

# THE HIGH COURT

RECORD NO. 2020/1644P

[2023] IEHC 689

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

FLIGHTBOX SP ZOO

DEFENDANT

**APPROVED EX TEMPORE JUDGMENT of Mr. Justice O’Higgins delivered on the 6<sup>th</sup> November 2023**

1. This case is about an activity known as “screen scraping”. The plaintiff (“Ryanair”) is the well-known airline that offers flights and related services to customers on the internet via its website. The defendant (“Flightbox”) is a company based in Poland that operates in the computer systems design field and offers IT solutions to the tourism and flight-booking industry. Ryanair's basic complaint is that Flightbox facilitates the extraction (“scraping”) of data from Ryanair's website which ends up on certain online travel agents' websites, contrary to Ryanair's wishes. Ryanair contends that Flightbox accesses the Ryanair website through the use of automated software and then takes Ryanair data and information without its consent or authority.

2. In this application, Ryanair seeks judgment in default of appearance from the defendant in circumstances where the defendant has been served with notice of the

proceedings but has chosen not to enter an appearance. I will come back to the specific criteria for judgment in default of appearance later on in this judgment.

3. Before I outline the evidence in the case, I need to say something about the background to the proceedings, about Flightbox's alleged role in matters, and I also need to explain the relevance of two separate sets of proceedings which I'll refer to as the "Related Proceedings" and the "Polish Proceedings".

4. In colloquial terms, and as put in its written submissions, Ryanair claims that over the past five years it has been an unwilling participant in a game of "cat and mouse" with Flightbox (which as I have mentioned is a Polish company), Vola (a Romanian company), and Ypsilon (a German company), as it has attempted to identify and hold the correct parties liable for the appearance of Ryanair price, flight and timetable ("PFT") data on Vola's website.

5. In very brief terms, Ryanair's position can be summarised in this way. When Ryanair sued Vola in this jurisdiction (the "Related Proceedings"), Vola identified Ypsilon as its provider of Ryanair price, flight and timetable data. When Ryanair joined Ypsilon to the Related Proceedings, Ypsilon's then 100% subsidiary, Flightbox, instituted proceedings against Ryanair in Poland in which it admitted screen scraping Ryanair's website and sought orders under competition law which would enable it to continue to screen scrape PFT data from Ryanair's website. Those proceedings, which Flightbox instituted against Ryanair, can be referred to as the "Polish Proceedings".

6. On 29<sup>th</sup> September 2017, Ryanair commenced the Related Proceedings against Vola, which is an online travel agent based in Romania. Those proceedings are ongoing before the Irish High Court. In those proceedings, Ryanair alleges that Vola is involved in screen scraping data from Ryanair's website by procuring, directing and/or controlling an automated system to extract PFT data from Ryanair's website. That data is then repurposed, in that it is

used by Vola on its website to offer for sale Ryanair flights to consumers without Ryanair's authority or consent. Ryanair maintains this activity is unlawful because the manner and purpose for which Vola accesses Ryanair's website is in breach of Ryanair's Terms of Use, (“TOUs”). In affidavits filed on its behalf, Ryanair maintains that agreement to the Ryanair TOUs is required in order to use Ryanair's website. The TOUs identify Ryanair's website as the only website authorised to sell Ryanair flights (Clause 2), prohibits screen scraping (Clause 3), the use of Ryanair's intellectual property (Clause 6), and linking to Ryanair's website (Clause 7). The TOUs also require submission to the jurisdiction of Ireland and Irish law. Vola denies Ryanair's claim and, in addition, pleads a counterclaim against Ryanair in which it essentially argues that Ryanair's actions to prevent the use of its PFT data amounts to an abuse of its dominant position, contrary to Article 102 of the TFEU.

7. In a hearing before Ní Raifeartaigh J. in the High Court, Vola unsuccessfully sought to challenge the jurisdiction of the Irish courts to hear the dispute. During that application, Vola disclosed that Ypsilon AG, whom I will refer to as “Ypsilon”, an entity based in Germany, was the relevant party that was engaged by Vola to provide such PFT data. Furthermore, Vola averred on affidavit that Vola obtains Ryanair flight data and booking functionality from legitimate professional third party suppliers, Ypsilon. Following that disclosure, Ryanair sought to join Ypsilon as a Defendant to the Related Proceedings, which application was granted by order of Ní Raifeartaigh J. of 8th March 2019.

8. Ypsilon delivered its defence in November 2019. Ryanair says that despite having stated to the Court on 15<sup>th</sup> October 2019 that it had no counterclaim, on 18<sup>th</sup> May 2022 Ypsilon subsequently issued a motion for leave to amend its defence and plead a counterclaim. Ypsilon was granted leave to do so by judgment of the High Court (Cregan J.) on 15<sup>th</sup> December 2022. Subsequently, Ypsilon delivered its amended defence and counterclaim on 10<sup>th</sup> February 2023, which had limited substantive change apart from the

introduction of a counterclaim.

