plaintiff's website evidence a visitor would have to engage in a process referred to as '*click-wrapping*'. Generally, '*click-wrapping*' involves the explicit acceptance of such terms through various 'clicks' at the front-end, back-end or payment stage of a website.

57. The plaintiff's evidence is that when a person visits its website and inputs the terms of a search on the plaintiff's website it was required to click a button entitled '*Lets go!*' under which it is expressly stated '*By clicking Lets Go I agree to the Website Terms of Use*'. This statement contains an emphasised hyperlink in bold font enabling the user to view the plaintiff's TOU. A tick box is located to the left of the hyperlink. Upon the user ticking the '*Lets go!*' button, the box is caused to be ticked thereby confirming the defendant's acceptance of and agreement to the TOU, which are highlighted in the hyperlink.⁵ The evidence of Mr. McNamara was that to the best of the plaintiff's knowledge '*it is not possible to access or screenscrape Ryanair's website and, at the same time, fail to agree to Ryanair's TOU's*'. That was never disputed, and neither was Mr. David O'Callaghan's averment of the plaintiff's website that '*interactions*

⁵ In his second affidavit, Mr. McNamara explained that the web site had changed since the delivery of the first affidavits so that instead of '*Lets go*' a user must click the word '*Search*' and that instead of clicking '*By Clicking Lets Go I agree to Website Terms of Use*' next to the tick box must click '*By clicking search you agree to the Website Terms of Use*'. It was not suggested by either party that the alteration changed the analysis.

cannot occur on its website without acceptance of the TOU's'. Moreover, in the case of the defendant it must – having regard to the original agreement between the parties – have been familiar with those terms.

58. The trial judge concluded that the claim based upon these TOU was not frivolous or vexatious having regard to these considerations and to the fact that the defendants benefitted financially from the sale of Ryanair flights by OTAs. His reasoning as to why the plaintiff had not established a strong case based upon the TOU of the plaintiff's website was explained as follows (at para. 74 of the judgment):

'Ryanair claims that it has a strong case to be tried and in this regard it relies on the decision in Ryanair v. S.C. Vola.ro S.R.L. [2019] IEHC 239 where Ni Raifeartaigh J. considered it significant that the express agreement to accept the Terms of Use of the Ryanair website appears beside the 'Let's go' button that a user of the Ryanair website must click – thereby expressly consenting to the Terms of Use. Furthermore, she notes in her judgment that the Terms of Use appear as a hyperlink at all times on the Ryanair website and that therefore any user of the website can access the Terms of Use at all times while using the website. The precise format of the Terms of Use is not necessarily the same for Skyscanner as it was for S.C. Vola.ro. In addition, of course, Skyscanner has denied screenscraping. Furthermore, Skyscanner claims that the Licence, which permits the use of Ryanair's PFT for price-comparison purposes only, was terminated on 11th November 2019. For these reasons, this Court concludes that, while Ryanair might well succeed at the hearing of the action that Skyscanner has breached its Terms of Use of its website, it is not possible

for this Court to conclude that Ryanair does has a strong case, such as to entitle it to a mandatory injunction at the interlocutory stage.’

59. I have some sympathy with the plaintiff’s complaint that the precise basis on which the trial judge concluded that the case based upon the TOU was not strong is not especially clear from this paragraph. It is also correct to say, as the plaintiff does, that the penultimate sentence addresses a separate cause of action, namely that for breach of the licence agreement. Nonetheless, the issue of whether the plaintiff has established a strong case that is likely to succeed is one of law, and this court is in as good a position as the trial judge to assess it.

(ii) *The legal claim arising from the TOU*

60. The question of whether, and if so when, ‘*screenscraping*’ is unlawful has generated a substantial academic literature.⁶ Across different jurisdictions it has been variously suggested that claims based upon intellectual property rights, upon particular statutes applicable in some jurisdictions, upon theories of trespass and upon the contractual rights of the owner of website from which information is extracted in this way, can be marshalled to prevent or recover damages in respect of the practice. Of these the contractual claim is that most persistently and universally invoked and, as the law presently stands in this jurisdiction, the clearest. In *Ryanair Ltd v. PR Aviation BV* ECLI:EU:C:2015:10 the CJEU suggested that terms and conditions governing the use of a website may function as a contractual limitation on screenscraping (at paras. 39 and 41) and (as the above quoted passage from the trial judge’s decision suggests) in

⁶ See in particular the survey of the American, Australian and UK literature and case law in Liu ‘*Two Decades of Laws and Practice Around Screenscraping in the Common Law World*’ 30 Wash. Int’l LJ 28 (2020).

Ryanair v. SC Vola.ro SRL [2019] IEHC 239 the High Court determined that the confirmation by users of the plaintiff's website that they agreed to the terms and conditions was such as to give rise to an agreement as to jurisdiction for the purposes of Council Regulation EC/44/2001.

61. The defendants raise three general and related points in response to this claim. The first is evidential. They point to the fact that they deny on affidavit (a) that they themselves sell Ryanair flights and (b) that they engage in screenscraping. Thus, they contend, at this point it cannot be said to be clear to the standard required to obtain mandatory interlocutory relief that the plaintiff has any cause of action in contract against the defendants. The court must operate on the basis that the defendants do not themselves engage in screenscraping, and if that is so the asserted breach of contract claim cannot be said to be a strong one.
62. The second point is rooted in public policy. The defendants suggest that there is a potential public policy defence to an action by the plaintiff seeking to enjoin the display and use of information that the plaintiff has itself chosen to publish to the world at large.
63. Third, the defendants complain that these proceedings in general, and in particular the application for injunctive relief the subject of this appeal, are part of what they describe as a '*domineering strategy*' whereby the plaintiff seeks to monopolise certain revenue streams and in that regard to retain for itself to the exclusion of OTAs, the ability to market and sell to the public the ancillary services. This is, the defendants say, anti-competitive by object and effect and is unlawful as such. Specifically, they assert that the plaintiff by seeking to prevent the use of its PFT by the defendants is abusing a

dominant position in the market for certain goods and services and that this affords the defendants with a substantive defence to an action to enforce a contract having this aim. Because of that defence, it is said, the plaintiff cannot surmount the hurdle for obtaining mandatory interlocutory relief.

(iii) *Mandatory interlocutory relief*

64. Since the decision in *Maha Lingam v. Health Services Executive* the Irish case law has been emphatic that an applicant for mandatory interlocutory relief must establish more than a ‘*serious issue to be tried*’. In his judgment in that case, Fennelly J. expressed the test as follows (at para. 10):

‘... it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action.’

65. This has since been frequently repeated. Some of the cases frame the requirement reflecting the formula used in England that the case must be ‘*unusually strong and clear*’ (*Shepherd Homes v. Sandham* [1971] Ch. 340 at p. 349) or have limited the grant of mandatory interlocutory relief to ‘*the clearest of cases*’ (*Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107, [2011] 3 IR 563 at para. 22). Most recently, the Supreme Court has framed the requirement for such a case in terms of its being ‘*particularly strong and powerful*’ (*Clare County Council v. McDonagh* [2022] IESC 2 at para. 91). Some of the commentaries suggest that the focus is not on the strength

of the case in terms of the underlying merits, but instead is properly directed to the degree of assuredness the court would have that the applicant will succeed having regard to the clarity of their case, and the credibility of the evidence they adduce to support it (see generally Kirwan *'Injunctions'* (3rd Ed. 2020) at para. 6-119 to 126). The distinction appears to be a very fine one. The proper focus, it seems to me, is upon two questions:

- (a) Is the cause of action relied upon by the plaintiff a defined and recognised one? If not and if the claim is one of significant legal novelty, the claim may be arguable, but it may not usually ground mandatory relief.

- (b) Are the facts relied upon by the plaintiff to establish that cause of action either undisputed, or supported by evidence that is credible to the extent that it can be described as *'strong'*? (and see *AIB plc v. Diamond* [2011] IEHC 505, [2012] 3 IR 549 at p. 576). If not, and in particular if the evidence before the court shows the plaintiff's claim on the facts to be speculative or lacking in certainty or internally contradictory, a mandatory order may be inappropriate.

