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Case No: CL-2021-000634

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (KBD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/10/2023

**Before :**

**Mr. Nigel Cooper KC**  
**sitting as a Judge of the High Court**

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**Between :**

**(1) ON THE BEACH LIMITED**  
**(2) SUNSHINE .CO.UK.LIMITED**  
**(3) CLASSIC PACKAGE HOLIDAYS LIMITED** **Claimants**  
**- and -**

**(1) RYANAIR UK LIMITED**  
**(2) RYANAIR DAC**  
**(a company incorporated in the Republic of Ireland)** **Defendants**

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**Andrew Sutcliffe KC and Anthony Pavlovich (instructed by Fox Williams LLP) for the**  
**Claimants**

**Brian Kennelly KC and Niamh Cleary (instructed by Stephenson Harwood LLP) for the**  
**Defendants**

Hearing dates: 23 and 24 May 2023  
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**Approved Judgment**

**I direct that no official shorthand note shall be taken of this Judgment and that copies  
of this version as handed down may be treated as authentic.**

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**MR NIGEL COOPER KC SITTING AS JUDGE OF THE HIGH COURT**

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 31 October 2023 at 10:30am.

## **Mr. Nigel Cooper KC:**

### **Introduction**

1. The first and second claimants are on-line travel agents which operate websites which allow travellers to book travel services offered by third parties. The third claimant is part of the same group of travel businesses and operates an on-line portal through which travel agents can sell third-party services to travellers. I shall refer to the claimants collectively for the purposes of this judgment as “OTB Group”.
2. The defendants are operational air carriers that carry on businesses as airlines (collectively “Ryanair”). Ryanair is Europe’s largest airline and largest low-cost carrier. The first defendant is incorporated in England and Wales and licensed to operate by the UK Civil Aviation Authority. The second defendant, Ryanair DAC, is incorporated in the Republic of Ireland and licensed to operate by the Irish Aviation Authority.
3. For the purposes of this judgment, it is not necessary for me to distinguish further between the individual claimants or the individual defendants.
4. OTB Group’s claim in this action is for a sum of some £2 million which they say represents the cost of flights which they have refunded to travellers for package holidays in circumstances where Ryanair have cancelled or made what are described as major changes to flights which were part of the packages. OTB Group says that Ryanair has a legal liability to the various group companies to make refunds for sums paid to travellers in respect of Ryanair flights, which were cancelled or to which major changes were made.
5. It is pertinent to note at the start of this judgment that:
  - a. This litigation and other litigation between the same parties is being pursued vigorously and at considerable cost. OTB Group have submitted a budget through to trial for this action of incurred and estimated costs of £1,653,523.50. Ryanair’s equivalent budget for their incurred and estimated costs through to trial is £1,612,525.50. In other words, the incurred and estimated costs through to trial for both parties is £3,266,049, a sum considerably greater than the principal amount in dispute. OTB Group’s estimate of its costs of the action through to the stage of summary judgment is £815,623.50.
  - b. Although Ryanair dispute that OTB Group have any legal entitlement to the refunds claimed, Ryanair have acknowledged both in the Defence and in the Second Witness Statement of Mr. Phillips that for commercial and political reasons Ryanair are willing to refund the cost of flights which have been cancelled provided that appropriate arrangements are put in place so that they are not at risk of being required to refund travellers twice for the same flight.
  - c. It is very obvious both from what was said in the parties’ submissions and from the correspondence within the bundles that this litigation is part of a much wider dispute between Ryanair and OTB Group (and apparently other on-line travel agents) as to the extent to which on-line travel agents may book flights operated by Ryanair. That dispute involves other litigation both in the High Court and

elsewhere and has been going on for a substantial period of time, certainly in excess of 10 years.

6. While the matters raised in the previous paragraph do not affect the answers to questions of law I have to decide or the threshold tests for the applications before me, they do highlight both the importance of scrutinising carefully the evidence before the court to see whether this is a case which should go forward to a full trial and the importance of keeping in mind the overriding objective.

### **Applications**

7. There are two substantive applications before me.
  - a. An application dated 30 September 2022 by OTB Group for summary judgment under CPR Part 24 against Ryanair on the basis that Ryanair have no real prospect of defending the liability issues or declaratory relief.
  - b. An application by Ryanair dated 30 September 2022:
    - i. To strike out paragraph 15(2) of the Reply on the basis that it is inconsistent with the Particulars of Claim, discloses no reasonable grounds for bringing the claim, improperly raises a new claim to which Ryanair has not had the opportunity to plead and is therefore an abuse of process and is in breach of PD16, paragraph 9.2.
    - ii. To strike out the claim in unjust enrichment under CPR r.3.4(2) or to have reverse summary judgment on the claim under CPR r.24.2(a)(i) on the basis that there are no reasonable grounds for the claim in unjust enrichment and because a fundamental element of that claim is pleaded for the first time in the Reply.
8. In addition, there was an application dated 17 April 2023 by Ryanair to be granted permission to rely upon the third witness statement of Paul Phillips dated 30 March 2023. OTB Group were prepared to consent to this application on the basis that they were in turn granted permission to rely on a third witness statement of Shaun Morton dated 28 April 2023. I granted permission to both parties to rely on the statements in question.
9. The hearing was also intended to be the first case and costs management conference in this claim. However, as was inevitable, it was accepted by both parties that directions for case management could only be given after I had determined the two substantive applications.
10. Shortly before the hearing, I was provided with draft Amended Particulars of Claim intended to meet Ryanair's criticism that OTB Group were seeking to advance a new claim in their Reply. No formal application for permission to amend was made although OTB Group did invite me during oral submissions to consider their application for summary judgment on the basis that I would grant permission. I will deal further below with the status of the draft Amended Particulars of Claim.

## **The claim**

11. OTB Group issued their claim form on 29 October 2021 with accompanying Particulars of Claim. In the claim form, the claim is described in the following terms:
  - a. Redress from Ryanair under Regulation 29 of the Package Travel and Linked Travel Arrangements Regulation 2018 (“PTRs”) as a result of Ryanair cancelling OTB Group travellers’ flights and thereby contributing to an event triggering compensation, a price reduction or other obligation in the form of refunds paid by OTB Group to their travellers.
  - b. Restitution in circumstances where Ryanair cancelled the flights for OTB Group travellers and OTB Group issued refunds for their travellers’ package holidays, which represented an unjust gain for Ryanair.
  - c. Associated declaratory relief concerning the principles by which Ryanair are liable to reimburse OTB Group for sums paid in respect of cancelled flights.
12. The sum claimed for flights up to 31 August 2021 was £2,330,771.62 of which £2,095,778.18 is attributable to the first claimant, £165,220.47 is attributable to the second claimant and £69,762.97 is attributable to the third claimant. OTB Group have, however, revised the sum claimed overall to £2,074,674.37.

## **Evidence and Submissions**

13. For the purposes of this hearing, I had before me both the CMC Bundle and the Application Bundle. The Application Bundle contained on behalf of OTB Group (i) the First, Second and Third Witness Statements of Mr. Shaun Morton, Chief Financial Officer of OTB and (ii) the First, Second and Third Witness Statements of Mr. Gavin Foggo, a partner with Fox Williams. On behalf of the Ryanair, I had before me the First, Second and Third Witness Statements of Mr. Paul Phillips, a partner with Stephenson Harwood. All of the Witness Statements were verified by a Statement of Truth. OTB Group also supplied me with two schedules, both as hard copy exhibits and as excel spreadsheets, respectively entitled “Revised Reply Schedule” and “Revised September Schedule” both of which were verified by the third witness statement of Mr. Gavin Foggo.
14. The Revised Reply Schedule is a detailed breakdown with input from both OTB Group and Ryanair of each of the holidays and flights which are the subject of the dispute including information as to the price paid for the flights, refunds paid by OTB Group to travellers and whether Ryanair has provided a refund either directly to the traveller or to OTB by way of cash, chargeback or voucher. The schedule also shows whether OTB Group says the flights in question were cancelled or whether they were subject to what is described as a ‘major change’. The Revised September Schedule is a version of the Reply Schedule but including a column to show the flights for which Ryanair sent an e-mail to the traveller notifying the traveller of a cancellation or a major change and offering the traveller the option of a refund of the cost of their flight.
15. In addition, I had extensive written and oral submissions from both parties. It is almost inevitable that this judgment will not be able to address each and every one of the

arguments raised in those submissions. However, I have carefully considered all arguments raised for the purposes of this judgment.

## **Background**

### *OTB's Sale of Package Holidays*

16. OTB (i.e. the First Claimant) specialises in package holidays to beach destinations, the vast majority of which are short-haul. OTB owns and operates [www.onthebeach.co.uk](http://www.onthebeach.co.uk) ("the OTB Website") which provides travellers with a web platform or mobile application through which travellers can build a package holiday from a selection of flights, hotels and transfers. As part of the booking process using the OTB Website, the traveller inserts their payment details and confirms their agreement to:
  - a. OTB's traveller terms and conditions ("the OTB Conditions");
  - b. The booking conditions of the suppliers providing the travel service (including the airline's conditions of carriage and the terms and conditions of the hotelier and/or transfer provider);
  - c. Information concerning the traveller's rights under the PTRs.
17. The OTB Website allows travellers to select and combine various travel services to create a single package holiday, following which the traveller enters into a single booking transaction to purchase that package holiday. It is common ground that as a consequence, the traveller benefits from various rights against OTB pursuant to the PTRs, including:
  - a. OTB's obligation under Regulations 13 and 14 to refund the traveller within 14 days when OTB terminates the package travel contract because it is prevented from performing the contract due to a situation which is beyond OTB's control and which could not have been avoided even if all reasonable measures had been taken.
  - b. OTB's obligations under Regulation 11, where it is constrained by circumstances beyond its control to alter significantly any of the main characteristics of the travel services included within the package travel contract, including to give the travellers the option to accept the changes, to receive a full refund within 14 days or to take any substitute package offered by OTB.
18. For packages which include a flight, OTB is also required to comply with the requirement for ATOL protection pursuant to the Civil Aviation (Air Travel Organisers Licensing) Regulations (2012) ("ATOL Regulations"). The ATOL Regulations are overseen by the UK Civil Aviation Authority and provide a scheme of insolvency protection for the traveller to ensure that the traveller is refunded and, if necessary, repatriated in the event that a travel organiser, such as OTB, fails. As part of these arrangements, OTB operates a trust account to hold traveller money until it is permitted to be released by the trustee. OTB also pays a per passenger levy of £2.50 to the ATOL scheme, which it passes on to travellers as part of the price charged for a flight inclusive package holiday.