**9.** In its defence, Ypsilon expressly denied engaging in screen scraping activities and/or that any contract exists between Ryanair and Ypsilon in the form of Ryanair's terms of use, (TOUs), or otherwise. More specifically, Ypsilon indicated that any loss or damage suffered by Ryanair, which it denied, was caused by "*other parties*". Therefore, Ryanair raised a notice for particulars on 22<sup>nd</sup> November 2019 seeking the identification of the other persons referenced by Ypsilon.

**10.** On 20th December 2019 Ypsilon replied to Ryanair's notice for particulars and stated that it did not provide any services to Vola at all. Ypsilon affirmed that:

*"to the best of Ypsilon's knowledge, a Polish registered company, Flightbox SP.Z.O.O, is a provider of certain IT related services to the first named Defendant".*

**11.** Shortly thereafter, Ryanair's solicitors raised further enquiries of Ypsilon regarding these replies. Ypsilon's lawyers responded on 28<sup>th</sup> January 2020 and stated *inter alia* that Flightbox is a "*100% subsidiary of our client*".

**12.** After Ypsilon submitted its blanket denial in its defence on 1<sup>st</sup> November 2019, but before it identified Flightbox as the relevant service provider to Vola in its replies on 20<sup>th</sup> December 2019, Flightbox issued proceedings in Poland against Ryanair (these are "the Polish proceedings"). In the Polish proceedings, according to Ryanair, Flightbox admits screen scraping Ryanair's website but pleads that it is entitled to do so as a matter of competition law. Ryanair says that the claim which Flightbox has brought to Poland is similar to the competition law counterclaim which Vola has brought against Ryanair in the Related Proceedings in Ireland.

**13.** Ryanair contends that the fact that Flightbox brought a competition law claim against Ryanair in Poland at a time when its then parent, Ypsilon, had declined to plead a competition law defence in Ireland in the Related Proceedings, was telling. Although Ryanair was not

aware of Flightbox's relevance to the related proceedings until December 2019, it is asserted that the same individual was at the helm of both Ypsilon and Flightbox. At the time of the institution of the Related Proceedings and the Polish Proceedings, and until approximately July 2020, when he stepped down as CEO of Flightbox, Mr. Hans Joachim Klenz was the CEO of Flightbox and Ypsilon.

14. Drawing these various points together, Ryanair contends that it is clear that between the companies there was a strategic decision to, firstly, ignore the jurisdictional clause in Ryanair's terms of use, secondly for Flightbox not to defend these proceedings, thirdly for Ypsilon not to file a competition law counterclaim in this jurisdiction at that time, and fourthly to run the Ypsilon/Flightbox competition law defence, which might have been run in these proceedings or in the Related Proceedings in Ireland, via the Flightbox proceedings in Poland.

15. The principal reliefs sought by Ryanair in this application are as follows:

*“(1) an order pursuant to O. 11 D, in particular r. 5 (2), and/or O. 13 A of the Rules of the Superior Courts and/or O. 13 of the Rules of the Superior Courts or otherwise, granting the plaintiff leave to enter judgment as against the defendant upon the statement of claim herein, the defendant having failed to file an appearance to the amended plenary summons within the time prescribed by the Rules of the Superior Courts;*

*(2) further and/or in the alternative: -*

*(i) a declaration that the terms of use of the Ryanair website are binding on Flightbox, its servants and/or agents;*

*(ii) a declaration that a contract was entered into between the plaintiff and Flightbox, its servants or agents in respect of access and/or use of the Ryanair website and/or use of the information contained thereon;*

*(iii) an order by way of prohibitory injunction restraining Flightbox, its servants and/or agents, from using the Ryanair website in breach of the terms of use thereto;*

*(iv) an order by way of a prohibitory injunction restraining Flightbox, its servants and/or agents, from infringing the European Union Registered Trademarks of Ryanair including (but not limited to) by the use of Ryanair's trademarks on any and all websites owned, controlled and/or operated by Flightbox, its servants and/or agents;*

*(v) an order by way of a quia timet injunction restraining Flightbox, its servants and/or agents from further breaching the terms of use of the Ryanair website*

*(b) the plaintiff's claim for unliquidated damages, an order pursuant to O. 11 D, r. 8 and O. 11, r 7 (1) RSC or otherwise, that damages be ascertained at a date to be fixed by the court, by a judge sitting alone."*

**16.** I have reviewed the following affidavits sworn on behalf of the plaintiff in this application:

- Grounding affidavit of Thomas McNamara, Director of Legal, Ryanair, sworn on 27<sup>th</sup> March 2023
- The affidavit of Piotr Gajek, a Polish lawyer representing Ryanair in the Polish proceedings, sworn on 7<sup>th</sup> March 2023
- An affidavit of John Hurley, Chief Technology Officer of Ryanair, sworn 13<sup>th</sup> March 2023
- Affidavit of Krzysztof Wasiewicz, a Polish lawyer representing Ryanair in the Polish proceedings, sworn on 9<sup>th</sup> June 2023
- And the affidavit of Eve Mulconry, partner in Arthur Cox, Solicitors for Ryanair,

sworn on 12<sup>th</sup> June 2023.