66. The decision of the Supreme Court in *Charleton v. Scriven*, shows that in at least some cases it is clarity rather than predicted outcomes that lie at the heart of the test, and that claims disclosing factual complexity or legal novelty will often fail that test by reason of that complexity or novelty alone. This makes sense. If a claim is dependent upon a wide range of difficult questions of fact, or involves a novel proposition of law, the court in determining whether it is appropriate to grant mandatory interlocutory relief

may find itself in a position where it is not possible to conclude that the plaintiff's claim is sufficiently clear and strong to conclude that the overall balance justifies putting the defendant to the inconvenience of complying with mandatory orders.

67. In that case, the plaintiffs were receivers purportedly appointed pursuant to a power in a mortgage entered into between a bank and the defendant. They sought interlocutory relief the effect of which would have been to enable them to take over properties the subject of that security. The defendant raised an issue around the validity of their appointment, claiming that the mortgages only allowed for the appointment of receiver managers, and that because the deed appointing the plaintiffs had failed to recite that they were so appointed (the deed merely referred to them as 'receivers') the appointment was invalid. The High Court, in an interlocutory application in another case involving similarly worded mortgages and deeds of appointment,⁷ had suggested that this argument was a strong one.

68. Obviously, the fact of that defence had to be considered in determining whether the plaintiffs had disclosed a sufficiently strong claim to ground the mandatory relief they sought to obtain. Clarke CJ. explained the correct approach to that defence as follows (at para. 6.13):

*'The potential for a distinction between relief which is essentially mandatory, on the one hand, and that which is prohibitory, on the other, arises where there is at least **some significant defence put forward** which the Court assesses might arguably provide a basis for suggesting that the receivers might fail at trial. In*

⁷ *McCarthy v. Moroney* [2018] IEHC 379. The underlying point was, as it happens, eventually found by this court to be ill founded in *Fennell v. Corrigan* [2021] IECA 248.

such circumstances, it will be necessary to assess the strength of the defence put up so as to, in turn, determine whether the receivers' case can be characterised as sufficiently strong to warrant the grant of mandatory relief or whether it may only be possible to say that the receivers' case gives rise to a fair issue to be tried, where only such part of the relief claimed as can properly be described as prohibitory should be granted.'

(Emphasis added)

69. While Clarke CJ. felt that the receivers had established a sufficient answer to the defendant's claim that their appointment was invalid to ground a prohibitory injunction (and indeed he granted them certain negative injunctions) he concluded that the complexity of the arguments around the relationship between the mortgage and the deed of appointment was such that it could not be said that the plaintiffs' claim was sufficiently clear to justify mandatory relief. He explained the conclusion in a manner that frames the proper test, as follows (at para. 6.11):

'However, in my view the arguments concerning the validity of the appointment of the Receivers are sufficiently complex (for the reasons analysed by McDonald J. in McCarthy) that it would be difficult to suggest that a sufficiently strong case could be made out to warrant the grant of an injunction which was essentially mandatory in character. I would, therefore, distinguish between the reliefs sought which simply seek to retain the position that the Receivers are entitled to collect the rent, on the one hand, from any relief which might be designed to allow the Receivers to move on to selling the property on the other.'

70. Before leaving this issue, one final point should be made. Counsel on behalf of the plaintiff argued in the course of his oral submissions that there was no hard and fast rule that in all applications for mandatory interlocutory relief the plaintiff – for that reason alone – had to establish a strong and clear case. He emphasised in this regard the decision in *Ó Murchú v. Eircell*. That judgment pre-dated *Maha Lingham*, and – as I have noted – it is a fact that since the latter decision the courts in this jurisdiction have adhered quite rigidly to the distinction between prohibitory and mandatory relief stressed in that *ex tempore* judgment. However, for my part, I think that there is some considerable substance to this aspect of the plaintiff’s argument, and indeed I note and agree with the comments of Barrett J. in *Bennett v. Minister for Justice* [2017] IEHC 261 at para. 14 to similar effect.

71. If one single proposition of law is to be derived from the judgment of the court in *Merck* it is that at the heart of the interlocutory injunctive order lies a necessary and pragmatic flexibility that sits uncomfortably with the rigid enforcement of strict rules of universal application. That principle would dictate that there will be orders which, although mandatory in terms, involve a minimal (and easily reversible) intrusion on a defendant’s activities and in which it is appropriate to relax the standard of a strong claim that is otherwise required to obtain such mandatory relief. This, I note, reflects the development of the law in the United Kingdom (*Nottingham Building Society v. Eurodynamics Systems plc* [1993] FSR 468). The critical question in all applications for orders of this kind is whether the risk of injustice, if it transpires that the injunction was wrongly granted, sufficiently outweighs the risk of injustice if it should prove to have been wrongly refused, and it is an error to view each element of the test applied to that relief as insulated from the other. Usually where mandatory interlocutory relief

is sought that risk of injustice will properly require that the plaintiff establish more than a serious issue to be tried. There may be cases in which this is not the case.

72. This, however, is not one of them. The orders sought by the plaintiff – as is clear from the description by its counsel of the steps involved in their execution – would involve a significant alteration to the manner in which the defendants conduct their business over a potentially substantial period of time, exposing them to risk of being found in contempt for a failure to either impose new terms of dealing with the OTAs or to enforce existing ones, to monitor the activities of those undertakings and to take coercive action against them if they did not comply with those involuntarily assumed obligations. This is, in substance and in form, relief that is intrusive and inherently mandatory in nature.

(iv) *Do the facts disclose a strong claim based on the alleged contract ?*

73. In the course of his judgment in *Betty Martin Financial Services Ltd. v. EBS DAC* Collins J. underlined the consideration – which is at the same time self-evident and easily forgotten – that in determining an application for an interlocutory injunction the court is not resolving any factual disputes (see para. 9). It is not, therefore, ‘*finding*’ any facts (*id.* para.. 83 fn. 6). The court is conducting - based upon the evidence before it and such legal principles as are relevant to the exercise - an assessment (a) as to whether the plaintiff’s claim is stateable or, in specific circumstances, strong and clear, and (b) as to where the balance of least injustice lies. Of course, in some cases there will be facts that are not in dispute, and (as I explain shortly) others in which the court must assess the credibility of the evidence said to subtend the cases of respective

parties (both on the merits and in respect of issues such as the adequacy of damages or balance of justice which may also involve disputed facts). However, it does not *'find'* any facts.

74. I labour this because one of the issues agitated in the course of this appeal arose from the fact that the defendants – while denying that they engaged in *'screenscraping'* - conspicuously refused to explain how it came about that the plaintiff's PFT was displayed on their *'meta search site'*. The plaintiff sought to contend that the court should conclude that the defendants were acting unlawfully in the manner in which they obtained the information, given that they have refused to adduce any evidence explaining how they actually sourced the data. In this regard, the plaintiff referenced various decisions confirming the power of the court following a witness action to draw adverse inferences from the failure of a party to call an available witness to address evidence adduced by its opponent (*Dublin Waterworld Ltd. v. National Sports Campus Development Authority* [2019] IECA 214 at para. 166). As so expressed, the argument is obviously misconceived: if the court is not engaged in an exercise of fact finding the question of reaching conclusions of fact based upon a failure to adduce particular evidence does not arise.

75. What is relevant, however, is a more rudimentary and, perhaps, related proposition. In an application for prohibitory interlocutory relief where the plaintiff must merely establish a serious issue to be tried, the failure of a defendant to deny a factual claim may not be particularly relevant to that aspect of the court's inquiry: the threshold imposed on the plaintiff in seeking such an injunction is a low one and the issue before the court is not whose case is likely to prevail at trial, but whether there is an arguable basis for the plaintiff's claim. That requires no more than that the plaintiff establish a

plausible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary to establish its legal claims (see *Lopes v. Minister for Justice* [2014] IESC 21, [2014] 2 IR 301 at para. 19). It must also be said that there are strong reasons of policy not to place litigants in applications for interlocutory relief (which are already prone to becoming swamped with irrelevant and argumentative affidavit evidence), in a position where they feel that they must particularise every denial of the facts or inference alleged by their opponent.