*OTB's Relationships with Suppliers*

19. Mr. Morton sets out the nature of the different relationships with suppliers at paragraph 13 of his witness statement:
- a. For hotels which form part of a traveller's package holiday, OTB acts as the hotel supplier's agent pursuant to agreements between OTB and the supplier. The suppliers provide their inventory and rates to OTB for OTB to advertise on the OTB website. When the traveller books a hotel, a contract is formed between the traveller and the supplier. OTB collects the traveller's payment and remits this to the supplier net of OTB's commission.
  - b. For transfers, OTB has agreements with transfer suppliers pursuant to which OTB acts as a sales agent for each supplier. Pursuant to these agreements, the supplier will provide its itinerary and rates to OTB to advertise on the OTB website. When a traveller books the transfer, a contract is formed between the traveller and the supplier for the supply of the transfer. OTB will collect the traveller's payment and remit the payment to the supplier net of commission.
  - c. For flights, the relationship between OTB and the supplier is different because OTB acts as the traveller's agent not the agent of the supplier (airline). OTB makes the booking either by:
    - i. Entering into the airline's public-facing website to book the flight;
    - ii. Using a software connection provided by the airline for the purposes of making a booking; or
    - iii. Booking with a third party which itself enters upon the airline's public facing website to book the flight or uses a software connection provided by the airline for making bookings.
20. When a traveller books a flight, a contract is formed between the traveller and the airline for the supply of the flight. OTB pays the airline in full upon making the booking. OTB will collect the traveller's payment, which may occur after the airline has been paid. The price charged to the traveller may differ from the price paid to the airline. OTB says that this is because the price of flights can and often do change between the time the traveller places a booking with OTB and the time when OTB places the booking with the airline. If such a change does occur, OTB does not pass the change on to the traveller provided it still realises a certain profit margin on the sale of the package to the traveller.
21. It is again common ground that whether or not OTB acts as the agent of the traveller when making arrangements with a supplier or acts as the agent of the supplier for the purposes of a traveller's package holiday, OTB is still an 'organiser' of the package under the terms of the PTRs.

*How OTB books and pays for Ryanair flights*

22. Ryanair does not enter into flight supply agreements with on-line travel agents and is open about its wish for the Ryanair website to be the only place where it is possible to

purchase a Ryanair flight. OTB says that for this reason, when OTB books flights with Ryanair as an agent of the traveller:

- a. OTB (or a third-party supplier to them) creates an on-line account with Ryanair using the traveller's full name and telephone number but with an OTB-controlled e-mail address.
  - b. OTB says that the principal reason why it supplies Ryanair with an OTB-controlled e-mail address rather than the traveller's e-mail address is to ensure that it receives any updates about the flight rather than updates going only to the traveller.
  - c. OTB (or their third-party supplier) then interacts with Ryanair's website to choose the flights and place a booking. The flight is paid for using a corporate payment card issued to OTB. OTB says there are various reasons why it uses its own payment card to pay for the flights, namely that it is more practical and secure, it allows OTB to offer low deposit/pay by instalment terms and that, if flights are cancelled and a refund is not forthcoming, OTB can use the 'chargeback' process to reclaim money for the flights.
23. The OTB conditions make clear that OTB acts as an agent when booking the individual travel services, which make up a package holiday and that it is also the organiser of multi-contract packages for the purpose of the PTRs.

#### *Sunshine Holidays*

24. Sunshine Holidays is an on-line travel agent which became part of the OTB Group in May 2017. Sunshine Holidays operates through a website and mobile application available at [www.sunshine.co.uk](http://www.sunshine.co.uk) ("the Sunshine website"). The Sunshine website operates in materially the same way as the OTB website but sources its hotels, transfers and flights from OTB, the costs of which are then recharged from OTB to Sunshine Holidays.
25. Sunshine Holidays says that for package holidays booked through Sunshine Holidays, Sunshine Holidays is acting as an organiser under the PTRs. Sunshine Holidays' terms and conditions also make clear that OTB act as an agent when booking the individual travel services which make up a package holiday and that it is also the organiser of multi-contract packages for the purposes of the PTRs.

#### *Classic Package Holidays ("CPH")*

26. CPH was incorporated on 17 October 2018 and operates a portal for travel agents at the website 'www.classic-package.co.uk' ("the CPH website"). Travel agents can use the CPH website to source package holidays and individual hotel rooms. The portal is only available to travel agents who signed up to CPH's agency agreement. The process of booking through the CPH website is similar to that for the OTB website and the Sunshine website save that the traveller will book the holiday using the services of a travel agent, who will book the holiday for the traveller using the website or in conjunction with a CPH employee. CPH will book the individual elements of the holiday sourcing the hotels, transfers and flights from OTB and being re-charged for those items by OTB.

27. CPH's conditions make clear that CPH acts as an agent when booking the individual travel services, which make up a package holiday and that it is also the organiser of multi-contract packages for the purpose of the PTRs.

*Cancellation of Package Holidays*

28. OTB Group's case is that the bookings which are the subject of this claim were made before or (to a lesser extent) during the Covid-19 pandemic and were bookings for package holidays. In relation to each booking, OTB Group say:
- a. The relevant OTB Group entity acted as agent for the hotel supplier and any transfer supplier but as agent for the traveller in booking Ryanair flights.
  - b. The traveller entered into contracts with Ryanair, the hotel supplier and any transfer supplier for the supply of these travel services; and
  - c. The relevant OTB Group entity was the 'organiser' of the package holidays for the purposes of the PTRs.
29. OTB Group also say that as a consequence of the pandemic, Ryanair cancelled thousands of flights or made changes to the flights such as changing the scheduled departure time or changing the departure or arrival airport. OTB Group say that on occasion, these changes amounted to major changes, that is to say a change of a flight time by five hours more or more or a change of airport to one which was not interchangeable to the original airport. In relation to changes, which were major changes, OTB Group say that it is their understanding that Ryanair offers a refund if the change is not accepted and this is not disputed by Ryanair and is consistent with the evidence before me.
30. OTB Group also says that the flight cancellations or major changes by Ryanair had a knock-on effect on package holidays organised by OTB Group, which triggered obligations under the PTRs including the obligation to provide refunds to travellers, who booked holidays, which then had to be cancelled.

*OTB Group actions following Ryanair Cancellations/Major Changes*

*1. OTB and Sunshine Holidays' actions following a Ryanair cancellation*

31. OTB Group say that the actions following a cancellation or major change were the same for OTB and for Sunshine Holidays. I will therefore refer to the procedure for OTB on the basis that the same procedure applied for both companies.
32. So far as OTB and Sunshine Holidays are concerned, the OTB Group say that when a flight was cancelled, a communication was sent to the traveller by OTB or Sunshine Holidays as the case may be to confirm that the holiday had been or would be cancelled or alternatively the traveller confirmed a preference to cancel the holiday after being given this option by OTB ("Cancellation Communication").
33. Following a Cancellation Communication, OTB had to take steps to implement the Cancellation Communication. OTB would cancel the accommodation and transfer reservations with the relevant supplier. The flight booking would be cancelled by Ryanair.



34. OTB say that prior to the pandemic where Ryanair cancelled a flight, it might have been possible to rebook the traveller on to a suitable alternative flight in order to save the holiday. In this context, OTB regarded a suitable alternative flight as being one which was reasonably priced, departed (and arrived) at roughly the same time as the cancelled flight and departed (and arrived) from the same airports. However, OTB says, the impact of the pandemic on the travel industry was such that it was simply not realistic to rebook travellers on to new flights either because there were no suitable alternative flights or there were no flights at all. OTB also faced other difficulties such as the time required to find alternative flights and the need to manage its own cashflow carefully due to diminished income. As a consequence, OTB say they refunded the cost of the holidays to their travellers including the cost of flights. While for some holidays, refunds for flight costs were only provided once the funds had been received from Ryanair, for many flights OTB say they provided a refund of the flight cost prior to receipt from Ryanair. OTB's evidence in support of the position as set out in this paragraph is found in the first witness statement of Mr. Morton and is evidence I accept.

2. *OTB and Sunshine Holidays' actions following a Ryanair Major Change*

35. Where flights were subject to a major change, OTB Group say that the traveller was given the option to:

- a. Take alternative flights if available;
- b. Make an adjustment of the hotel stay (if required and possible) with a partial refund or a requirement to pay for additional nights; or
- c. Accept a full refund.

36. Where the traveller accepted the option of a refund, OTB Group would take steps to implement the traveller's wishes.

3. *CPH process following a Ryanair flight cancellation or major change*

37. Following a Cancellation Communication, CPH also had to take steps to implement that communication and it did so by cancelling the accommodation and transfer reservations with the relevant supplier. CPH say that they also made refunds to travellers for flights cancelled by Ryanair or subject to major changes without waiting to receive funds from Ryanair.

*Attempts to recover flight refunds from Ryanair*

38. OTB Group's evidence is that they would initially ask for a refund from Ryanair via either an e-mail link or via an on-line chat function and if this did not work, they would then seek a refund using the chargeback facility for purchases made using a Visa or Mastercard. However, OTB Group say that they were not able to claim a chargeback for the flights which are the subject of this claim because either they were out of time to make a claim or the flights were purchased using an American Express card issued to OTB (which does not permit chargebacks in the circumstances).

39. Ryanair does not accept that it has a legal obligation to pay refunds to OTB for the flights which are subject of the present claim but it was prepared to offer refunds

provided OTB Group obtained a letter of authority from the relevant traveller. Ryanair say that other on-line travel agents have accepted this requirement. OTB Group say that process insisted on by Ryanair for the letters of authority was unreasonable particularly in circumstances where OTB Group had thousands of flight refunds to claim and that it was a process designed to make it as difficult as possible for travellers to claim a refund.