17. The Court was provided with four lever-arch folders containing affidavits, pleadings and relevant papers. In addition, the court was provided with a number of affidavits of service including affidavits from Tom Livingstone, Tara Roche and Orla Donovan, many of which are set out in Book 4 of the papers. A separate booklet was dedicated to the Polish Proceedings so that the Court would be fully appraised of Flightbox's position even though it has chosen not to enter an appearance.

18. Subsequent to the hearing of the motion before the court, but prior to the court giving its ruling, Flightbox sent a letter by email to the Central Office for the attention of the court. This occurred on 4<sup>th</sup> October 2023. The email was sent by a person called Magdalena Klaczek from the defendant's email address. The email enclosed a document headed "*Defendant's position*" and it essentially reprised a document that had been sent previously on the defendant's behalf. On 9<sup>th</sup> October 2023 the court sat and alerted the parties present to the fact of the letter. The case was adjourned to enable me consider the status of the document and to consider further my ruling.

19. Having carefully reviewed all of the affidavits, pleadings and papers placed before the court, and in the absence of any appearance by the defendant, or any replying affidavits or any cross-examination of the plaintiff's deponents, I am satisfied to accept at face value the affidavit evidence that the plaintiff has placed before the Court.

### **Jurisdiction**

20. The principal question which I have to decide in this application is the issue of jurisdiction. I must firstly consider jurisdiction under Article 28 (1) of EU Regulation 1215/2012 (as amended). This regulation is also known as "Brussels I Recast". Article 28 of the Regulation provides:

*“Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation”.*

**21.** Flightbox contends in its correspondence that the proceedings before this court should be suspended because of the existence of the Polish proceedings and when they were instituted. I will come back to the legal argument made by Flightbox in greater detail later on.

**22.** Separately I must also consider the question of seisin under the Regulation, due to the existence of the Polish proceedings (which instituted on 6th November 2019) which may be said to compete with these proceedings (which were instituted on 28th February 2020).

**23.** Ryanair makes the observation that instead of appearing before the court to challenge jurisdiction or filing an affidavit which could be properly part of the application, Flightbox's only engagement in the proceedings consisted of sending a letter dated 5<sup>th</sup> May 2023 from its Polish lawyers to Arthur Cox solicitors three days before the first return date of this application. I will refer to this as the "BLU letter" as that is the name of the firm of lawyers that sent the letter. Quite properly, counsel for Ryanair, Ms. Jennifer Goode BL, specifically brought the letter to the attention of the Court and in written and oral submissions addressed the various points made on the defendant's behalf. The BLU letter was also exhibited to the affidavit of Eve Mulconry sworn on 12<sup>th</sup> June 2023.

**24.** In the BLU letter the Defendant's position was set out as follows:

*“(1) Flightbox requests the court to stay these proceedings on the basis of the provisions of s. 9 of the EU Regulation 1215/2012 of the European Parliament and the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels Recast”);*

*(2) Firstly, in November 2019 the defendant submitted to the Polish court in Wroclaw*

*a lawsuit against the plaintiff. At present, after overruling by Polish court of second instance on the 13th of January 2023, the decision of the court of first instance to reject the lawsuit, the case is still being examined by the court of the first instance, only under new court file number (V GC 275/23);*

*(3) Thus, at no stage of proceedings before the Polish court, initiated in November 2019, was the case closed – it has continued since November 2019;*

*(4) Secondly, Article 30 (1) of Brussels Recast provides: -*

*“Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings”.*

*(5) Thirdly, Article 32 (1) (a) of Brussels Recast provides: -*

*For the purposes of this Section, a court shall be deemed to be seised:*

*(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant....”.*

*(6) Fourthly, the lawsuit submitted to the Polish court in Wroclaw by the defendant against the plaintiff has to be undoubtedly considered a “document instituting the proceedings” in the meaning of Article 32 (1) (a) of Brussels Recast, while the defendant in further course of the proceedings did not fail to undertake steps that it was obliged to take in order to serve the documents to the plaintiff, in particular paid the respective fees and submitted further writs and procedural motions before the Polish court;*

*(7) Having regard to the above, since the defendant lodged its claim against the plaintiff with the Polish court in November 2019 and the plaintiff lodged its claim that initiated the proceedings only in 2020, it must be stated that the Polish court is the*

*court first seised in the meaning of the above mentioned provisions of Brussels Recast;*

*(8) For these reasons, the court shall consider – on the basis of the provisions of s. 9 of Brussels Recast – staying the proceedings until the final and binding termination of the ongoing proceedings before the Polish court in Wroclaw;*