76. The position is different when the application is for mandatory interlocutory relief and thus where the court must proceed to interrogate more closely the nature of the claim and the evidence said to subtend it. When, in that situation a plaintiff deposes to particular facts and adduces evidence that appears to support them, a defendant who wishes to contend that the claim based upon those facts is not a strong one must do more than baldly record that the facts are denied. Laddie J. in *Series 5 Software Ltd. v. Clarke* [1996] 1 All ER 853, at p. 861 deprecated the suggestion that a defendant could defeat the plaintiff's claim for an injunction by such a stratagem. If *American Cyanamid* meant, he said, that the court could not assess the strength of a plaintiff's case if there was any dispute on the evidence it would mean that (at p. 865):

'all a defendant would have to do is raise a non-demurrable dispute as to relevant facts in his affidavit evidence and then he could invite the court to ignore the apparent strength of the plaintiff's case. This would be inconsistent with the flexible approach suggested Furthermore it would be somewhat strange, since American Cyanamid directs courts to assess the adequacy of damages and the balance of convenience, yet these too are topics which will almost always be the subject of unresolved conflicts in the affidavit evidence.'

77. Here, the facts as recorded on affidavit disclose that the defendants host and exploit for their own commercial advantage information which – to their knowledge – has been obtained on terms that it will not be used in the manner the defendants use it. They have made clear that they did not themselves extract that information from the plaintiff's website. However, on the basis of the evidence that was before the High Court, if in fact the information was not obtained directly from the plaintiff's website by the defendants, it *must* have been obtained by third parties either (a) acting at the defendants' direction and as its agents and/or (b) on foot of a contractual relationship falling short of such an agency which nonetheless envisaged the extraction of the information and its provision to the defendants. These are the only possibilities that occur to me, and no others were suggested by the defendants, let alone attested to by them by way of explanation of how the information is obtained by them.

78. For the reasons I have earlier outlined, and to which I return shortly, there is in the first of these eventualities a strong basis for a claim that the defendants would be in breach of contract. In the second there may be no subsisting contractual relationship between the plaintiff and the defendants precluding use of the information in any particular way, but they may be liable to the plaintiff for inducing breach of contract or an unlawful means conspiracy.

79. However, without an explanation from the defendants as to how they actually obtain the data, all of this is speculative. Their strategic silence may not in itself justify the court in assuming the worst, but on the evidence adduced here it compels the conclusion that, for the purposes of this interlocutory application, the evidential basis for the plaintiff's claim that the defendants obtain the information in such a way that

they or their privies are obtaining it when they are aware of and in consideration for their accepting the TOU, is strong and credible. In *AIB v. Diamond* at p. 579 Clarke J. asked himself whether the party seeking the mandatory order in issue there ‘*has put before the court sufficient credible evidence which, if accepted at trial, would provide a strong arguable basis to the effect that an inference can be drawn from that evidence*’ to sustain its claim. That phrases the relevant inquiry well, and so expressed the plaintiff here has met that test on this aspect of its case.

80. In particular, when accepting the termination of the licence agreement threatened by the plaintiff in its letter of 4 November 2019, the defendants in their letter of 11 November threatened as follows:

‘... the unilateral and entirely unjustified action that Ryanair has taken seriously impacts upon our business and competitive position, particularly having regard to Ryanair’s position in the market(s) involved and the nature of the information involved. Accordingly, in order to mitigate against such damage and consumer harm, and to ensure business continuity for both ourselves and our travellers we have had no option but to commence using alternative means to access information relating to Ryanair flights’

81. This was highlighted in the second affidavit of Mr. McNamara, who said of the defendants’ evidence that they did not engage in screenscraping, the following:

‘Given that Skyscanner confirmed in its letter of 11 November 2019 that it would go elsewhere for Ryanair data, I can only take this averment as an assertion that, instead of screenscraping itself (on which Ryanair makes no admission),

Skyscanner receives scraped data from another, which it then uses on its platforms.'

82. Neither the threat in the letter nor the averment are engaged with by the defendants in their affidavit evidence. Instead, they studiously avoid explaining how they obtain the plaintiff's PFT information, and when viewed in context the evidence that is directed to this issue (at para. 70 of the first affidavit of Mr. Aitken) might be seen as evasive: *'[n]one of the defendants are involved in this activity.'* Indeed in the course of oral argument counsel for the defendants declined the invitation to explain how the defendants might have obtained the information other than by directing third parties to obtain the information. He said *'if the Court is saying to me that you haven't explained the presence of PFT from Ryanair on your website, that is correct and our position is that we didn't have to explain it because we had other grounds to contest the Ryanair case'*.

(v) *The enforceability of the alleged contract*

83. The evidence before the court thus discloses the following facts to be undisputed:

- (i) The plaintiff displays on its website information regarding its flight details and prices.
- (ii) Those accessing the website can only do so upon confirming their agreement to the defendant's terms and conditions of use.

- (iii) It is not possible to access or screenscape the plaintiff's website and, at the same time, fail to agree to its TOU.
- (iv) Included in those terms and conditions is a requirement that users agree not to use the information on the website for commercial purposes nor to use any automated system or software to extract any data from the site.
- (v) The PFT information contained on the defendants' site could only have been sourced from the plaintiff's website.
- (vi) The defendants at all material times knew each of the foregoing facts.
- (vii) The plaintiff's PFT information was obtained either by the defendants or, if the defendants did not themselves obtain that information from the plaintiff's website, by some other party who provided it to the defendants.

84. Based upon those undisputed facts I would have little difficulty in concluding that the plaintiff has established that it has a strong arguable case that generally and in theory it is entitled to enforce the TOU against the defendant. I have referred earlier to the decision of Ní Raifeartaigh J. in *Ryanair v. SC Vola.ro SRL*, where following an exhaustive analysis of the authorities the court concluded that those terms were sufficient to ground jurisdiction in Ireland pursuant to Council Regulation EC/44/2001 in respect of proceedings against an OTA who was displaying the plaintiff's PFT. There, Ní Raifeartaigh J. in the course of her clear analysis quoted the decision of Laffoy J. in *Ryanair v. On the Beach* [2013] IEHC 124 (a decision also concerned with the location of jurisdiction) who referred in turn to a judgment of the courts of British

Columbia (*Century 21 Canada Limited Partnership v. Rogers Communications Inc* [2011] BCSC 1196 which explained (at para. 114 and 119):

‘The evolution of the internet as an ‘open’ medium with its ability to hyperlink being key to its success, does not mean it must function free of traditional contract law. It is simply the manner of contracting that has changed not the law of contract. The acceptance of click wrap and browse wrap agreements⁸ acknowledges the right of parties to control access to, and the use of, their websites.

....

Taking the service with sufficient notice of the Terms of Use and knowledge that the taking of the service is deemed agreement constitutes acceptance sufficient to form a contract. The act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the Terms of Use if those terms are provided with sufficient notice, are available for review prior to acceptance and clearly state that proceeding further is acceptance of the terms’.

85. When *Ryanair v. On the Beach* was decided with another similar case by the Supreme Court (*Ryanair v. Billigflüge.de GmbH and ors.* [2015] IESC 11), Charleton J. in delivering the judgment of the court was at pains to emphasise that the court was determining jurisdiction, not whether the TOU gave rise to a binding contract. Nonetheless, the conclusion reached by Ní Raifeartaigh J. in that case that the TOU

⁸ Browse wrapping is the accessing and browsing of a website on which the TOU are readily available.

were effective to prove agreement to jurisdiction is readily applicable to the issue of whether there was a contract of the kind alleged by the plaintiff here. In deference to the defendants' submissions I should make it clear that I acknowledge that the issue of jurisdiction under the applicable EU Regulation presents distinct questions – not least of all the fact that the court is applying an autonomous concept of agreement that reflected the need for certainty and foreseeability for litigants under the Regulation. However, for the purposes of applying the burden imposed on the plaintiff at this stage its argument that the acceptance of the TOU was capable of giving rise to binding contractual obligations is both strong, and clear.