40. There was correspondence between Ryanair and the OTB Group and then between their respective solicitors concerning the payment of refunds which did not lead to any resolution of the issues surrounding payment of refunds.
41. It appears from the evidence that there are instances where travellers have been paid a refund by both Ryanair and by the OTB Group.

### **The Claim**

42. The OTB Group say that all the flights which are the subject of the present claim are ones:
  - a. Which relate to package holidays booked by OTB Group's travellers as described above.
  - b. Which include a Ryanair flight booked as described above.
  - c. Where an OTB Group company paid for the Ryanair flight in full at the time of booking as described above.
  - d. Where the flights were cancelled by Ryanair or subject to a major change by Ryanair.
  - e. Where Ryanair has offered a refund to the traveller.
  - f. Where an OTB Group company has refunded their traveller for the flights following cancellation of the package holiday by OTB or because the traveller did not accept a significant alteration to the package holiday.
  - g. Where Ryanair has not refunded the OTB Group company for the flights either in full or at all.
43. Since the claim was issued, the parties have been in correspondence about the detail of the claim and the treatment of the different flights which are the subject of the claim. The most up to date position is set out in the third witness statement of Mr. Foggo and the Revised Reply Schedule. It shows that:
  - a. The claim relates to 4,191 holiday bookings with a claim value of £2,074,674.37.
  - b. For 2,352 of the bookings, Ryanair admit that the corresponding flights were cancelled. This represents £1,103,832.92 of the claim.
  - c. For 1,034 of the bookings, Ryanair admit that one leg of the return flights was cancelled but deny that the other leg was cancelled. This represents £554,547.98 of the claim.

- d. For 718 of the bookings, Ryanair allege that the corresponding flights were not cancelled. OTB Group say that these flights were subject to a major change (namely a change to the flight time of five hours or more). This represents £378,684.80 of the claim. For 711 of these bookings (with a value of £377,091.87), OTB Group have provided Ryanair with a copy of an email from Ryanair confirming that the flight was subject to a major change (and offering the traveller the option of a refund). This evidence was not challenged by Ryanair.
- e. For the remaining 87 bookings, Ryanair allege that the corresponding flight was not cancelled, whereas OTB Group says that it was. Overall, this element of the claim is worth £37,608.67. OTB Group has provided Ryanair with e-mails for 61 of the bookings (representing £31,899.45) confirming that the flight was cancelled. This leaves 26 bookings (representing a sum of £5,709.22) for which no e-mail confirmation is available.

### **Ryanair's Position on the Purchase of Flights by OTB Group Companies**

44. Ryanair's position on the purchase of flights by OTB Group Companies can be shortly stated. Ryanair does not sell flights via on-line travel agents and the purchase and sale of such flights by on-line travel agents such as the OTB Group is a breach of Ryanair's website terms of use.
45. Ryanair says that it has no contractual obligation to refund travellers who have purchased flights using an on-line travel agent but that nevertheless they will provide refunds including to OTB Group provided that they can be assured that they are not being placed in a position where they are at risk of being required to refund a traveller twice for the same flights.
46. Ryanair dispute that OTB Group has any good cause of action against Ryanair on the basis that (i) there is no freestanding right of redress under the PTRs and (ii) there is no good claim in unjust enrichment.
47. Ryanair's position as set out in the second witness statement of Mr. Phillips is that Ryanair is willing to provide refunds to OTB Group in relation to cancelled flight bookings provided that arrangements can be put in place so that Ryanair are not placed in a position where they are at risk of being required to refund travellers twice for the same flights. Unsurprisingly, Ryanair's position is that the steps they wanted put in place in relation to letters of authority and use of the chargeback function are reasonable ones.
48. Apart from its challenge to the legal basis of OTB Group's claim, Ryanair also challenge the factual basis of the claim. Ryanair say that they have to rely on non-admissions in relation to certain factual issues because they do not have the information to be able to admit or deny those issues. However, Ryanair identify the following matters as being the principal ones in dispute:
  - a. Whether OTB Group companies were acting as agents of travellers.
  - b. Whether the flight bookings formed part of a 'package' within the meaning of the PTRs.

- c. Whether relevant flights were cancelled by Ryanair.
  - d. Whether if a relevant flight was cancelled, that cancellation caused the cancellation of the associated holiday so as to be “*an event triggering compensation, a price reduction or other obligation*” under Regulation 29 of the PTRs.
  - e. What, if any, refunds the OTB Group paid to their underlying travellers in respect of the Flight Bookings.
  - f. The extent to which Ryanair has already refunded the cost of the flights, whether in cash, through the chargeback mechanism, or in vouchers.
49. Ryanair disputes OTB Group’s entitlement to make a claim in respect of flights which were subject to a major change not only on the grounds that it says it has a defence to those claims but also on the basis that it says OTB Group has only pleaded its claim in respect of those flights in its Reply whereas the claim is a separate and new cause of action compared to the claim for cancelled flights and should properly have been pleaded in OTB Group’s Particulars of Claim. Ryanair say that the claim in respect of flights subject to major change is one which is inconsistent with the Particulars of Claim and that Ryanair has not had the opportunity to plead to it.
50. In relation to the items said to be in dispute as set out in paragraph 48 above:
- a. I am satisfied that there is no realistic prospect of challenging whether OTB Group companies were acting as agents of travellers who were offered refunds by Ryanair. All the flight bookings are made in the name of the traveller and OTB Group booking conditions expressly state that the relevant company acts as the traveller’s agent when booking flights. Further, Ryanair deny that OTB Group companies were acting as their agents.
  - b. I am satisfied that there is no realistic challenge to the question of whether the flight bookings formed part of a package. It is clear that both OTB Group and Ryanair have done a considerable amount of investigation as to the circumstances surrounding the bookings which are the subject of this claim. If there was credible evidence which gave rise to doubt as to whether the flights were booked as part of a package, then I have no doubt that such evidence would have been put before me. It is also part of Ryanair’s case that they have no obligation under Regulation 261/2004 to provide a refund in respect of the flights which were cancelled or subject to major change because the flights were booked by OTB Group and accordingly fall within the scope of the PTRs. For that argument to be open to Ryanair, it must follow that the flight bookings formed part of a package.
  - c. As to whether relevant flights were cancelled by Ryanair, no evidence has been put forward to challenge the evidence from OTB Group that they have been able to provide copies of e-mails from Ryanair confirming for all but 26 of the bookings that relevant flights were cancelled or subject to major change. Accordingly, I accept that Ryanair have no realistic prospect of contradicting the evidence of OTB Group as to which flights were cancelled and which flights were subject to major change.

- d. I will deal separately with the issue of causation below.
  - e. So far as refunds paid by OTB Group are concerned, the Revised Reply Schedule has a column (column Z) confirming the dates on which OTB Group paid refunds to their travellers. I also have the evidence of Mr. Morton, OTB Group's Chief Financial Officer, confirming that refunds for the flights have been paid to their travellers. This again is evidence which I accept. Ryanair sought to challenge this evidence based on correspondence with two travellers in early 2023, which appears to suggest that OTB Group failed to pass on offers of refunds from Ryanair to customers. For reasons discussed below, I do not accept that this evidence provides any realistic prospect of challenging the evidence in the Revised Reply Schedule and the evidence of Mr. Morton that the refunds listed there have been paid.
51. The remaining issue is the question of what refunds have been provided by Ryanair already either to OTB or directly to travellers. In this regard, Mr. Phillips gives evidence in his first witness statement that Ryanair has provided a cash refund or voucher for 3,680 flight bookings with a value of £1,796,692.40. The revised Reply Schedule suggests that the majority of this figure represents refunds provided by vouchers (according to Ryanair). Further evidence as to the position on refunds is found in the third witness statement of Mr. Foggo. His evidence is:
- a. That only 621 of the 4,191 bookings involve an alleged refund by cash or chargeback equivalent to £246,660.62.
  - b. For 229 bookings, the parties are agreed as to the refund paid which is equivalent to a sum of £43,400.57.
  - c. For the remaining 392 bookings, representing £203,260.05, an as yet unidentified sum relates to refunds paid directly to OTB Group's travellers otherwise the payment was made to OTB Group either by chargeback or a separate payment.
  - d. There are 35 bookings representing £17,929.07 for which Ryanair may have given a cash refund prior to OTB Group doing so.

### **The Regulatory Framework**

52. Behind the dispute between the parties are the regulations governing the circumstances in which travellers are entitled to claim refunds either from their airline in the case of directly booked flights or from their travel operator in the case of package holidays. Both sets of regulations are measures relating to consumer protection. The PTRs are United Kingdom legislation and were made to implement Directive 2015/2302/EU of the European Parliament and of the Council. They are retained in UK domestic legislation by s.2(1) of the European Union (Withdrawal) Act 2018. It is these regulations which OTB Group rely on for the purposes of their claim. However, to properly understand the contractual terms on which the parties operate and for commercial context, it is also necessary to look at Regulation (EC) No. 261/2004 ("Regulation 261") which sets out the rules governing, inter alia, compensation payable by airlines to passengers in light of the cancellation or long delay of flights.

*The PTRs*

53. So far as material, the PTRs are in the following terms:

**“2 Interpretation**

*“Organiser”* means:

(a) a trader who combines and sells or offers for sale, packages either directly or through another trader or together with another trader;

(b) the trader who transmits the traveller’s data to another trader in accordance with paragraph 5(b)(v);

...

*“Package”* means a combination of at least two different types of travel services for the purpose of the same trip or holiday.

*“Package travel contract”* means a contract on a package as a whole or, if the package is provided under separate contracts, all contracts covering the travel services included in the package.

...

*“trader”* means any person who is acting, including through any other person acting in their name or on their behalf for purposes relating to their trade, business, craft or profession in relation to contracts covered by these Regulations, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider.

*“travel service”* means:

(a) the carriage of passengers;

...