*(9) It is also to be emphasised that in the proceedings before the Polish court of the second instance, when overruling the decision of the court of first instance about the rejection of the lawsuit, the court has stated that it is necessary for the court of the first instance to undertake further actions named at, inter alia, establishing when the lawsuit against Ryanair DAC was in fact served to the Ryanair DAC in the proceedings ongoing before the Polish court in Wroclaw. Thus, at present, the Polish court in Wroclaw has undertaken actions aimed at explaining which lawsuit (lawsuit of Flightbox against Ryanair in the case before the Polish court, or the lawsuit of Ryanair against Flightbox initiating the proceedings) was served first;*

*(10) Finally, it must be stated that due to the difficult financial situation, including the charges related to the previously commenced proceedings before the Polish court, the defendant is not able to appoint an Irish attorney at law before the Honourable Court and thus applies for sending all letters to its registered office (address given in Wroclaw, Poland)”.*

**25.** It is fair to say that the jurisdiction issues raised by the case are somewhat complex.

Thankfully the court has available to it a number of relevant cases from the superior courts in this jurisdiction to which my attention was drawn, including an analysis carried out Ní Raifeartaigh J. in the Related Proceedings. In *Ryanair DAC v. SC Vola* [2019] IEHC 239, Ní Raifeartaigh J. in a similar “screen scraping” context considered the defendant's application to have the proceedings stayed on jurisdictional grounds. The defendant, Vola, claimed that Romania, its domicile, was the proper jurisdiction in which to hear all of Ryanair's claims

following the general rule under Article 4 of Regulation 1212/2012 which provides that a defendant should be sued in its place of domicile. Ryanair sought to displace the operation of the general rule in Article 4 and relied upon Articles 7(1) and 7(2) as well Article 25(1)(a) and 25(1)(c) of the Regulation.

26. For my part, I found the judgment of Ní Raifeartaigh J. to be helpful on a number of fronts, not least that it translated into plain English various pieces of airline industry jargon and set them out in a helpful glossary and also explained, in a digestible way, technical aspects relating to online travel websites.

27. Ryanair's core submission as to jurisdiction is that the parties to these proceedings agreed to submit to the exclusive jurisdiction of the Irish courts within the meaning of Article 25(1)(a) and/or 25(1)(c) of Brussels I Recast, which provides, and I'll read this out because it's important:

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

*(a) in writing or evidenced in writing;*

*(b) in a form which accords with practices which the parties have established between themselves; or*

*(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."*

**28.** The interpretation and application of Article 25 was distilled into six principles at paragraph 77 in the judgment of Ní Raifeartaigh J. in the Related Proceedings. At paragraph 77 (v), Ní Raifeartaigh J. stated as follows:

*"v. Derogation from Article 4 in favour of Article 25 prorogation requires a demonstration that consensus has been reached between the parties as to where the dispute is to be litigated, this consensus must be clear and is "a matter of the independent will of the parties"; a court may need to enter into a consideration of such limited facts as are relevant to jurisdiction while leaving any decision as to the substance of the case to the trial".*

**29.** Ní Raifeartaigh J. carried out an extensive review of the relevant case law, including the decision of Charleton J. for the Supreme Court in *Ryanair v. Billigfluege* [2015] IESC 11, which concerned appeals from the decision of Hanna J. in *Ryanair v. Billigfluege* [2010] IEHC 47, and from Laffoy J. in *Ryanair v. On the Beach* [2013] IEHC 124. It was held by the Supreme Court that although the consensus must be “real”, it is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist of which the parties are or ought to have been aware and a national court must determine whether:

- (a) the relevant contract comes under the head of international trade or commerce;
- (b) there was a practice in the branch of international trade or commerce in which the parties are operating; and
- (c) the parties were aware or are presumed to have been aware of the practice, (per Laffoy J. in *Ryanair v. On the Beach* [2013] IEHC 124).

**30.** In *Ryanair v. On the Beach*, Laffoy J. found a consensus because Ryanair was an airline which sold flights and services through its website, and On the Beach was a travel agent specialising in online business and, as part of that business, interacted with Ryanair's website. Laffoy J. held that the evidence established that within the airline and travel agency

business, the practice was that the user becomes contractually bound by clicking the box on the website demonstrating assent to the terms displayed by the owner. She found that the evidence also demonstrated that On the Beach was aware of the practice, being a practice which was generally and regularly followed when making bookings with online travel agents and airlines. There was “real consent” because, from the outset of its interaction with Ryanair's website, On the Beach encountered the hyperlink to the terms of use, the TOUs, and if it did not wish to be bound, it should desist from proceedings beyond its first encounter with the hypertext link. As I mentioned, the decision of Laffoy J. was upheld by the Supreme Court in *Ryanair v. Billigfluege* 2015 IESC 11.