86. In the course of his oral argument counsel for the plaintiff referred to a number of decisions from Federal Courts in the United States in which TOU were enforced by interlocutory injunction on the basis of similar theories of contract between website owner, and user and these do, indeed, add some ballast to this conclusion.⁹ In that context, the recent decision of the United States District Court for the Northern District of Texas in *Southwest Airlines Co. v. Kiwi.com, Inc.* [2021] WL 4476799 merits specific mention.¹⁰ As with the plaintiff in these proceedings, Southwest Airlines is a

⁹ Most clearly, I think, the decision of the US District Court for the Central District of California in *Ticketmaster LLC v. RMG Technologies Inc.* 507 F. Supp. 2d 1096 (CD Cal. 2007). There, the defendant was alleged to have developed and marketed automated devices that could access and navigate through the plaintiff's website thereby violating the TOU of that site. Those TOU were accepted by visitors to the site in much the same way as the plaintiff says occurred on its website. The plaintiff sought and was granted interlocutory relief that *inter alia* prevented the defendant from creating or trafficking in computer programmes that circumvented the protection systems in the plaintiff's site and from facilitating the purchase of tickets from the plaintiff's website for the commercial purpose of re-selling them. A number of causes of action were pleaded, including various alleged interferences with the plaintiff's intellectual property. One of the claims was in contract. The claim, the court found, that the TOU created a sufficient strong claim for breach of contract to ground the injunctive relief claimed: the defendant by using the site assented to the terms. The plaintiff was, it found 'highly likely' to prove at the trial that use of the website was governed by the terms, that the defendant was on notice of and assented to those terms and that these were breached by engaging in the conduct sought to be enjoined (at para. 23).

¹⁰ The case was not referred to by the parties - judgment was delivered on 21 September 2021 shortly before the hearing of this appeal. An appeal was brought from the decision of the District Court to the United States Court of Appeals, Fifth Circuit where an unopposed motion for final judgment issued on 23 December 2021, and final judgment was delivered on 28 December 2021. On 3 January 2022 the appeal to the Fifth Circuit was dismissed.

substantial airline, in fact one of the most flown in the United States. It also operates a policy of not permitting OTAs to sell its flights without its approval, and it seeks to reflect that position in the TOU of its website which prohibited users from screenscraping or from using its website for any commercial purpose without its permission.

87. The defendant in the *Southwest Airlines* action was an OTA – as it happens one of the OTAs whose activities give rise to this appeal. It purchased tickets from the plaintiff's website and resold them. It did so at an increased price, also engaging in some of the practices of which the plaintiff complains here – by refusing to provide Southwest with customer e-mails or telephone numbers and thus interfering with direct customer notifications from Southwest, while also charging more for the flights than the airline did. As I explain later, it engaged in other practices that had the capacity to seriously injure Southwest. For present purposes it suffices to note that the plaintiff was granted a preliminary injunction restraining the defendant from *inter alia* scraping information from the plaintiff's website, publishing the plaintiff's flight or fare information on the kiwi.com website and from selling Southwest Airline flights. The court had little difficulty concluding that the plaintiff had established its case in breach of contract based upon the TOU: it performed its obligations under those terms, while the defendant breached those terms by scraping the plaintiff's flight data and fare details from the plaintiff's web site and selling the plaintiff's flights without authorisation. The plaintiff, the court said, has demonstrated '*a substantial likelihood of success on the merits of its contract claim*' (at p. 7).

88. Of course this was a direct action against the offending OTA rather than undertakings providing the type of intermediary services in which the defendants here engage. As I

later explain, when it comes to an analysis of the balance of justice, this is a significant distinguishing factor. However having regard to what I have said about the facts in this case, on the merits the issue is the same. The defendants host and exploit information from the plaintiff's website when they know it has been obtained in breach of the terms and, if they did not take the information themselves, the court must – for the reasons I have explained – conduct its assessment here on the basis that it was obtained by its agents or privies.

89. The question of whether specific TOU are enforceable presents a different issue. In oral argument counsel on behalf of the defendants sought to suggest that there was what he described as a '*public policy*' basis on which it could be concluded that a person was not entitled to place information on a publicly accessible website and to then preclude its use in particular ways. That claim does not appear to me to have been articulated in those terms in any document filed in the High Court or in this court and no authority of any kind was identified in which this had been suggested, let alone decided. It is a curious argument for the defendants to advance in a context in which the TOU of their own website contain a stipulation similar to that invoked by the plaintiff, prohibiting the use of the defendants' platforms '*for any commercial purpose or in any manner which may cause damage to Skyscanner ...*' and precluding the use of '*any automated computer programme or application to scan, copy, index, sort or otherwise exploit the Skyscanner Services and/or Skyscanner Platforms or any part thereof*'. I note that in *Southwest Airlines v. Kiwi.com* a contention based upon a public policy seemingly grounded in the proposition that private companies could not unilaterally restrict public access to publicly available information, a claim that the

injunction advanced ‘*a consumer-harming monopoly on flight and fare data*’ and a somewhat general appeal to consumer welfare were rejected by the court (at p. 6).

90. The point may, or may not, be found ultimately to be one of substance at the trial but in the absence of any clearly articulated basis for it (and in the course of this application there was none – the precise public policy engaged by the argument was, in fact, never identified) I have discounted it from my analysis here.¹¹ Insofar as this is, in fact, an argument based upon the adverse effect of the order on competition, that falls to be properly addressed in the context of Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’), to which I will now turn.

(vi) *The competition law defence*

91. The essential claim made by the defendants as pleaded by them in their defence and counterclaim is as follows:

- (i) The relevant market for scheduled passenger air transport services is based on what is termed ‘*the point of origin/point of destination city pair approach*’. The parties use the shorthand ‘*O&D*’ to describe this method of analysis. On this basis, every combination of a point of origin and point of departure (‘*O&D route pairs*’) is considered a separate

¹¹ The defendants referred in their High Court submissions to the decision of the Spanish Supreme Court in *Ryanair v. eDreams* (SCJ 9153/2012). In oral submissions to this court it was suggested that the case supported a public policy defence to the breach of contract claim insofar as based upon the TOU. I do not see that the decision is of any relevance to this claim. Ryanair claimed eDreams had screenscraped information in breach of Ryanair’s TOU, infringed their IP rights and breached Spanish competition law. The claims were rejected. The Supreme Court held there was no breach of contract as eDreams had not entered into a contract so the issue of breach of the general conditions of Ryanair’s website could not be raised. It was held that there was no ‘*real database*’ and thus no IP rights were infringed, and as there was no database, there was no case for ‘*data extraction*’ which could lead to an ‘*improper use of the efforts of others by the defendant.*’

market, the geographic market for each pair being defined by the location of the points of origin and departure in question.

- (ii) There are 1,157 O&D route pairs in which the only operator is the plaintiff. That 100% share of the market renders it presumptively dominant on each of these separate markets.
- (iii) As a by-product of their main activity in providing air transport passenger services for O&D route pairs, the plaintiff compiles and has access to PFT data. There is a market for this data. By definition, the plaintiff holds a position of monopoly as respects the supply of that data.
- (iv) Because of its dominant positions in multiple O&D routes and in the supply of PFT data for its flights, the plaintiff has a '*special responsibility*' not to distort competition on those markets.
- (v) It may not, therefore, engage in conduct that maintains or strengthens its dominant position in the markets for multiple O&D route pairs and the supply of PFT data nor can it '*leverage its dominant positions from those markets into other related markets*'. The specific '*other related markets*' identified are those for OTAs for air transport passenger services, online travel meta search sites for air transport passenger services and the market for products and services which are ancillary to the purchase of air transport passenger services.
- (vi) In seeking to prevent the sale of air passenger transport services for the plaintiff's O&D route pairs and in seeking to preclude other

undertakings from selling to those travelling on those routes the ancillary services, the plaintiff is abusing that dominant position.

- (vii) Meta search sites and OTAs provide valuable and innovative services to consumers that are not available from the plaintiff or other airlines themselves, including the opportunity to purchase itineraries using a combination of different airlines, to have a one-stop shop for booking. They offer a greater range of language and other localised options, and the range of search options they provide allows users to make optimal choices. It is essential that these undertakings offer both flight related and non-flight related ancillary services to customers under conditions of equality with the plaintiff.
- (viii) The plaintiff's enforcement of the contractual terms in issue here amount to abusive leveraging in the form of '*self preferring its own promotion of ancillary products and services*' and reduces competitive pressure in the area of air passenger transport services and in the market for ancillaries. The plaintiff is thus, it is contended, '*leveraging*' its position in the markets in which it is dominant from those markets into the related and '*ancillary*' markets for online travel meta search sites and OTAs for air transport passenger services.
- (ix) The plaintiff's insistence on the contractual scheme it seeks to impose is in breach of Article 102(a) TFEU as the terms are unfair, it being neither necessary or appropriate to prevent customers who have chosen to use an OTA or meta search site from also viewing offers in regard to ancillary products and services in respect of the plaintiff's flights.