*“traveller”* means any individual who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded, within the scope of these Regulations;

*“unavoidable and extraordinary circumstances”* means a situation –

(a) beyond the control of the party who seeks to rely on such a situation for the purpose of regulation 12(7), 13(2)(b), 15(14) or (16), 16(4)(c) or 28(3)(b); and

(b) the consequences of which could not have been avoided even if all reasonable measures have been taken.

**13 Termination of the package travel contract by the organiser**

(1) The provisions of this regulation are implied as a term in every package travel contract.

(2) Paragraph (3) applies where:-

(a) ...

(b) the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.

(3) The organiser –

(a) may terminate the package travel contract and provide the traveller with a full refund of any payments made for the package; and

(b) is not liable for additional compensation.

#### **14 Refunds in the event of termination**

(1) The provisions of this regulation are implied as a term in every package travel contract.

...

(3) Any

...

(b) refund required pursuant to:

...

(ii) a termination under regulation 13(3)

Must be made to the traveller without undue delay and in any event not later than 14 days after the package travel contract is terminated.

...

#### **29 Right of redress**

Where an organiser ...

(a) pays compensation,

...

the organiser ... may seek redress from any third parties which contributed to the event triggering compensation, a price reduction or other obligations.”

54. In addition to the above provisions, it is to be noted that:

- a. Under Regulation 12(7) a traveller is entitled to terminate the contract before it begins without paying a termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate

vicinity and which significantly affect the carriage of passengers to their destination. In these circumstances, the organiser is obliged to pay a full refund.

- b. Under Regulation 11(2), an organiser is permitted to make insignificant changes to the package unilaterally if the terms of the contract allow it. However the situation is different if the organiser is constrained by circumstances beyond its control to alter significantly any of the main characteristics of the travel services including changes to flights such as the points, dates and time of departure and return. In these circumstances, Regulation 11(4) – (11) provides that the organiser must offer the traveller a substitute package of equivalent or higher quality, if possible, and the traveller may elect to accept that substitute or terminate the contract. If the traveller terminates the contract, the organiser is liable to provide a refund.
55. There is no dispute that the PTRs apply to the holidays cancelled by the OTB Group, which are the subject of this claim. Nor is there any dispute that OTB, Sunshine Holidays or CPH are traders and organisers for the purposes of the PTRs.
56. There is also no dispute that it is a fundamental feature of the regime found in the PTRs that liability for performance of the package viz-a-viz the traveller lies with the organiser irrespective of whether the services are to be performed by the organiser or by any other travel service providers. The reason for this is explained in §7.3 of the explanatory memorandum to the PTRs:
- “As package services are often complex combinations of travel services, including multiple services and various providers, a problem with the delivery of one service may affect the delivery of others. By making the organiser responsible for the whole package, this avoids the consumer having to deal with multiple parties if something goes wrong.”*
57. The principal dispute between OTB Group and Ryanair in relation to the interpretation of PTRs is in relation to Regulation 29 and whether it creates a free-standing right of redress or whether, as Ryanair alleges, it merely preserves the organiser’s rights to seek recovery from travel service providers under a relevant contract (if one exists) or other causes of action.

*Directive (EU) 2015/2302*

58. Directive (EU) 2015/2302 repeals and replaces Directive 90/314/EEC and provides in so far as material:

“Whereas

...

(2) Tourism plays an important role in the economy of the Union and package travel, package holidays and package tours (“packages”) represent a significant proportion of the travel market. That market has undergone considerable changes since the adoption of Directive 90/314/EEC. In addition to traditional distribution chains, the internet has become an increasingly important medium through which travel services are offered or sold. Travel services are not only combined in the form of traditional pre-arranged



packages, but are often combined in a customised way. Many of those combinations of travel services are either in a legal ‘grey zone’ or are clearly not covered by Directive 90/314/EEC/ This Directive aims to adapt the scope of protection to take account of those developments, to enhance transparency, and to increase legal certainty for travellers and traders.

...

(36) This Directive should not affect the rights of travellers to present claims both under this Directive and under other relevant Union legislation or international conventions so that travellers continue to have the possibility to address claims to the organiser, the carrier or any other liable party, or, as the case may be to more than one party. It should be clarified that in order to avoid overcompensation, compensation or price reduction granted under this Directive and the compensation or price reduction granted under other relevant Union legislation or international conventions should be deducted from each other. The organiser’s liability should be without prejudice to the right to seek redress from third parties, including service providers.

...

Article 22

### **Right of Redress**

In cases where an organiser or in accordance with the second subparagraph of Article 13(1) or Article 20, a retailer pays compensation, grants price reduction or meets the other obligations incumbent on him under this Directive, Member States shall ensure that the organiser or retailer has the right to seek redress from any third parties which contributed to the event triggering compensation, price reduction or other obligations.

### *Regulation 261*

59. Regulation 261 was previously a directly effective EU Regulation and since 31 December 2020 is now “retained EU law” under sections 3(1), (2) and (4) of the European Union (Withdrawal) Act 2018. Under Articles 5(1) and 8(1)(a), in cases of flight cancellations travellers are entitled to be offered the choice between several alternative arrangements, including the option of reimbursement within seven days of the full cost of the ticket at the price at which it was bought for the part or parts of the journey not made. This right of reimbursement does not apply to travellers whose flights form part of a package where a right to reimbursement arises under the PTRs (article 8(2)).
60. It is important to keep in mind that Regulation 261 provides travellers with rights against airlines. It does not, however, exclude any claim for breach of contract which a traveller might have against an airline as a consequence of delay or compensation. Of course, if a traveller receives compensation under Regulation 261, that compensation is likely to equal or outweigh any damages otherwise recoverable for breach of contract.

## The Contractual Framework

### *Ryanair*

61. Access to Ryanair’s website to make flight bookings is governed by “the Website Terms of Use”. Ryanair say, and this has not been disputed by OTB Group, that it is not possible to use the Ryanair website without first expressly agreeing to be bound by its terms (by clicking on “I accept”). Under the Website Terms of Use:
  - a. The Ryanair Website is the only website authorised to sell Ryanair Group flights (clause 2); and
  - b. Accessing the Ryanair Website other than for private non-commercial purposes is not permitted (clause 3).
62. Ryanair say that the effect of the Website Terms of Use is to prohibit OTB Group from selling Ryanair flights and from accessing Ryanair’s website to do so. OTB Group deny that they are aware of this prohibition. There is, however, force to Ryanair’s submission that this denial is implausible in circumstances where Ryanair DAC has brought proceedings in Ireland to restrain OTB from accessing the website and OTB entered a conditional appearance to those proceedings on 24 January 2011 and where the OTB Group use e-mail addresses to make bookings for travellers, which are intended to conceal who is making the booking.
63. Notwithstanding the provisions of Ryanair’s Website Terms of Use, it is clear that once flights are booked by OTB Group companies for travellers there was a contract of carriage by air between the travellers in question and Ryanair for the flights which have been booked. This was not disputed by Ryanair.
64. Ryanair submits that its general terms and conditions of carriage (“GTCCs”) provide that travellers are entitled to refunds as provided under Regulation 261, but not otherwise. This is said to be achieved pursuant to the following terms:
  - a. Clause 9.2.1 provides that, in the event Ryanair cancelled a flight, which a traveller had booked, or failed to operate the flight reasonably according to schedule, or cancelled a route, then the traveller may be entitled to rights under Regulation 261/2004 (or under the Montreal Convention 1999).
  - b. Clause 10.1 provides that, except where clauses 4.2, 10.2, 10.3 and 10.4 applied, all amounts paid for flights operated by Ryanair are non- refundable.
  - c. Clause 10.2 provides that, where a refund is given under clause 9.2, it will be equal to the fare a traveller paid for the particular flight that the traveller cannot take plus any associated taxes, fees and charges that the traveller paid.
65. The overall effect of clause 9.2.1 in conjunction with Article 8(2) of Regulation 261 is that where a flight is cancelled and the traveller has a right of refund under the PTRs, the traveller is not entitled a refund under either Regulation 261 or the GTCCs.
66. However, it is important to also have regard to clause 9.1.2 which deals with major changes. That provides:

*If we change flight timings or numbers before scheduled departure, we will notify you about these changes by e-mail and text message (if you gave us a phone number for this purpose) Except where clause 9.2 below applies, if before the date of travel:*

- *We make a change of at least 5 hours to the scheduled departure time;*
- *This is unacceptable to you; and*
- *We cannot book you on an alternative flight which is acceptable to you;*

*You will be entitled to a full refund of all amounts paid to us in connection with that flight.*

67. It is therefore the case that where a flight is subject to a change to the scheduled departure time of more than 5 hours, then a traveller may be entitled to a refund pursuant to clause 9.1.2 notwithstanding the terms of clause 10.1.

#### *OTB Group*

68. Bookings made by travellers with the individual claimants were subject to the booking conditions used by each OTB Group company. They are on materially the same terms. Under the PTRs, the provisions of regulations 11, 12, 13 and 14 are implied terms of the booking conditions.

69. Regulation 11 of the PTRs allows organisers to unilaterally make insignificant changes to a package that are permitted under the booking conditions but places obligations on the organiser if significant changes are made. The PTRs do not define an insignificant change but that term is defined under clause 30 of OTB's booking conditions, clause 29 of Sunshine Holidays' booking conditions and clause 25 of CPH's booking conditions. Each defines an insignificant change as being:

- a. An alteration of the travellers' outbound or return flights by less than 12 hours; and
- b. A change of UK departure airport where the change is to a geographically proximate airport, as specified in each of the booking conditions.

### **The Law relating to Summary Judgment and to Striking Out**

#### *Summary Judgment*

70. Both parties invite the Court to grant summary judgment; OTB Group in respect of their claim generally and Ryanair in relation to OTB's claims for unjust enrichment. Both parties also addressed me as to the correct approach I should take in deciding whether to grant summary judgment. With this in mind, I believe it is helpful to address the relevant authorities on the approach I should take before I consider each of the applications.