**31.** A consensus under Article 25(1) (c) was also found by Ní Raifeartaigh J. in the Related Proceedings, albeit the evidence and facts in that case were a little different. At the time of the jurisdiction hearing, Vola was the only defendant. Vola averred that it obtained Ryanair's PFT data from Ypsilon. Similar to the present case, Ryanair had pleaded that Vola agreed to Ryanair's terms of use through the conclusion of a “*click wrapped*” agreement, sufficient to meet the requirements for prorogation of jurisdiction under Article 25(1) (c) of Brussels I Recast. Ní Raifeartaigh J. agreed with that submission. Despite Vola's attempts to argue that Ypsilon came between it and the interactions with Ryanair's website, Ní Raifeartaigh J. found that there was sufficient evidence that Vola interacted with Ryanair's website which was not undone by the fact that Ryanair's terms of use were “*auto-ticked*”.

### **Analysis**

**32.** For my part, I am satisfied on the evidence, insofar as I'm required to do so, that there is a similar consensus here between Ryanair and Flightbox. I accept the evidence produced by Ryanair that it is not possible to screen scrape its website without entering a “click wrapped” agreement with it via its terms of use. I accept the evidence of Thomas McNamara

that Flightbox, its agents and/or accessories were and are bound by Ryanair's terms of use, or TOUs, because it is not possible to obtain PFT data from Ryanair's website without agreeing to Ryanair's TOUs. The evidence justifying this conclusion is to be found in the grounding affidavit of Thomas McNamara, Director of Legal Ryanair, including and specifically paragraphs 64, 65, 86 and 89 thereof. Those TOUs contain an exclusive jurisdiction clause in favour of the Irish courts.

**33.** I also note and take into account that in the Polish proceedings, Flightbox appears to have admitted that it screen scrapes Ryanair's website in order to obtain Ryanair's PFT data. This is stated at paragraph 57 of the grounding affidavit of Mr. McNamara. It is also stated that this constitutes a violation of Ryanair's TOUs.

**34.** Quite properly, Ms. Goode BL for Ryanair, has told the Court that in the Polish proceedings, Flightbox disputes that it has admitted screen scraping Ryanair's website. However, having reviewed the affidavits, I am satisfied from the evidence that click wrapped agreements are widely used in the trade or commerce in which both Flightbox and Ryanair operate and that both were clearly aware of the practice. Ryanair has produced unchallenged evidence that Flightbox screen scraped Ryanair's website, entered into a contract with Ryanair via Ryanair's TOUs and agreed to submit to the jurisdiction of the Irish courts as contemplated by Article 25(1) (c) of Brussels I Recast.

**35.** Although the context is somewhat different, it seems to me that the evidence that was sufficient for Ryanair to succeed in the Related Proceedings is also available and has been produced in the present proceedings before me. Ryanair's deponents have produced sworn evidence that Flightbox could not obtain its data without agreeing to its TOUs and that Flightbox appears to have admitted that its screen scraping violates Ryanair's TOUs.

**36.** In her oral submissions for Ryanair, Ms. Goode BL, brought the Court through the relevant case law and identified the main reasons why the Irish courts should assume

jurisdiction and why, in her submission, Ryanair was entitled to the reliefs being sought including the injunctive and declaratory reliefs. The first and principal reason was that the parties have agreed that the jurisdiction of the Irish courts can be assumed. That agreement derives from the principle of prorogation jurisdiction under Brussels I Recast. It was submitted that Article 25 of the Regulation is a rule of special jurisdiction which, once the conditions of that Article are met, deems the court that is designated in the choice of court clause to be the court which has exclusive jurisdiction. Under Article 25, if the parties, regardless of their domicile, have agreed that the courts of a Member State are to have jurisdiction to settle any disputes which have arisen in connection with the particular legal relationship, those courts shall have jurisdiction unless the agreement is null and void under the law of that Member State. Under Article 25(1) (c), such agreement may arise in international trade or commerce in a form which accords with industry practice of which the parties are or ought to be aware. That was the basis of the assumption of jurisdiction in *Ryanair v. On the Beach* (Laffoy J.), in *Ryanair v. Vola* (Ní Raifeartaigh J.), and in *Ryanair v. Billigfluege* (Supreme Court).

**37.** Secondly Ms. Goode argued that in addition to finding that the conditions of Article 25(1)(c) were met, the court should also find on the evidence that Ryanair is entitled to enforce its TOUs against Flightbox and that, by inference, Flightbox has been accessing Ryanair's website. She relied principally on the affidavit of John Hurley in that regard but also on the analysis of Murray J. for the Court of Appeal in *Ryanair v. Skyscanner* [2022 IECA 64]. I note that in that case, Ryanair's application was unsuccessful but nonetheless counsel urges that the analysis of the Court of Appeal supports the conclusion on the facts of the present case that there is a contract between Ryanair and Flightbox which Flightbox has breached.

**38.** Thirdly Ms. Goode relied upon Flightbox's own pleadings in the Polish Proceedings,

which according to Ryanair indicate that Flightbox *"using a screen-scraping method"* accesses data from the Ryanair website through the use of automated software, and further that it engages Ryanair's TOUs in so doing.