- (x) The enforcement of the plaintiff's TOU would adversely affect competition by reducing competitive pressure in the area of air transport, in the market for intermediating ancillaries and on the ability of meta search sites and OTAs to compete and expand their activities into new areas.

92. The claim as thus expressed is supported by a report and a replying affidavit from an economist, Dr. Miguel de la Mano. He takes some care to explain in his affidavit that his report presents only a *'high level overview of potential abuse of dominance issues arising in respect of the restrictions sought by Ryanair'*. He describes himself as providing but *'a preliminary opinion and the framework for future analysis together with preliminary suggestive evidence'* and in particular underlines in that report that his opinion in regard to dominance is *'necessarily preliminary and does not contain any definitive or final conclusion.'* He stresses that he has not conducted an analysis of the extent to which the markets he identifies are relevant anti-trust markets by reference to established methodology.¹² In the course of his report and replying affidavit he says the following:

¹² The standard methodology is conducted by reference to the position of the hypothetical monopolist or the *'SSNIP'* test, which directs itself to whether such a monopolist would be able to profitably raise prices by a small but substantial amount for a non-transitory period. Dr. de la Mano's explanation for not applying the SSNIP test for market definition in itself demonstrates the complexity of the issue: O&D routes are often oligopolistic being served by a small number of carriers. If their prices are used for the purposes of defining the price that would prevail in circumstances of perfect competition these may, if the anti-competitive conduct has completed, be above the competitive level resulting in the definition of the market being framed in an excessively broad way. In other words, because of their dominant position the prices charged by the undertaking will have already been increased to the maximum extent by reason of its dominance. As it is often put, reasonable interchangeability at the current price but not at a competitive price level may be a symptom of monopoly power, as opposed to evidence of the absence of such power.

- (i) The '*O&D pair approach*' pleaded by the defendants, and suggested in his analysis of dominance, is the standard approach to market definition for air passenger services and has been used to that end by the European Commission in a series of competition decisions.
- (ii) An in-depth assessment on that basis of the relevant factors (including levels of concentration, substitutability and entry barriers) '*would likely lead to the conclusion*' that the plaintiff remains dominant in a large number of routes across Europe – in particular routes originating in Dublin, where the plaintiff enjoys a strong hub advantage. He emphasises in this regard the significant demand and supply side barriers to developing a competing hub at Dublin and other airports at which the plaintiff has a base presence, the limited power of buyers of the plaintiff's flights and the absence of competition on many of the point to point routes on which the plaintiff operates.
- (iii) That conclusion is not affected by the fact that the plaintiff offers low prices: a dominant carrier may charge the lowest prices if the source of its dominance is its superior cost efficiency, and in any event it is incorrect to infer that a firm is not dominant simply because competitive pressure restricts its ability to further increase prices.
- (iv) Route dominance across a material number of important O&D route pairings in the context of PFT being a critical input for downstream online service provision, a carrier such as the plaintiff '*is likely to be in*

a position to materially control how competition develops in the online travel sector'.

- (v) The plaintiff likely has both the ability and the incentive to leverage its dominance in the market for air travel to soften competition in the market for airline price comparison services as well as in the markets for the intermediation of ancillaries.
- (vi) Providing a credible and comprehensive meta search function requires access to the PFT of all significant carriers nationally or across member states. The plaintiff's PFT is in this regard especially essential to the defendants and OTAs because of its position in the airline market and the number of route pairings it services.
- (vii) A refusal by the plaintiff to supply its PFT would prevent the defendants from competing in an effective manner in the market for price comparison services and would make it significantly harder for OTAs to facilitate and/or sell ancillary services to passengers. This would result in harm to customers relative to the relevant counterfactual.
- (viii) Insofar as the defendants are concerned, if they did not have OTAs on their platform and/or the OTAs were compelled to reduce their offerings of the plaintiff's flights, this would decrease customer choice on that platform, diminish consumer confidence in the site and result in customers either picking flights that were less convenient to them, or leaving the platform.

- (ix) The OTAs and online travel ‘meta’ marketplaces provide immediate benefits to consumers by facilitating their travel research and booking processes which will enhance long term incentives to compete and innovate in the travel sector. These push airlines to compete more vigorously by offering better prices and innovating more effectively to offer better services or improved quality, by expanding their travel schedule to match the schedule of competing airlines or by improving the quality of their customer services.

- (x) In this regard he says that it is clear that Article 102 prohibits conduct by an undertaking with a dominant position in a given market that tends to extend that position to a neighbouring but separate market by distorting competition. It is not necessary that the dominance, the abuse and the effects of that abuse are all on the same market (*Google v. European Commission* Case AT.39740).

(vii) *The plaintiff's response*

93. As of the hearing of this appeal, the plaintiff had not delivered any pleading replying to the defence and counterclaim. Its expert evidence was almost entirely negative, coming in the form of a report from another economist, Dr. Parker. Dr. Parker’s report does not present any findings of its own and does not posit any evidence that contradicts the preliminary views expressed by Dr. de la Mano. It does not purport to detail a denial of dominance nor does it substantiate any claim that (if the plaintiff is dominant in the manner alleged by the defendants) its attempt to enforce the TOU would not constitute an abuse of that dominance. In fact, I think it fair to say that Dr.

Parker's report is not a report on the plaintiff's position in the alleged markets, but is instead a report on Dr. de la Mano's report (and indeed it so describes itself).

94. Dr. Parker's stated conclusion is that the defendants' expert evidence presents omissions and shortcomings which mean that it *'does not support a claim ... of an abuse of dominance by Ryanair through a refusal to supply or otherwise.'* The essential points he makes are as follows:

- (i) Dr. de la Mano has not provided evidence or analysis as to, and has not substantiated his definition of the relevant markets (including the relevant downstream markets) failing, in particular, to address the hypothetical monopolist, to assess demand or to examine supply side substitution. Specifically, he would need to demonstrate that the O&D approach is appropriate in this case, identify each O&D pair and show that these are relevant markets by considering the competitive constraints acting on the airlines operating on these routes.
- (ii) There were *'several problems'* with Dr. de la Mano's view that a detailed assessment of the relevant factors would likely lead to the conclusion that the plaintiff was dominant on a large number of routes in Europe: he took no account of prices, his assessment does not match up to the market definitions he proposes, the market shares presented by him in almost all cases are too low to give rise to a dominant position, there is no material analysis of the countervailing factors identified in the relevant EU guidance, and his reliance on the Commission decision

regarding the merger of the plaintiff and Aer Lingus (to which Dr. de la Mano had referred in his report) was misplaced.

- (iii) If the plaintiff had a dominant position it would be able to raise prices above the competitive level whereas it is recorded by Dr. de la Mano as the carrier with the lowest fares. This feature of the relevant test for dominance as identified by Dr. Parker – the ability of the firm to raise prices above the competitive level – is a key feature of his report and he returns to it frequently, emphasising that the evidence in relation to the plaintiff's pricing suggests that these are low when compared to those of other airlines.

- (iv) Insofar as Dr. de la Mano had referred to the market share held by the plaintiff by capacity in Europe (25%), together with its position as first carrier by capacity in Ireland (48%), with substantial proportions of that market in other European jurisdictions (Poland 29%, Belgium 28%, Italy 27%, Spain 20%, Portugal 20%, and UK 19%), the vast majority of the market shares he reported were too low. Market shares below 40% (Dr. Parker says) are not likely to give rise to a dominant position. He notes that, in respect of Ireland as a whole, Aer Lingus is a similarly sized rival to the plaintiff, and he observes that a firm is unlikely to be found dominant if there is a similarly sized rival in the relevant market.