71. As a starting point, the approach I should take is set out in the well-known summary provided Lewison J. (as he then was) in Easyair Ltd v. Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]:

*“As Ms. Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*

*i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: [Swain v Hillman \[2001\] 2 All ER 91](#);*

*ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: [ED & F Man Liquid Products v Patel \[2003\] EWCA Civ 472](#) at [8];*

*iii) In reaching its conclusion the court must not conduct a “mini-trial”: [Swain v Hillman](#);*

*iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: [ED & F Man Liquid Products v Patel](#) at [10];*

*v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: [Royal Brompton Hospital NHS Trust v Hammond \(No 5\) \[2001\] EWCA Civ 550](#);*

*vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: [Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd \[2007\] FSR 63](#) ;*

*vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: [ICI Chemicals & Polymers Ltd v TTE Training Ltd \[2007\] EWCA Civ 725](#) .”*

72. The decision in Easyair concerned an application for reverse summary judgment but the same principles apply to an application for summary judgment by a claimant. In the context of the present case and the scope of the evidence put before me, it is important that the Court does not conduct a mini-trial. Equally, it is also important that the court should not allow factual disputes which might arise in relation to claims for a refund in respect of a specific flight or flights to distract the court from deciding points of law or principle which underpin either the claim generally or Ryanair's defence to the claim. Otherwise, the parties could spend significant time and resources addressing the detail of individual bookings, which may not be necessary depending on the decision as to the points of principle and their impact on the underlying factual disputes.
73. The question of whether in principle OTB Group has a right to compensation from Ryanair under Regulation 29 of the PTRs does not depend on the facts behind the cancellation of an individual flight and the cancellation of any related package holiday. Similarly, the question of whether OTB Group's claim for unjust enrichment fails as a matter of law is not dependent on the question whether any change to a flight by Ryanair led to OTB Group cancelling the related holiday and paying a refund for the flight concerned.
74. Where the Court does decide to 'grasp the nettle' and finally decide a point of law, then it must follow that the Court decides the issue on the balance of probabilities rather than simply on the basis of whether the applicant has a real as opposed to a fanciful prospect of success; see Easyair at §15(vii) and also Rhodia v. Neo [2021] EWHC 1035(Ch) at §83.
75. Ryanair submitted in relation to the question of whether a right of redress is available under Article 29 that this issue could not be determined without a full trial in order to ensure that all salient facts were before the Court. I do not accept this submission. The facts which go to how the flight bookings were made and as to how the parties operate their businesses are largely matters of common ground and in evidence before me. The detail of how an individual booking was made and whether the flight was cancelled or subject to a major change will not affect the question of whether a right of redress exists in principle.

#### *Striking Out - The CPR 3.4(2) application*

##### *Relevant Principles*

76. CPR 3.4(2) provides that the Court may strike out a statement of case if it appears to the Court:
- “(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*
- c) that there has been a failure to comply with a rule, practice direction or court order”*
77. Ryanair rely on each of these grounds to strike out paragraph 15(2) of OTB's Group's Reply (dealing with major changes) on the basis that:

- a. It is an abuse of process because Ryanair have not had an opportunity to respond to it in a statement of case.
  - b. It introduces a new claim with a different factual basis.
  - c. It does not disclose reasonable grounds for relying on major changes because the paragraph does not say on what basis the traveller's holiday has to be cancelled.
78. They also submit that OTB Group's plea of unjust enrichment as pleaded in paragraphs 15 to 17 of the Particulars of Claim and paragraph 23(1) of the Reply should be struck out on the grounds that it is an abuse and discloses no reasonable grounds for bringing the claim.
79. The core principles applicable in the context of applications under CPR 3.4(2)(a) as combined with an application for reverse summary judgment under CPR 24.2 were summarised by Professor Burrows QC (as he then was) in The Federal Republic of Nigeria v J.P. Morgan Chase Bank, N.A. [2019] EWHC 347 (Comm) at §6 and are similar to the principles laid down in the Easyair case:

*“As regards applications by defendants for reverse summary judgment, the central points to be derived from [the] cases are as follows:*

*i. The burden of proof is on the defendant.*

*ii. The court must consider whether the claimant has a ‘realistic’, as opposed to a ‘fanciful’, prospect of success.*

*iii. The court should not conduct a mini-trial. Where there is a dispute on the facts, the court should assume that the claimant will be able to prove the facts it is alleging unless it is clear that there is no real substance to those allegations, as where they are contradicted by the documentary evidence.*

*iv. If there is a short point of law, or construction, and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, the court should grasp the nettle and decide it.”*

80. The above quotation is consistent with the guidance in the Easyair case set out earlier in this judgment.
81. Applications under rule 3.4(2)(b) must satisfy a two-stage test:

*“First, the court has to determine whether the claimant's conduct was an abuse of process. Secondly, if it was, the court has to exercise its discretion as to whether or not to strike out the claim ... It is at that second stage that the usual balancing exercise, and in particular considerations of proportionality, becomes relevant”:* Standard Life Assurance Ltd v Building Design Partnership Ltd [2022] 1 W.L.R. 878 §37.

82. In Standard Life, the Court of Appeal also confirmed (at §39-42) the importance of complying with the basic ingredients of a pleading, confirming that the statement of case must be pleaded in such a way as to allow the defendant to know the case that it

has to meet, and that pleadings should not be vague and unparticularised, and if they are, they are liable to be struck out.

*The PD16 §9.2 prohibition*

83. Practice Direction 16, §9.2 provides:

*“A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example a reply to a defence must not bring in a new claim. Where new matters have come to light the appropriate course may be to seek the court’s permission to amend the statement of case”.*

84. The PD16 §9.2 prohibition has been considered in a number of recent cases, and the relevant principles may be summarised as follows:

- a. While a Claimant may plead new facts in order to refute a defence, it is not entitled to plead a new ground of claim: Martlet Homes Ltd v Mulalley & Co. Ltd [2021] EWHC 296 (TCC) at §20-22. In that case, Pepperall J confirmed that *“new claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply”*: at §20. He explained the rationale for the Practice Direction as follows (at §21):

*‘Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant.’*

- b. The PD16 §9.2 prohibition is not limited to new causes of action, but also extends to new allegations in respect of a cause of action that has already been pleaded: Powis Street Estates (No.3) Ltd v Wallace LLP [2021] EWHC 3269 (Ch) at §28(iii)-(v) and 34-35 and the conclusion in Martlet Homes at §34.

85. This approach is on all fours with the approach taken by the courts in determining what constitutes a new cause of action for the purposes of CPR 17.4. In Co-operative Group Ltd v Birse Developments Ltd [2013] EWCA Civ 474, a *“leading authority on what constitutes a new cause of action”* (White Book §17.4.4), Tomlinson LJ summarised the relevant principles as follows:

*“20. In the quest for what constitutes a “new” cause of action, i.e. a cause of action different from that already asserted, it is the essential factual allegations upon which the original and the proposed new or different claims are reliant which must be compared. ...*

*21. The court is therefore concerned with the comparison of “the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed” – see per David Richards J in HMRC v Begum*

[2010] EWHC 1799 (Ch) at paragraph 32. “A change in the essential features of the factual basis (rather than, say, giving further particulars of existing allegations) will introduce a new cause of action” – *ibid*, paragraph 30.

22. *Where an amendment pleads a duty which differs from that pleaded in the original action, it will usually assert a new cause of action – ..... where different facts are alleged to constitute a breach of an already pleaded duty, the courts have had more difficulty in deciding whether a new cause of action is pleaded. ...The question to be resolved is therefore one of fact and degree. For my part I am not convinced that one needs to look further than for a change in the essential features of the factual basis relied upon, bearing in mind that the factual basis will include the facts out of which the duty is to be spelled as well as those which allegedly give rise to breach and damage.”*

86. Ryanair submits that the PD16 §9.2 prohibition is a broad one and applies even where the claimant disavows any additional ground of claim.
87. More generally in relation to the requirements of a pleading and specifically in relation to the plea of unjust enrichment, Ryanair draw my attention to a passage from the decision of the Court of Appeal in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co EC [2013] EWCA Civ 1169 at [17]:

*“Particulars of Claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said that the facts give rise to a right to the remedy being claimed.”*

88. In contrast, OTB Group points to the reminder of Saville LJ in British Airways Pension Trustees Ltd v. Sir Robert McAlpine & Sons Ltd (1994) 45 ConLR 1 at [5] that ‘pleadings are not a game to be played at the expense of the litigants’.
89. OTB Group also rely on the decision in Martlet, in which Pepperall J. stated that “a Reply can usefully admit a fact alleged in the Defence ... while explaining why such admitted fact does not provide a defence to the claim”.

#### *Disposal of the application to strike out*

90. OTB Group say that delay by Ryanair in bringing on their application suggests that the application is ‘opportunistic’. I do not accept this submission. Ryanair’s application raises serious issues for consideration as to where the boundary lies between what is a new cause of action or allegation of new facts such that it is essential that the case is pleaded in the Particulars of Claim and what properly falls within a rebuttal of a defendant’s case such that it is sufficient that the matter is raised in the Reply.
91. OTB Group also point out that there is a fine line both as a matter of law and as a matter of fact between whether a flight is to be treated as having been cancelled or as having been subject to a change. In this regard, they point to:



- a. The decision of the CJEU in AirHelp Ltd v. Landamotion GmbH (Case C-263/20 of 21 December 2021) in which the Court held that for the purposes of Regulation EC 261/2004 “*a flight is regarded as being ‘cancelled’ in the case where the operating air carrier brings that flight forward by more than one hour*”.
  - b. The interpretative guidelines from the European Commission on Regulation 261 at paragraph 3.2.1 in which the European Commission stated that “*Cancellation occurs in principle where the planning of the original flight is abandoned and the passengers of that flight join passengers on a flight which was also planned ...*”.
  - c. The evidence from Mr. Phillips and Mr. Morton which suggests that there is a fine line between cancellations and major changes. They cite a flight which was consolidated with another flight; in another words, the flight was cancelled and the travellers were moved to the other flight.
92. In contrast, Ryanair say that the Particulars of Claim are clear that the factual basis of the claims is that each of the relevant flights were cancelled. They point, for example, to the pleas in paragraphs 8 to 10, 12 to 13 and 15 to 17 and to the claim for declaratory relief being expressed to relate only to circumstances in which Ryanair cancelled a relevant flight. They point to paragraph 15(2) of the Reply which admits that 699 of the relevant flights were not cancelled but were subject to major change.
93. Ryanair say that this is a new basis for liability and not a case where OTB Group have admitted a fact alleged in the Defence but explained why it does not have relevance.
94. Ryanair also say that paragraph 15(2) is defective because OTB Group do not particularise on what basis a change in flight time of 5 hours or more required or entitled OTB Group to cancel the traveller’s holiday bookings. Ryanair say Paragraph 15(2) should therefore be struck out on the basis that it discloses no reasonable grounds for bringing or defending the claim and does not permit Ryanair to understand the fundamental basis of the claims being brought against them or to raise significant matters by way of defence that they could have done had OTB Group properly set out their case in the Particular of Claim.
95. Does paragraph 15(2) raise a new cause of action? I am satisfied that it does not. This is not a case similar to that in Martlet or in Birse, where a claimant has raised a new and separate breach of contract or separate breach of duty arising out of different defects in construction. Rather, OTB Group’s case continues to depend on Ryanair’s treatment of the same flights and the same travellers and relates to the same package booking. Underlying OTB Group’s case whether the flight was cancelled or was the subject of a major change are the following allegations:
- a. Ryanair cancelled or made a major change to a flight and offered their traveller a refund.
  - b. OTB Group were obliged to pass that offer on to the traveller, who accepted the offer of a full or partial refund.
  - c. Consequently, OTB Group were no longer able to maintain the holiday booking and were required to cancel it.

- d. OTB Group have refunded the traveller and are entitled to recover the cost of the flights from Ryanair either based on a statutory right of recovery under the PTRs or as a matter of unjust enrichment.
96. These essential allegations do not change whether the underlying flights were cancelled or were the subject of major change. Nor does OTB Group seek a different remedy depending on whether the flights in question were cancelled or the subject of major change. In both instances, OTB Group say they are entitled to a refund of sums, which Ryanair offered to refund to the travellers.
97. For the same reasons, I am also satisfied that to the extent that OTB Group could be said to be raising new facts in support of their existing cause of action, they are essentially relying on the facts put forward by Ryanair and submitting that based on those facts, OTB Group are still entitled to recover. Accordingly, I accept OTB Group's submissions that paragraph 15(2) of the Reply should not be struck out as an abuse of process.
98. There is force to Ryanair's criticism that for the purposes of their case on major change, OTB Group rely on clause 9.1.2 of the GTCC as establishing the basis on which Ryanair is liable to provide a refund to travellers and there is no reference to clause 9.1.2 in OTB Group's pleadings. But this is a different case to the situation in the Credit Suisse case, for example, where the claimant relied on the alternative provision of the contract as providing an alternative remedy to the one originally sought by the claimant. Further, OTB Group do not need to rely on the specific provisions of clause 9.1.2 for the purpose of their claim. Their claim arises because in relation to all flights, Ryanair offered a refund to the travellers, which was accepted. The failure to refer to clause 9.1.2 is not therefore a ground to strike out paragraph 15(2).
99. As to whether the pleading should be struck out as disclosing no reasonable grounds for bringing their claim, I consider that it should not.
100. Dealing first with the matters of principle, Ryanair say that as a matter of principle no claim in unjust enrichment can arise where a flight is subject to major change. They also say that there is no statutory right to contribution under the PTRs. The principal argument, which Ryanair say arises in relation to flights subject to major change, is that there is no legal right for OTB Group to cancel holiday bookings because OTB Group's booking conditions only require OTB Group to pass on options from airlines where there is a significant change to a flight or the flight is cancelled (see, for example, clause 12 of the OTB booking conditions). They also say that OTB Group have failed to plead the basis on which each change of flight time of 5 hours or more required OTB Group to cancel their holiday bookings.
101. I deal below in the context of summary judgment with matters of principle and why OTB Group's booking conditions are not a bar to any claim by OTB Group in respect of a flight which was subject to a major change. For the same reasons, I do not consider that OTB Group's plea relating to major changes should be struck out as disclosing no reasonable cause of action.
102. So far as matters of detail are concerned, Ryanair submit that OTB Group's pleading is embarrassingly vague because it does not descend into the required detail for each of the relevant flights to explain why the change to flight time required OTB Group to

cancel the holiday booking thereby triggering an entitlement to compensation. For the reasons set out below and bearing in mind the admission made by Ryanair as to the existence of extraordinary and unavoidable circumstances, I do not consider that it is necessary for OTB Group to go further to establish that they could not reasonably maintain each holiday package following the changes to flights in order to make good their claim. Accordingly, it follows that I do not consider that it was necessary for OTB Group to plead further detail in relation to each booking.

103. It follows from the findings above, that Ryanair's application to strike out paragraph 15(2) of the Reply pursuant to CPR Part 3.4(2) fails.
104. OTB Group submitted that if I did strike out paragraph 15(2) of the Reply, I should give them permission to amend their Particulars of Claim in line with the draft provided to me with their skeleton argument. No application notice was issued in respect of the amendments and the application was only made orally during Mr. Sutcliffe's submissions.
105. If I had accepted Ryanair's argument that they had no reasonable opportunity to meet the case advanced against them in the Reply such that I should strike out paragraph 15(2) of the Reply, it would not have been appropriate to grant OTB Group permission to amend without a formal application.
106. The other limb of Ryanair's strike-out application attacked OTB Group's case on unjust enrichment more generally. Ryanair submit that the claim should be struck out on the ground that OTB Group only pleaded their case on this liability in their Reply at paragraph 23(1) and even then, inadequately. Relying, inter alia, on the Credit Suisse case, Ryanair submit that this alone would be a sufficient basis to strike out the unjust enrichment claim as it is contrary to the overriding objective, unfair and an abuse of process.
107. While there is force to the criticism that OTB Group failed to plead their case as to the basis of their plea sufficiently clearly in the Particulars of Claim, I am satisfied that the essential basis as to the plea of unjust enrichment was made out in the Particulars of Claim. The essential allegations of fact which OTB Group relies on for the basis of their plea are to be found in the Particulars of Claim, namely:
  - a. That Ryanair had cancelled travellers' flights.
  - b. That OTB Group as organiser of the travellers' package holidays and as agent for the travellers had paid refunds to travellers including the price of the flights.
  - c. That Ryanair had failed to pay the sums refunded by OTB Group to the relevant travellers and was thereby unjustly enriched.
108. It would have been better if OTB Group had expressly identified the two separate grounds on which they seek to support their plea of unjust enrichment in the Particulars of Claim rather than in paragraph 23 of the Reply but I do not consider that the plea as made is so embarrassing as to be an abuse of process or unfair such that I should in the exercise of my discretion strike out the plea. This is particularly so, where (i) there is no dispute that Ryanair separately offered travellers the option of a refund of the same flight costs and (ii) it was clear from the submissions made to me that Ryanair knew the

case they had to meet and were able to do so. Accordingly, Ryanair's application to strike out the unjust enrichment plea fails.

### **Reverse summary judgment**

109. OTB Group make their claim in unjust enrichment on the grounds that the cancellation of flights amounted to a total failure of consideration alternatively to a breach of contract. In making payments to travellers, OTB Group say they have discharged a liability which Ryanair would otherwise have to travellers. In these circumstances, OTB Group submit that Ryanair has been unjustly enriched. In particular:
- a. By section 1 of the Civil Liability (Contribution) Act 1978, OTB Group is entitled to recover a contribution from Ryanair in respect of refunds provided.
  - b. Alternatively, OTB Group are entitled to contribution or reimbursement at common law or in equity because they have paid refunds and thereby discharged Ryanair's liabilities to OTB Group's travellers.
110. Ryanair submit that the claim in unjust enrichment is defective because:
- a. It is a necessary pre-condition to any contribution claim under s.1 of the Civil Liability (Contribution) Act 1978 ("the 1978 Act") that the parties are both liable "*in respect of the same damage*" and the parties are not here both liable for such damage.
  - b. There is no claim for a contribution or reimbursement at common law or in equity even if OTB Group have discharged a liability owed by Ryanair to OTB Group's travellers. The principal basis on which this submission is made is that Ryanair has no enforceable contractual obligation to make refunds in respect of the flights which were cancelled or subject to major change.
111. Dealing first with the question of whether OTB Group have a right of contribution under s.1 of the Civil Liability (Contribution) Act 1978, this depends on whether OTB Group and Ryanair can be said to have a liability in respect of 'the same damage' for the purposes of s.1.
112. This is not a point which I consider suitable for summary determination even if I am deciding the question on the balance of probabilities. It is also not a question which I consider it necessary to decide for the purposes of the application before me.
113. There are two issues in play: (1) what would be the nature of the traveller's claim against each of Ryanair and OTB Group and (2) is that a claim in respect of the same damage?
114. OTB Group accepts that the relevant claim by a traveller against group companies is a claim for a refund pursuant to Regulation 13 of the PTR. They submit that this is a claim for liquidated damages because Regulation 13 is incorporated as an implied term into the package holiday contract (Regulation 13(1)) and because Regulation 13(3) provides that once the organiser has provided the traveller with a full refund, it is not liable for additional compensation. I do not agree with OTB Group's analysis of Regulation 13. While Regulation 13(3) is effective to exclude a claim for damages arising out of the termination of a package holiday contract, the requirement on the

organiser to provide a full refund is expressed in terms which is consistent with an obligation in debt or restitution. The purpose of Regulation 13(3) is to regulate the position in circumstances where the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances. In other words, in circumstances where the organiser is not at fault.

115. As for the traveller's claim against Ryanair, it is OTB Group's case that the claim arises either by way of a total failure of consideration or as a claim for damages for breach of contract. In the former case, it is not a necessary element of OTB Group's case that Ryanair is in breach of contract.

116. In circumstances where the traveller's claim against one or both of Ryanair and OTB Group does not depend on a wrong, it is uncertain whether there is damage for the purposes of s.1(1). The situation is summarised, helpfully, at §19-30 of *Goff & Jones on The Law of Unjust Enrichment*, 10<sup>th</sup> ed. at §19-30.