39. Fourthly Ms. Goode relied upon paragraphs 28 to 34 of Mr. Hurley's affidavit to support the conclusion that Flightbox cannot acquire the data from the website without agreeing to Ryanair's TOUs, and that therefore Ryanair has established a strong case, firstly, that there exists a contract and, secondly, that there has been a breach of contract by Flightbox.

### **Significance of the Polish Proceedings**

40. One of the main issues I have to decide in this case is whether the fact that Flightbox issued proceedings against Ryanair in Poland and did so prior to the institution of the present proceedings affects or "knocks out" this court's jurisdiction to hear the case. Having carefully considered the evidence in the case, the terms of the Regulation and the extensive case law and materials that have been opened to me, including the two pieces of correspondence issued on behalf of Flightbox, I have come to the conclusion that the existence and timing of the Polish Proceedings does not displace this court's jurisdiction to deal with the plaintiff's application. It seems to me that Article 25 of the Regulation is a provision of exclusive jurisdiction which, once its conditions are met, leads to the court, which the parties have agreed should have jurisdiction, having such jurisdiction. The Regulation goes on to provide in Article 31(2) that :

*"...where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings..."*

It follows that in such circumstances, this court has "priority seisin" of the proceedings under

Brussels I Recast.

41. I accept Ryanair's submission that Flightbox's position in these proceedings as set out within the BLU letter does not affect the above conclusion. I note that Flightbox has not appeared in the proceedings and has not sought to contest jurisdiction. While Flightbox is within its rights to adopt such a position, it must be aware that a decision to not participate in the proceedings or even enter an appearance carries with it certain unavoidable consequences.

42. In any event, even though Flightbox elected not to participate, the court has been concerned to ensure that its position has been fully considered and taken account of in the court's deliberations. For that reason, I have had regard to the matters set out within the BLU letter and in the similar document that was sent to the court by Ms. Klaczek in the email of 4<sup>th</sup> October 2023. Flightbox has argued for the jurisdiction of the Polish courts in the Polish proceedings. It seems to me that the Polish courts have to date declined jurisdiction in favour of the Irish courts on a basis that is not inconsistent with the authorities that I've referenced earlier. In my view, the queries from the Polish court to the Irish courts dated 14<sup>th</sup> March 2022 and 20<sup>th</sup> April 2023 do not affect this conclusion in a material way.

43. I am supported in my conclusion on the jurisdiction question by the fact that the Irish High Court has been hearing separate applications by Ryanair against companies based in other Member States, including against Vola since 2017 and against Ypsilon since 2019. I note too that this point was made by the Polish court of first instance in the Polish proceedings at paragraph 5 of its decision, albeit that decision was set aside on appeal and the case was remitted for further argument.

44. I have read and accept the contents of the affidavit of John Hurley, Chief Technology Officer of Ryanair. He says at paragraph 5, *inter alia*, that the Ryanair website is controlled and operated from Ireland. Ryanair has spent significant sums of money and invested considerable resources in the implementation and maintenance of the website. The website is

fundamentally important to the present and future operations of Ryanair in their promotion and consolidation of direct contact between Ryanair and its customers. The Ryanair website is imperative for allowing Ryanair to sell its products and services to its customers and is a central component to Ryanair's expansion plans and future development. These products and services are not just for the flights themselves but ancillary services that include, *inter alia*, accommodation, car hire, holiday packages and insurance.

**45.** At paragraph 8 Mr. Hurley avers that access to and use of the Ryanair website and its content is regulated and governed by the Ryanair website terms of use ("TOU"s), and these are amended from time to time. The TOUs are available for inspection on each page of the Ryanair website by way of hypertext link. It is standard internet practice for terms of use or terms and conditions associated with the website to be made available for inspection by way of hypertext link on a website. The websites of Vola and Ypsilon all have such terms of use, each of which contain a similar jurisdiction and/or applicable law clauses. Ryanair's TOUs do not prohibit price comparison websites offering consumers a convenient method of comparing all air carrier prices on a particular route. According to Mr. McNamara, this can be done by way of licence agreement.

**46.** Based upon the unchallenged averments within the affidavits that I've referenced, I conclude that the Irish courts have jurisdiction in the proceedings under the terms of Brussels I Recast based upon the same reasoning as applied by Ní Raifeartaigh J. in her judgment in the Related Proceedings.

**47.** I accept the submission of Ryanair that for the same reasons relied on in the Polish Proceedings, the proceedings before this court and the Polish Proceedings essentially involve the same cause of action. It seems to me that the parties are the same in both sets of proceedings and both proceedings pursue the same objective, namely, to establish whether the parties are bound by Ryanair's TOUs. In my view, there is a heavy degree of overlap in the

subject matter and in the object of the proceedings. That being so, Article 29 of the Regulation is engaged rather than Article 30. Article 29 refers to proceedings involving the same cause of action, whereas Article 30 refers to "*related actions*". In any event, I note from the wording of the Regulation that Article 30, even if it did apply, is not cast in mandatory terms.