- (v) Insofar as it is suggested that a failure to make PFT information available might constitute the abuse of a dominant position, Dr. Parker notes the applicable legal test – the supply of the relevant input being

objectively necessary or indispensable for the provision of goods or services by the party requesting supply in order to compete on the downstream market, the refusal to supply being likely to eliminate all effective competition on the downstream market and the absence of an objective justification for the refusal. He stresses that the plaintiff does not seek to preclude the availability of its PFT for price comparison purposes.

- (vi) He observes that Dr. de la Mano presents no evidence to support his claim that customers will not use airline price comparison services that do not include fit for purpose booking options and OTA options for the main airlines, noting that the fact that the defendants could compete without offering the plaintiff's flights for sale itself or through OTAs in the past was consistent with this.

95. Based on the foregoing, the plaintiff says that the defendants have advanced '*no more than the seeds of competition law defences which Ryanair will strenuously resist*'. By reference to Dr. Parker's report, it says that the defendants' claim and supporting evidence treat the relevant market definitions in an inadequate and imprecise manner, the assessment of whether the plaintiff is dominant in such markets is insufficient and the claim that there has been an abuse of a dominant position is incomplete and unsupported. Specifically, they complain that the defendants do not assess the key questions of indispensability of an upstream product service or elimination of effective competition of a downstream market with robust evidence and do not follow through from the report's assessment of dominance.

96. Put at its simplest, the plaintiff says that whether or not the plaintiff is dominant in some aspect of the market for the provision of airline services, that is not a market in which the defendants operate, and that for the defendants to enjoy any basis for a claim of the kind they suggest it is necessary for them to establish dominance in an upstream market that controls a downstream market. All the defendants have done, it is said, is to identify suggestions by an economist as to what the market might be or what he might look for in defining the market.

(viii) Assessment of the competition defence

97. In the course of his judgment in *Charleton v. Scriven*, Clarke CJ. explained how an affirmative defence falls to be addressed within the context of an inquiry as to whether a plaintiff has established a strong claim for the purposes of an application for mandatory interlocutory relief. I have quoted the relevant passage earlier. The critical question as he formulated it is whether the defence is ‘*significant*’ and is such as might arguably provide a basis on which the plaintiff might fail at trial. This requires an assessment of the strength of the defence advanced in order to determine whether the plaintiff’s case can be characterised as sufficiently strong to warrant the grant of mandatory relief or whether it may only be possible to say that the plaintiff’s case gives rise to a fair issue to be tried. In that case, it will be recalled, the defendant’s argument had been characterised by the High Court in another action as a good one, and was of such complexity that it meant that the plaintiff’s claim could not be viewed as ‘*clear*’.

98. I would incline to the view that in order to convert what might otherwise be a strong and clear claim that is likely to succeed into one that cannot sustain a mandatory interlocutory injunction of the kind sought here, it is not necessary that the ground of

defence in itself be strong and likely to succeed and not sufficient for it to be merely arguable. What Clarke CJ. is suggesting, and I think he is self-evidently correct in this regard, is that the defence present a serious issue that is by reason of its complexity and coherence such that the very fact that it *might* succeed would render it unjust to impose on a defendant mandatory and intrusive obligations pending trial. This is, it seems to me, one of the situations in which the court must be astute to recall that it is answering one question in an application of this kind – whether an injunction should be granted – and that it is wrong in addressing that question to treat as sealed from each other the issues of whether the plaintiff has a case, the strength of that case, and where (having regard to those matters) the balance of justice lies.

99. If that approach is to be adopted here it must follow that the competition defence urged by the defendant has the effect of rendering what might otherwise be a strong and clear case based upon the terms and conditions to a claim lacking the clarity and solidity necessary to ground mandatory interlocutory relief. Specifically, (a) *if* it is the case that the plaintiff is dominant in a large number of flight routes across Europe, (b) *if* it is the case that those routes collectively, individually or through some combination comprise an appropriate and relevant market for the purposes of the complaints in these proceedings, (c) *if* it is the case that the plaintiff's PFT is proven to be objectively necessary or indispensable for the provision of goods or services by the defendants or OTAs in order to compete on an identified downstream market, (d) *if* it is the case that a refusal to supply is likely to eliminate effective competition on that market and (e) *if* there is no objective justification for that refusal, then the proposition that Ryanair breaches Article 102 TFEU by denying access to its PFT to either the defendants or to OTAs who themselves wish to sell Ryanair flights *unless* they agree not to exploit the

material on that website themselves, is clearly a plausible one. In that eventuality, the defendants have raised a serious issue as a basis for resisting the relief claimed in the proceedings.

100. As is obvious from the manner I have framed it, that proposition is dependent on many hypotheses and it is hard not to sympathise with the essential point made by the plaintiff that proof of a claim of dominance of this kind, and the establishment of abuse in the control of information in a downstream market are both complex and from the perspective of the undertaking the subject of such an allegation, highly significant. To make out such a case, the defendants will have to adduce detailed expert evidence as to the relevant markets and as to the competitive conditions within those markets. In seeking to establish the plaintiff's dominance in that market the defendants will have to substantiate the correctness of their analysis insofar as based upon the O&D approach, negotiate issues such as the substitutability of other routes on which the plaintiff is not dominant or indeed which it does not service, should analyse any relevant barriers to entry and the strength of rivals, and will have to substantiate the defendants' claim that a strong presence at particular hubs in itself enables a conclusion of dominance to be drawn. They will have to establish that any such dominance (if proved) entails an obligation on the plaintiff to desist from the imposition of conditions on the use of its PFT which are liable to constrain competition in the online travel sector, and they will have to establish that the plaintiff's asserted rights over its PFT have that effect.

101. It goes without saying that the mere fact that the plaintiff is a highly successful airline, with consequent significant market strength in at least some routes or that OTAs are

dependent on the ability to access the plaintiff's PFT and to exploit it in the manner objected to by the plaintiff do not in themselves establish any of these matters. The evidence that the defendants have adduced in support of their claim under Article 102 TFEU does not in itself afford the basis on which the defendants have a claim in this regard that is likely to succeed. That evidence is avowedly tentative and conditional. It also does not need to be said that parties in the position of the defendants here should not be in a position to defeat a claim for injunctive relief to which a plaintiff with a strong market position would otherwise be entitled by simply asserting market dominance and suggesting that at some point in the future they may be able to prove that the relief sought would enable an abuse of that dominance.

102. All of these objections would be critical to the question of whether the defendants have on the evidence before the court established that they have, on the issue of the plaintiff's alleged abuse of a dominant position, either a strong case that is likely to succeed (the uncertainties and contingencies in their evidence are such that they have not) or a serious issue to be tried in the sense of a case that is not frivolous or vexatious (as the barrier to be surmounted for that issue is low, they have). However, neither of these propositions define the question with which the court is concerned. It is, instead, concerned with whether the fact of the defence is such that the plaintiff's claim is sufficiently weakened so that it is no longer '*strong and powerful*' or rendered so complex that it lacks the clarity necessary having regard to the balance of justice, to sustain an order of the kind in issue.

103. In reaching the conclusion that the defence suggested by the defendants does have this effect of sufficiently diluting the strength of the plaintiff's claim so as to require refusal

of this application, I would stress that the defendant's claim is not, having regard to the following, based upon bald assertion.

104. First, as to dominance the evidence from Mr. De La Mano is that an in-depth assessment of the relevant factors (including levels of concentration, substitutability and entry barriers) '*would likely lead to the conclusion*' that Ryanair remains dominant in a large number of routes across Europe – in particular routes originating in Dublin, where Ryanair enjoys a strong hub advantage. That statement is not denied by reference to any particular analysis. While the methodology leading to it is questioned, that is not a matter that can be resolved within the framework of this application. Moreover, the evidence is that the '*O&D pair approach*' suggested in Mr. de la Mano's analysis of dominance is the standard approach to market definition for air passenger services and has been used to that end by the European Commission in a series of competition decisions. It is entirely understandable in an application of this kind that no evidence was adduced by the plaintiff that it is not dominant on any of the O&D markets it serves and on which it enjoys high market shares or a monopoly position but nor was it even suggested that the relevant expert believed that such evidence might, following the necessary analysis, likely be forthcoming.