*“There are other situations where it is less certain whether or not the Act applies. Several cases have considered whether it follows from the fact that the word “damage” in ss.1 and 6 is not synonymous with the word “damages” that the Act covers claims between parties whose liabilities are not wrong-based but are liabilities for debt or unjust enrichment. In our view, claims of this kind do not fall within the scope of the Act, because the Law Commission’s 1977 Report and Hansard indicate that Parliament’s intention was solely to enact a scheme for contribution between wrongdoers.”*

117. *Goff & Jones* goes on to identify authorities from the Court of Appeal and House of Lords which support both views cited in the paragraph above and to conclude that the law is unsettled; see also the discussion in *Niru Battery v Milestone Trading* [2004] EWCA Civ 487 at [74] – [78].

118. Against the above background and given potentially conflicting appellate authorities, I do not consider that this issue is one suitable for summary determination.

119. This brings me then to the alternative basis for OTB Group's claim in unjust enrichment, namely that there was a total failure of basis (to adopt the terminology preferred by the Court of Appeal in *Dargamo Holdings v. Avonwick Holdings* [2021] 2 CLC 583) or that Ryanair were liable to the travellers for breach of contract.

120. Central to Ryanair's challenge to both limbs of OTB Group's case on unjust enrichment is their case that pursuant to their GTCCs, Ryanair has no contractual obligation to make refunds to OTB Group's travellers even if they have accepted a practical obligation to do so. Ryanair say that there can be no valid plea of total failure of basis nor a claim for breach of contract in circumstances where the parties have allocated the risk under a valid and subsisting contract. In relation to the plea of total failure of basis both Ryanair and OTB Group referred me to the recent decision of the Court of Appeal in *Dargamo Holdings Ltd & Anor v. Avonwick Holdings Ltd & Anor* referred to above.

121. *Dargamo* was a case concerning, inter alia, whether there had been a total failure of basis in relation to the price for the sale of certain shares. In simple terms, the claimant alleged as one limb of its case that there was a claim in unjust enrichment on the basis

that a certain proportion of the price under a share purchase agreement for a company, Castlerose, was in fact intended to be the price of shares in other Ukrainian companies (which were not named in the agreement). The Court of Appeal upheld the Judge's decision that there had been no failure of basis on the grounds that where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting contract, there was no proper scope for inquiring into an alternative basis that was plainly contrary to the express basis freely agreed between the parties.

122. The following passages from the judgment are helpful in deciding this case:

*“[55] Courts and commentators have broken down the conceptual structure of a claim in unjust enrichment into four elements: (i) Has the Defendant been enriched (ii) Was the enrichment at the Claimant's expense (iii) Was the enrichment unjust? (iv) Are there any defences?*

...

*[67] However, as demonstrated by Roxborough, invalidity of a relevant contract is not a necessary pre-requisite to a successful claim in unjust enrichment. That is not to say that claims in unjust enrichment must not respect contractual regimes and allocations of risk agreed between the parties. On the contrary, as explained by Professor Burrows in The Restatement (at 3(6)), an 'often overlooked but crucial element of the unjust factors scheme is:*

*'that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant's expense is not unjust. ...'*

123. In other words, if the terms of the contract for carriage between Ryanair and the individual travellers were effective to exclude any liability on the part of Ryanair to compensate a traveller if Ryanair failed to provide the flight or flights booked, then there could be no claim for total failure of basis. Nor could there be a claim for breach of contract. I accept this proposition but it leads on to the next question as to whether Ryanair's terms were so effective.
124. So far as Ryanair's liability to their travellers is concerned, Ryanair say that a traveller's right to a refund under the GTCCs is governed by clauses 9.2, 10.1 and 10.2 of the GTCC (set out above). Ryanair says that pursuant to these terms a traveller may only seek a refund for a cancelled flight from Ryanair when it is entitled to recourse under Regulation 261 or under the Montreal Convention (which the parties agree is not relevant). As already noted above, this is not the complete picture because Clause 9.1.2 also creates a right to a refund in circumstances which fall outside those contemplated in clauses 9.2 and 10.2 and which would be enforceable by a traveller notwithstanding clause 10.1.
125. I accept that Ryanair does not have an absolute obligation to provide a flight and that its obligations to individual travellers are circumscribed by Regulation 261 and the GTCC. Nevertheless, neither Regulation 261 nor the GTCC absolutely excludes a claim in damages by a traveller who has a valid contract of carriage and receives neither a flight

from Ryanair nor compensation in lieu of the flight. I also accept that it is arguable that clause 10.1 is not effective in its wording to exclude a claim for total failure of basis.

126. The above conclusions are sufficient for me to reject Ryanair's application for reverse summary judgment on the grounds that OTB Group do not have a legally sustainable basis on which to ground their claim in unjust enrichment based on total failure of basis or breach of contract.
127. Of course, a separate question arises in relation to OTB Group's application for summary judgment, namely whether Ryanair have no reasonable prospect of defending that claim. As to this, I accept that factual questions as to the circumstances in which Ryanair was unable to provide the flights could arise whether the claim is one in damages or for total failure of basis. This is particularly the case when it is the essence of OTB Group's case under Regulation 29 that there were extraordinary and unforeseen circumstances which justified the cancellation of the relevant package holidays and when the background to the claim is the pandemic; in other words, circumstances which might provide a defence to a claim for breach of contract. Further, in relation to any claim for damages for breach of contract, issues might also arise as to the proper measure of damages recoverable by a traveller and whether it was equivalent to the refund paid by OTB Group.
128. However, there is another simpler reason why I consider that Ryanair's application for reverse summary judgment fails and why OTB Group's claim for summary judgment on their unjust enrichment claim succeeds in principle. Ryanair suggest that they offered refunds to travellers irrespective of their contractual liability to do so. It is said that this was a commercial decision based in part at least on Ryanair's understanding of what was expected from them by regulatory authorities. But the refunds were also obviously intended to end any liability Ryanair had to the individual travellers arising out of the cancellation or change to the traveller's flights however that liability might arise.
129. I do not, therefore, accept that the refunds offered had no contractual effect. Each of the travellers to whom a refund was offered had a contract for carriage by air with Ryanair which was made by them (or by another traveller on their behalf) acting through their agent, OTB Group. Whether Ryanair had a right under the GTCC to refuse that traveller a refund pursuant to clause 10.1 or not, Ryanair chose not to exercise that right and offered the travellers an unconditional refund, which on the evidence, the travellers accepted. In other words, as Mr. Sutcliffe submitted, Ryanair had a liability to the travellers to make the refunds offered.
130. The evidence before me is that the relevant e-mails from Ryanair offering the refund have been found for all but 20 of the bookings and I find that there is no realistic prospect of Ryanair establishing that similar e-mails were not sent to the travellers for the remaining 20 bookings. If there was evidence to suggest that the position might have been different in relation to those 20 bookings, then no doubt that would have been put before me.
131. Further, in circumstances where the evidence before me is that the dispute between OTB Group and Ryanair over OTB Group booking flights using the Ryanair website has been going on since about 2011 and where there is evidence that Ryanair has similar disputes with other on-line travel agents, it is unrealistic to suggest that when

Ryanair made the unqualified offers of refunds, they did not know that they would be making offers to travellers who had booked directly and travellers who had booked through on-line travel agents. Indeed, the evidence of Mr. Phillips and the submissions made to me on behalf of Ryanair were to the effect that Ryanair made the offers not knowing whether a traveller had booked directly or not.

132. It follows that there is or was a liability owed by Ryanair to travellers arising out of the cancellation or major changes to the flights which is sufficient for OTB Group's claim in unjust enrichment. Ryanair has been enriched by the payment of refunds by OTB Group to travellers for sums including the cost of flights for which refunds were offered by Ryanair and which it would be unjust if Ryanair were not required to pay the refunds to OTB Group. This is subject to the particular issues of causation or quantum which I address below.

### **Is there a right of reimbursement under the PTRs?**

133. The issue of principle under this heading is whether Regulation 29 of the PTRs creates a right of redress or is simply permissive, confirming that an organiser may exercise any existing rights of redress it has outside the Regulation. This is a question which has not apparently been decided before by the courts of England & Wales. Nor is there any jurisprudence of the European Court of Justice as to the interpretation of the relevant provisions of the Directive. I have, accordingly, considered whether it is appropriate on an application for summary judgment for me to decide this question. In this regard, Ryanair submitted that there may be questions of fact that are pertinent to the issue which can only be determined at trial. They also submit that there may be further legal research to be done. I do not accept these submissions. The general facts concerning the circumstances in which the relevant flights and holidays were cancelled are before the court and either not in dispute or are ones which are not susceptible to realistic challenge. As to the need for legal research, it is important to keep in mind that I am being asked to construe the PTRs which are UK regulations. It was not submitted that the PTRs are incompatible with the Directive. National regulations from other jurisdictions might be of tangential interest but they would not be directly relevant because those regulations would need to be construed against the background of their own national legal system and the contractual or non-contractual rights otherwise available to an organiser. There is no wider research to be done which is likely to assist on the question I have been asked to decide. Accordingly, I am satisfied that it is appropriate for me to decide the issue.
134. I approach the issue by looking at the wording of the specific regulation, Regulation 29, the PTRs as a whole, the context, the Directive, working documents behind the Directive and any guidance I receive from academic and government commentary.
135. So far as the wording of Regulation 29 is concerned, the words 'may seek redress' can be read as being solely permissive of the organiser exercising such other contractual or non-contractual rights as the organiser otherwise has against a third party. That is the interpretation which Ryanair puts on the words 'may seek'. However, I do not accept that the words 'may seek' can only be permissive. They are equally capable of conferring on an organiser a right to redress, which the organiser may or may not decide to exercise.