48. Turning to the question as to which party has priority seisin, Ryanair's core submission under this heading is that, if I am satisfied that these proceedings and the Polish Proceedings are subject to section 9 of Brussels I Recast, and that this court has jurisdiction under Article 25 of the Regulation, it follows that this court has priority seisin. In my view that is correct. It seems to me that that conclusion flows from the terms of Article 31 of the Regulation which provides as follows:

*"1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.*

*2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement".*

49. I accept Ryanair's submission that on foot of the wording of Article 31(2) of the Regulation, it is the Polish court which is obliged to stay proceedings unless and until this court declares that it has no jurisdiction under the agreement (the agreement being Ryanair's TOUs).

#### **Alternative Submission by Ryanair**

50. Ryanair makes an alternative submission and submits that even if Article 29 of

Brussels I Recast applied, and Article 31(2) did not apply, the Irish courts may have "*leap frogged*" the seisin of the Polish courts under Article 32 due to certain issues as to translation and service of documents.

**51.** Under Ryanair's alternative argument, Article 32 of Brussels I Recast provides that a court shall be deemed to be seized:

*“(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant” (emphasis added).*

**52.** Ryanair submits that since Flightbox issued the Polish proceedings on 6<sup>th</sup> November 2019 and rejected service thereof under the then applicable Article, as the documents had not been translated, Ryanair says that the Polish proceedings were not translated until 12<sup>th</sup> March 2020 (as set out in the affidavit of Mr. Gajek). Ryanair points out that Ryanair issued these proceedings on 28<sup>th</sup> February 2020 but it obtained its translation on 9<sup>th</sup> March 2020. The plaintiff submits translation is not necessary to validly serve proceedings under Brussels I Recast, but on 27<sup>th</sup> February, when Ryanair refused to accept service due to a lack of translation of the initiating document, translation arguably became a step that Flightbox was required to take in order to have service effected on Ryanair. Ryanair submits that this step was not completed by Flightbox until 12<sup>th</sup> March 2020, at a point in time after Ryanair had issued its proceedings (28<sup>th</sup> February 2020) and translated its proceedings (9<sup>th</sup> March 2020). Thus, says Ryanair, the Polish courts lost seisin due to the operation of Article 32(1) (a) of the Regulation. According to Ryanair, it follows that even if the Polish court was originally first seized, the fact that its jurisdiction has not been finally determined does not preclude this court from determining jurisdiction as it might otherwise have done.

**53.** In my view it is not necessary for the court to determine this alternative argument.

Since I have found that the proceedings before me are subject to section 9 of Brussels I Recast, and that this court has jurisdiction under Article 25 thereof, and further that this court has priority seisin within the meaning of Article 31(2) of the Regulation, it seems to me that it is not necessary for me to address Ryanair's alternative argument that the Irish courts have leap-frogged the seisin of the Polish courts having regard to Article 32 of the Regulation and the factual matters relating to translation as set out within Mr. Gajek's affidavit.

### **Necessary Proofs for Judgment in Default of Appearance**

54. Being satisfied, as I am, on the issues of jurisdiction and seisin and since the defendant has not filed a defence or offered any countervailing evidence, I should now consider whether Ryanair has done enough to meet the required proofs for obtaining judgment in default of appearance within the meaning of the Rules of the Superior Courts.

55. Under that heading it seems to me that where judgment is sought against an EU Defendant, Order 11D, Order 13A and Order 13 of the Rules of the Superior Courts and the provisions of Brussels I Recast apply.

56. Arising from the affidavits filed on behalf of the Plaintiff, including the grounding affidavit of Mr. McNamara, in particular at paragraphs 94 to 117, I am satisfied as to the following matters:

(a) Ryanair has a strong substantive case against Flightbox, and in particular has a strong claim for breach of contract as detailed in the Statement of Claim as follows:

Firstly, Flightbox is bound by Ryanair's TOUs; secondly, Ryanair's TOUs prohibit screen scraping; and thirdly, Flightbox I am satisfied is screen scraping Ryanair's data and thereby breaching its TOUs;

(b) the Irish courts are appropriately seized and have jurisdiction to hear the matter

under regulation 1215/2012;

(c) the proceedings have been duly served upon Flightbox, no appearance has been entered and Ryanair has met the technical requirements of the rules for leave to enter judgment.