105. Second, as to abuse it is arguable that proof of dominance by the plaintiff on relevant markets may result in a legal obligation to make information available without objectively unnecessary and anti-competitive conditions where the supply of the relevant input is necessary or indispensable for the provision of goods or services by the party requesting supply in order to compete on that market and where the refusal both lacks objective justification and is likely to eliminate competition on that downstream market. The analogy with *Raidió Teilifís Éireann and Independent*

Television Publications v. European Commission [1995] I-00743; ECLI:EU:C:1995:98 (in which it was held a refusal to supply television listings was viewed as abusive) is obvious.

- 106.** Third, the evidence before the court on this application supports the defendants claim that providing a credible and comprehensive meta search function requires access to the PFT of all significant carriers nationally or across member states. It is arguable that the plaintiff's PFT is on the basis of that evidence, critical. These central propositions are not disputed by the plaintiff's expert (although it should be said that counsel indicated in the course of his submissions that this would be disputed).
- 107.** Fourth, the conclusion suggested by the evidence that if route dominance by the plaintiff across a material number of important O&D routes is established, and if it is the case that PFT is a critical input into downstream online service provision, a carrier such as the plaintiff is likely to be in a position to control how competition develops in the online travel sector, seems to me to be entirely logical. So is the proposition that it has both the ability and the incentive to leverage its dominance in relation to the market for air travel so as to soften competition in the market for airline price comparison services and the market for intermediation of ancillaries.
- 108.** Finally – if only by way of sense check - the more general context is important. The plaintiff is on any version a significant actor in the European airline sector. While there can be no doubt but that its claim that its activities in seeking to ensure that its customers obtain their flights directly through it may ultimately enure to the benefit of overall consumer welfare because flights are purchased from it at lower prices than if bookings are made with the OTAs, the fact is that it seeks to achieve that objective by means of the imposition of restrictive terms on information it has chosen to make

publicly available which have the *potential* to restrict competition in respect of ancillary services and which impose significant constraints on what Mr. Aitken describes as ‘*the broader offerings and competitive presence of OTAs and meta sites*’. The prospect that this could affect competition between airlines, and that it could do so to the advantage of the plaintiff, is not an unreal one.

109. It would be wrong to put any defendant in a position where, under sanction of contempt, it was required to comply with mandatory interlocutory orders of the kind sought in these proceedings in the teeth of a plausible and self-evidently complex claim of this kind, not least of all in circumstances in which the effect of the orders if granted would be to underpin by court order the allegedly anti-competitive behaviour of the plaintiff. That is a rationale that cuts across the strength of the defence, the impact of that credible defence on the clarity of the plaintiff’s claim, and the balance of justice. While counsel for the plaintiff referred derisively to the fact that similar arguments are frequently raised by OTAs against the plaintiff, the solution to the frequency with which this contingency is invoked as a basis for denying the plaintiff interlocutory relief lies not in dismissing the arguments on that basis, but in bringing these claims to trial and having the allegations finally determined for once and for all.

The balance of justice

110. While this court must make a *de novo* assessment of the legal issues around the test for the grant or refusal of any particular type of injunction and the question of whether the plaintiff has established a serious issue or, as the case may be, a clear and strong case that is likely to succeed, the findings of, and analysis by, a trial judge as to the balance of justice is a matter to which great weight must be given, and which should be reversed

only if the appellate court is satisfied that there was an injustice (*Betty Martin Services Ltd. v. EBS DAC* at para. 35). In this case I agree with – and certainly see no grounds to interfere with – the judge’s conclusion that the balance of justice favours the refusal of the orders sought by the plaintiff. I do so, mostly, for the reasons the judge gave. Some of these I have addressed already – in particular the adequacy of damages and the question of the *status quo ante*. As to the others, my views in summary are as follows.

111. First, it follows from the comments I have made earlier that in this case, damages will be an adequate remedy for the plaintiff if the relief sought is refused and it prevails in its claim. In purely commercial cases this is a factor of overwhelming importance.
112. Second, and following from this, I find the various examples given by the plaintiff of inconvenience to its customers and to implications for its reputation of its being unable to contact its customers in certain extreme circumstances, strained. Out of the vast number of passengers transported by the plaintiff each year, the incidents to which it refers are *de minimis*, were not convincingly related to its issues with these defendants, and in many cases could easily have been avoided – were they of any real concern – by enabling passengers to use identifying information other than their mobile telephone numbers or e-mail addresses. I agree with the contention advanced by the defendants that it is hard to see that it is in the interests of OTAs to fail to inform their customers of changes to flights as to do so would inevitably harm the reputation, goodwill and business of the OTA and the relationship between them and the passengers.
113. In that respect, the contrast with the evidence in *Southwest Airlines v. Kiwi.com* is arresting. There, the injunction was sought against the OTA, and was negative in its

terms. As in this case, the plaintiff also complained of the interference by the defendant with its customer notifications and its inability to communicate directly with passengers about flight schedule revisions or other information. In addition it established that the defendant – although undertaking not to do this in the future – had in the past encouraged customers to book ‘*hidden city*’ fares in breach of the plaintiff’s contract of carriage, thus urging them to book flights from A to B to C, but only to travel to B (a practice that generated logistical, operational and public safety concerns undermining the plaintiff’s ability to estimate passenger numbers, causing disruption at the departure gates and resulting in difficulties with the checking of baggage). While – eventually – the defendant agreed not to do this any further, the plaintiff also produced what the court described as ‘*a flood of customer complaints*’ arising from the defendant’s conduct. In comparison, the evidence in this case of instances giving rise to an un-compensatable damage to the plaintiff’s commercial operations and reputation caused by any act or omission of the defendants, is strikingly thin.

- 114.** Third, the nature and extent of the imposition on the defendants by the order the plaintiff seeks bears no reasonable or proportionate relationship to the benefit that the plaintiff will obtain from such an order. This is a critical aspect of the test for identifying where the balance of justice lies, as applied to this case. That test is, ultimately, directed to the identification of whether the least harm would be done by granting or refusing the relief sought (*Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 152, at p. 181). Insofar as the defendant is concerned, the plaintiff seeks to have it alter its dealings with the OTAs and to enforce terms upon them with the consequent disruption of its relationship with those undertakings and potential loss of their custom. The plaintiff, on the other hand, loses a commercial

benefit (for the loss of which it can be compensated), prevents an avoidable disruption with a small number of passengers but still faces the prospect of OTAs who do not book flights with the facility of the defendants' meta sites continuing to provide their own email addresses and telephone numbers. It must be stressed that the OTAs about which the plaintiff complains are free to operate on their *own* websites but it is Skyscanner that will be isolated if the order sought is granted. As it was put by counsel for the defendants in the course of oral argument before this court, '*I'd be enforcing a contract against my own customer about issues that customer is free to engage in on its own website and with other meta data websites between now and the trial*'. As the defendants put it in their written submissions to the High Court, the granting of the interlocutory relief sought would harm the defendants, but would neither alter nor reverse the phenomenon of which the plaintiff complains. An analysis directed to the distribution of burdens and benefits were the order to be made, strongly favours the defendants.

- 115.** Fourth, I fully agree with the trial judge insofar as he attached significance to the fact that this order is sought against these defendants as part of a proxy battle with the OTAs against whom it has not sought interlocutory relief. The decision in *R Griggs Group Ltd. and ors v. Dunnes Stores Ireland Company* is apposite. There, McCracken J. refused an application for an interlocutory injunction seeking to restrain the defendants from passing off a range of footwear as those of the plaintiffs. The proceedings were a fragment of a wider international engagement between the owners of intellectual property in a distinctive type of footwear and the manufacturers of allegedly similar products. Partly because the injunctive relief was sought against retailers who were described by McCracken J. as '*a secondary target*', and because no action had been taken against the manufacturers from whom the defendants had purchased the

products, the court refused the relief. It would, the court said, be '*inherently inequitable*' to grant the relief against the retailer who had *bona fide* purchased the goods in those circumstances, not least of all because the damage to the plaintiff in the context of its world-wide sales be minimal while the consequence of preventing the defendants from selling the complete range of a popular style of footwear would be more serious for them. This has been cited and applied since (see *Teva Pharmaceuticals Industries Ltd. v. Mylan Teo* [2018] IEHC 324 and *Merck* at para. 50 to 52). It appears to me that precisely the same consideration applies here.

116. Of course, these issues around the balance of justice only arise if I am mistaken in the conclusion I have reached as to the strength of the plaintiff's case having regard to the defendants' competition defence. However, even if I am wrong in my conclusion on that issue it must follow from the examination of that defence that the defendants' counterclaim is, if not of sufficient clarity to displace the plaintiff's otherwise strong case on the merits, most certainly arguable. Bearing in mind the point I have made earlier as to the importance of not putting each aspect of the test for the grant of an interlocutory injunction into '*silos*', the fact of that arguable defence and the four points I have made leave no doubt in my mind that this is a case in which the trial judge's refusal of the application was wholly justified.

117. Before leaving this aspect of the case, it is proper to observe that I do not agree with some features of the trial judge's treatment of the balance of convenience. Specifically, I cannot accept that the conduct of the plaintiff in entirely unrelated legal proceedings in another jurisdiction is a matter to which this court should have regard in assessing the merits of an application of the kind in issue here. If the plaintiff miscondacted itself in such litigation, that is a matter to be addressed in that litigation by the

appropriate court. It is not helpful that the court is expected to address in an application of this kind the rights or wrongs of legal proceedings taken in another jurisdiction. Nor do I believe it correct that the plaintiff was criticised for dealing with customers *via* ‘chat bots’. These are commonly used by service companies and it was not right to hold the fact of their use against the plaintiff in this application. However, none of these issues affect the conclusion I have reached, or the reasons I have reached it.

Miscellaneous issues

118. I pointed out at the start of this judgment that the issues canvassed by the parties covered a broad terrain. It is appropriate that I mention – if only for the sake of completeness - three further questions that were raised by the parties.

119. First, the defendants made the point that the plaintiff could never obtain following a trial a final injunction of the kind sought in this application and that, accordingly, it was not appropriate to grant the relief by way of interlocutory application. Reference was made to the comments of O’Donnell J. in *Merck* where (at para. 64(1)) the point was made that:

‘the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted.’

120. Having regard to the conclusions I have reached as explained above, the question of whether this comment was intended to prevent a plaintiff who might obtain a greater injunction following a trial (in this case preventing the defendant from hosting OTAs

who purchase flights from the plaintiff or otherwise from exploiting the PFT scraped from the plaintiff's website) would preclude the plaintiff from seeking a lesser form of interlocutory relief, should await a case in which the issue is determinative. To my mind, I cannot see why the law would impose such a requirement, and indeed it has long been recognised that there will be cases in which the interests of justice are best guarded by some order which would not be appropriate at the end of the trial (see *Fresh Fruit Wales Ltd. v. Halbert*, Times, 29 January 1991 cited by Kirwan at para. 6-10). I note that the comment of O'Donnell J. upon which the defendants rely, is qualified.

121. Second, the plaintiff placed heavy reliance on a number of decisions in which orders were made against internet service providers requiring that they prevent access to websites on the basis of third party infringements of trade marks or other intellectual property rights. Many of these involved final orders following a full trial (*Dramatico Entertainment Ltd. v. British Sky Broadcasting Ltd.* [2012] EWHC 268 (Ch) and *Cartier v. British Sky Broadcasting Ltd.* [2014] EWHC 3354 (Ch), [2015] 1 All ER 949), although one of the cases was made on an interlocutory basis (*Bell Media Inc. v. John Doe and ors.* [2019] FC 1432). Reference was also made to decisions of the courts of this jurisdiction in which similar 'blocking' orders were made (*Union Des Associations Europeennes de Football v. Eircom Ltd and ors* [2020] IEHC 488). While the principle by reference to which these orders were made is now unexceptional I do not see how – in particular – the decisions on the making of final orders advance the analysis here. While the judgment on the interlocutory orders does not identify a separate test under the applicable law to the issuing of mandatory relief, I note that the court in *Bell* required evidence of a 'strong prima facie' case (at para. 57) and that the

claim there (against the unrepresented defendants) appears to have been particularly strong on the merits.

122. Third, the plaintiff complains that the defendants did not ‘*clear the field*’ before they began engaging as they now do with the OTAs and before they hosted the plaintiff’s PFT. Here, the plaintiff makes a point of some substance. On one view, the defendants have engaged in ‘*self-help*’ seemingly accepting information from some source when they know it has been obtained unlawfully from the plaintiff’s website: that, at least, is how matters presently appear on the basis of the evidence before this court. Insofar as they have a valid justification for doing this it lies in their competition defence and, as is clear from my earlier analysis this – while stateable – is unclear and contingent in important respects. They could have sought declaratory relief before embarking on that course of action.

123. However, while this may well be relevant to costs at the conclusion of the proceedings, I am not satisfied that here it operates to tip the balance in favour of the plaintiffs insofar as the interlocutory relief is concerned. A similar argument was advanced – albeit in a different context - in *Merck* and the court was clear that it could not be viewed as dispositive of the balance of convenience. The fact is that the defendants are operating in a rapidly developing market and, if they are proved correct in the competition claim they advance, they were at all times entitled to act as they have. To expect them to hold their operations while a competition claim is processed may not be entirely reasonable. If they fail to sustain that competition claim, on the other hand, they will be liable to compensate the plaintiff for the losses it has sustained.

Conclusion

124. My conclusions on the principal issues arising in this appeal are as follows:

- (i) The relief sought by the plaintiff in the application giving rise to this appeal are for what are in substance mandatory interlocutory orders. Having regard to that fact, and to the consideration that no feature of the application has been identified that removes the application from the normal principles attending an application for such mandatory relief, the applicant can only succeed if it establishes that it has a strong and clear case that is likely to succeed at trial.
- (ii) The plaintiff has not established such a case insofar as its claim is based on the proposition that the licence agreement between it and the defendant remains in force. The plaintiff accepts that it has not established a claim that meets this threshold insofar as its other causes of action are concerned, save in respect of the issue around the effect of the TOU.
- (iii) In the abstract, the plaintiff's claim that it is entitled to enforce the TOU to which visitors to its website agree to be bound meets this component of the criteria for the grant of a mandatory interlocutory order. This is especially the case given (a) that the defendants were at all material times aware of the TOU, and (b) that they have failed to provide any

explanation to the court as to how they obtain the plaintiff's PFT information.

- (iv) However, the defendants claim that the plaintiff abuses a dominant position on O&D route pairings by seeking to impose on users of its website preclusions on the commercial exploitation of PFT information obtained therefrom – while on the basis of the information presently before the court not shown by the defendants to be either clear or strong – raises a serious issue such as to lower the plaintiff's claim on foot of those TOU beneath the threshold required to obtain mandatory interlocutory relief.
- (v) Even if I am mistaken in (iv), the balance of justice favours the refusal of the relief claimed here.

125. It follows that this appeal should be dismissed.. Donnelly J. and Haughton J. are in agreement with this judgment and the orders I propose. The court will fix a further date for hearing the parties on the issue of costs.

APPENDIX

1. An interlocutory injunction, prohibiting the Defendant(s) from, at the occasion of the sale of the Plaintiff's flights *via* the Defendant(s)' website:
 - a. and where the sale is made on the Defendant(s)' domain, providing the Plaintiff with email addresses and/or phone numbers for the Plaintiff's customers which do not correspond to the actual email addresses and/or phone numbers of those customers and/or do not facilitate a direct email and/or phone contact between the Plaintiff and its customer;
 - b. and where the sale is made *via* the third party domains linked from the Defendant(s)' domain, providing the Plaintiff with email addresses and/or phone numbers for the Plaintiff's customers which do not correspond to the actual email addresses and/or phone numbers of those customers and/or do not facilitate a direct email and/or phone contact between the Plaintiff and its customer, or permitting others to do so;
2. Further, or in the alternative, an interlocutory injunction prohibiting the Defendant(s) from selling the Plaintiff's flights on its website, whether on its own domain or *via* linked domains, without ensuring that the Defendant(s) and/or the selling party provides the Plaintiff with an email address and/or phone number which would enable it to directly contact its customer;