57. I am satisfied that Ryanair has met the technical requirements for entering judgment in default of appearance as follows:

- (a) Ryanair produced an affidavit of service of the notice of summons as envisaged by Order 13, Rule 12 RSC and exhibited the certificate of service.
- (b) Ryanair filed a Statement of Claim in accordance with Order 11D, Rule 7(i).
- (c) Ryanair served the motion papers including the affidavits on Flightbox in accordance with the required method of service such that Flightbox is quote *"on notice"* of this application under Order 11D, Rule 5(3) RSC. Given that service between Member States is now regulated by Article 7 of EU regulation 2020/1784, service of the motion papers was required to be in accordance with that regulation.
- (d) Ryanair demonstrated jurisdiction in its grounding affidavit and included at paragraph 100 the averment required by Order 11D, Rule 5(4)(i) of the Rules of the Superior Courts to the effect that each claim made by the summons is one which, by virtue of Brussels I Recast, the Court has power to hear and determine.
- (e) Ryanair has demonstrated the exclusive jurisdiction of the Irish High Court and included the averment required by Order 11D, Rule 5(4) RSC, namely that no other court has exclusive jurisdiction within the meaning of Article 24 of Brussels I Recast.
- (f) Ryanair demonstrated that service of the notice of summons out of the jurisdiction under Order 11D took place in due and proper form as required by Order 13A, Rule 2 RSC.
- (g) Ryanair demonstrated that notice of summons was actually delivered to Flightbox in

accordance with the service regulation and therefore in sufficient time to enable Flightbox to defend the claim.

- (h) Ryanair has averred at paragraph 105 of the grounding affidavit that it believes the matters underpinning its claim for relief and concerning the steps taken to serve the proceedings are true and accurate. This meets the requirement laid down by Order 11D, Rule 5(3) RSC.
- (i) Ryanair have sent a 28-day warning letter consenting to the late entry of an appearance.
- (j) Ryanair also served the Statement of Claim on Flightbox under regulation EU 2020/1784K. Ryanair has verified the facts relied upon in the application as may have been required under Order 13A(3) of the Rules of the Superior Courts.

From a fair procedures point of view, I am entirely satisfied that Flightbox was at all material times on notice of the proceedings and was provided with ample opportunity within which to enter an appearance but has chosen not to do so. Moreover, under the procedural rules set out within the Rules of the Superior Courts in Ireland, Flightbox can apply, provided it can demonstrate it meets the required conditions set out within the rules, to have this default judgment set aside.

### **Specific Reliefs Sought**

**58.** I now consider the specific reliefs sought by the plaintiff. Ordinarily, a motion for judgment in default of appearance does not involve a court adjudicating on the substantive merits of dispute because, by definition, no defence to the claim has been filed and the claim goes undefended. Here however, because injunctive relief is being sought, the plaintiff must persuade the court that it is entitled to the injunctive and declaratory reliefs that are being sought. This in turn requires the court to consider the substantive merits of the plaintiff's

action. For the reasons I have endeavoured to explain above, I am satisfied that the plaintiff has demonstrated that it has a strong case for the court granting the specific relief that it seeks. I am satisfied that Ryanair has met the required threshold of demonstrating that it is entitled to the reliefs set out within its Notice of Motion. I note that in *Trafalgar Developments Limited v. Bairiki Incorporated* [2019] IEHC, Barniville J. was prepared to grant injunctive relief against a non-appearing defendant as part of an application for judgment in default of appearance.

**59.** Mr. Hayden, senior counsel for the plaintiff, made the fair point in his submissions that while a non-appearing defendant is entitled to fair procedures, they are not entitled to "*gain the system*" and should not expect to be placed in a better position by not entering an appearance or engaging with the proceedings. He also points out that the defendant can in due course, provided it meets the rules and conditions for doing so, apply to have judgment set aside under the Rules of the Superior Courts and/or appeal the granting of relief to the Court of Appeal.

**60.** As to the claim for a perpetual *quia timet* injunction, I am satisfied that the plaintiff has proved to the required standard that "*there is something to be enjoined on an ongoing basis*". The plaintiff is there citing Kirwan on Injunctions at paragraph 7.05 of the most recent edition. I am also satisfied that the plaintiff has proven "*substantial risk of danger*". That is a reference to the dictum of Geoghegan J. in *Szabo v. Esat Digiphone Limited* [1998] 2 ILRM 192. I accept Ryanair's submission that its affidavits show that unless the court grants the injunction sought, Flightbox will continue to breach Ryanair's TOUs. I am also satisfied that on any *Campus Oil* assessment as to the balance of justice, Ryanair has done more than enough to demonstrate its entitlement to the reliefs claimed.

**61.** In all these circumstances I am content to make an order pursuant to Order 11D of the Rules of the Superior Courts granting the plaintiff leave to enter judgment as against the

defendant upon the statement of claim herein, the defendant having failed to file an appearance to the amended plenary summons within the time prescribed by the Rules of the Superior Courts. I am also content to grant the specific reliefs sought and I will hear the plaintiff as to the wording of the court's order with respect to those specific reliefs and also on the question of costs.

**62.** As to the specific claim for unliquidated damages as sought at paragraph 2 (b) of the notice of motion, I propose to make an order that damages should be ascertained at a date to be fixed in due course.

Signed:

Mícheál P. O'Higgins

Appearances: Martin Hayden SC and Jennifer Goode BL instructed by Arthur Cox Solicitors for the plaintiff.

No appearance on behalf of Flightbox SP ZOO