136. Mr. Kennelly contrasted the language of Regulation 29 with the language of Regulation 11(8), which provides that where a traveller terminates the contract and doesn't accept an alternative package, then the organiser must refund payments made by the traveller. Mr. Kennelly suggested that if Regulation 29 were intended to provide redress it would use language consistent with an obligation that the third party must provide redress. I do not accept this submission. Regulation 11 is regulating the position between an organiser and the traveller as a consumer whereas Regulation 29 is addressing both the commercial relationship between an organiser and their suppliers as well as the possibility that there may no contractual relationship between the organiser and a third party. It is entirely consistent with these different situations that Regulation 11 is imposing an obligation on an organiser whereas Regulation 29 is giving the organiser a right. In other words, giving the organiser an entitlement.
137. Ryanair also suggested that the reference to 'redress' is too vague and that it could refer to non-pecuniary redress such as specific performance. I do not find this a realistic interpretation of the word 'redress' in the context of Regulation 29, where the organiser's right of redress only arises when the organiser pays compensation. It is clear that what is intended is financial redress.
138. Further, there are no provisions elsewhere in the PTRs which might be taken as restricting an organiser's rights against a third party. For example, Regulation 13 dealing with the organiser's rights and obligations on cancellation does not by its terms interfere with an organiser's rights to claim redress. If Regulation 29 were permissive only, it therefore raises the question why the provisions were required. An organiser would still have any existing rights of redress even in the absence of Regulation 29. On balance, therefore, I am satisfied that Regulation 29, by the words 'may seek redress', is intending to actually confer a right of redress on an organiser.
139. A conclusion that Regulation 29 is intended to confer a right of redress is consistent with the overall framework of the PTRs which is intended to provide a straightforward and comprehensive package of rights and obligations for travellers and organisers (retailers). It makes sense that, in circumstances where the regulations provide travellers with rights of compensation from an organiser notwithstanding that the holiday arrangements are being provided by other suppliers, the regulations also provide the organiser with a right of redress against those suppliers (and possibly other third parties). It is also consistent with the intention behind the regulations and, indeed, Regulation 261, namely consumer protection. It is in the interests of consumers that there is a straightforward and comprehensive package of rights which means that travellers, organisers and third parties know where they stand.
140. It might be said that there is no need for a statutory right of redress in circumstances where suppliers and organisers can regulate their relationship contractually. However, four points need to be made in this regard, all of which speak to Regulation 29 conferring a right of redress:
- a. Although in this case Ryanair say that they are not prepared to deal with on-line travel agents and only want travellers to book direct, the PTRs clearly contemplate that organisers may not be in a contractual relationship with suppliers. Travel agents and other organisers can and no doubt often will make holiday arrangements acting as agents for the traveller with the knowledge of the holiday suppliers and without a contractual relationship with the supplier.

- b. The facts of this dispute highlight the difficult issues which can arise when an organiser does not have a contractual relationship with the supplier. In this case, Ryanair have said that irrespective of their strict legal rights, they would be prepared to pay the refunds subject to certain conditions. It is not difficult to envisage circumstances where a supplier might not, however, be willing to reimburse an organiser, who has been required to pay refunds and who cannot easily establish a right of reimbursement whether in unjust enrichment or otherwise.
  - c. Regulation 29 provides a right of redress against third parties generally. There is no limitation to the right of redress solely to suppliers who might be in a contractual relationship with the organiser.
  - d. The PTRs do not expressly prevent organisers and their suppliers excluding or limiting the scope of a right of redress contractually.
141. When one considers the Directive, I accept that Recital (36) could be read as suggesting that the right of redress referred to in Article 22 of the Regulation is only intended to be permissive. However, equally, there is nothing in the Recital which is inconsistent with Article 22 imposing a positive obligation on a Member State to create a right of redress.
142. Recital (2) is also relevant. This Recital does suggest that the EU institutions intended to provide greater certainty as to the rights and obligations of organisers and suppliers in circumstances where there might not be a traditional contractual relationship between those parties. (I emphasise that in reaching this view, I am not suggesting that the EU institutions had in mind the situation where an on-line travel agent might seek to book flights through an airline's website despite the airline not wanting to do business with that agent.)
143. The reasoning set out in Recital (2) helps explain why the Directive contains an express provision governing redress in circumstances where no similar provision was to be found in the previous package travel directive 90/314/EEC.
144. Article 22 of the Directive imposes a positive obligation on Member States "*to ensure that the organiser or retailer has the right to seek redress from any third parties, which contributed to the event triggering compensation, price reduction or other obligations*". It is possible to read this Article as simply requiring Member States to ensure that there is a right of redress and, if there is an existing right of redress under national law, then no further action needs to be taken. However, the article imposes a positive obligation on a Member State to make sure not merely that any national legislation is without prejudice to a right of redress but also that the right of redress exists. This positive obligation in Article 22 would support a conclusion that Regulation 29 is intended to create a statutory right of action because it is the straightforward way of ensuring that the United Kingdom has complied with its obligations under the Directive. It also contrasts with the wording of Art. 13 of Regulation 261, which states that "*no provision of this Regulation may be interpreted as restricting [the operating air carrier's] right to seek compensation from any person ...*", which is wording very clearly intended to only preserve existing rights rather than create a new right.
145. Ryanair suggests that to construe Regulation 29 as creating a right of redress is to create an unfair and unprincipled balance of rights and obligations between air carriers and

organisers because it would create a system in which organisers have statutory rights of recovery against air carriers, when air carriers have no equivalent recourse against organisers. I do not agree that this is the case. First, it is difficult to envisage a situation where an airline would require a right of redress against an organiser in circumstances where the organiser and the airline are not in a contractual relationship. Second, the purpose of the PTRs is to give consumers rights against organisers directly rather than leaving the consumer to have to pursue individual suppliers (who may or may not be based in the jurisdiction). There is a logic to providing an organiser with a remedy against suppliers in these circumstances which does not support the requirement for a similar right of recourse as between an airline and a supplier.

146. Ryanair also refer to Recital (20) and suggest that this recital supports their interpretation of Article 29. Recital 20 provides “*This Directive should be without prejudice to national contract law for those aspects that are not regulated by it.*”. I do not read recital 20 in this way. Recital (20) is neutral as to the interpretation of Article 29. It only serves to emphasise that the Directive is not intended to cut across domestic contract law unless expressly dealt with in the Directive. It does not go so far as to suggest that EU institutions were leaving rights of redress to be addressed by national contract law nor does it suggest that the Directive is premised on there being a contractual relationship between an organiser and a supplier. Recital (2), in contrast, makes clear that the intention was that the Directive should govern non-traditional forms for the supply of package holidays.
147. As already mentioned I was referred to a number of different documents as providing interpretative guidance for the PTRs and the Directive. It was suggested that at least some of the documents should be treated as having the status of ‘travaux préparatoires’. During the hearing I asked if there was guidance or authority as to what documents should be regarded as ‘travaux préparatoires’. At the time, the parties were not able to identify such guidance or authority. However, subsequent to the hearing, the Supreme Court decided JTI Polska Sp. Z.o.o & Ors v Jakubowski & Ors [2023] UKSC 19 concerning the interpretation of the CMR Convention. In the course of the hearing, there was an issue between the parties as to the extent to which the court can have regard to the preparatory work or travaux préparatoires for the Convention. Lord Hamblen addressed the issue in his speech and said:

*“[30] In Fothergill at 278B Lord Wilberforce stated that the use of travaux préparatoires should be ‘cautious’ and only where two conditions are fulfilled:*

*“... first that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention”.*

*Lord Wilberforce explained that limiting the use of travaux préparatoires in this way would largely overcome the objections “relating to later acceding states” and “that individuals ought not to be bound by discussions or negotiations of which they may never have heard”.*

...

*[34] It is not possible to be categorical about what documents may properly be regarded as comprising preparatory work or travaux préparatoires but they are*

*most likely to be part of the formal record of the Convention rather than expressions of opinion or policy made during the process leading to treaty agreement. Examples include official explanatory reports, agreed conference minutes, published proceedings of conferences and earlier drafts of the treaty.*

*[35] The documents need to demonstrate the common intention or understanding of the parties to the treaty, not those of third parties or of the drafters. As stated by Jacob and Etherton LJJ in Grimme Landmaschinenfabrik GmbH & Co KG v Scott [2010] EWCA Civ 1110, para 96:*

*“... the travaux relevant to construction of a treaty do not include any intention of the actual draftsman who provided the text for the legislators to consider. One only goes to the travaux to find out what the legislators intended, not what someone else intended.”*

148. Applying the test laid down in JTI Polska, only the following documents might sensibly be considered as travaux préparatoires from the materials provided to me:

- a. In relation to the Directive, the European Commission’s proposal for what became the Directive and the European Parliament’s proposal for the Directive.
- b. In relation to the PTRs, the Explanatory Notes attached to the regulations.

149. The other materials from the Commission and from UK government departments may be helpful as guidance to how those institutions interpret the Directive and PTRs respectively but they are not indicative of the intention of the legislators.

150. Turning to the Commission’s proposal for the Directive, their proposal provided at Article 20 Right of Redress:

*“In cases where an organiser or, in accordance with Articles 15 or 18, a retailer pays compensation, grants price reduction or meets the other obligations incumbent on it under this Directive, no provision of this Directive or of national law may be interpreted as restricting its right to seek redress from any third parties which contributed to the event triggering compensation, price reduction or other obligations.”*

151. In contrast, the Parliament’s proposal put forward an amended Article 20, which provided that “Member States shall ensure that the organiser or retailer has the right to seek redress from” contributing third parties and included additional provisions as to what was expected of any measures introduced by the Member State. The Parliament’s justification for its proposed amendments was that the Commission’s proposed article was unclear as to whether it recognised a right to redress for organisers or not.

152. The final version of Article 22 in the Directive is in a more limited form than that proposed by the Commission. As a consequence, Ryanair relies on the difference between the Parliament’s proposal and the final form to support their submission that the Directive did not intend that Member States should introduce a right of redress in their national legislation. It is correct that the final version of Article 22 is not in the detailed form proposed by the Parliament but equally the final version of Article 22 does expressly require Member States to ensure a right of redress and is not in the

negative form proposed by the Commission. In this regard, the final form is in terms which more closely matches the intention of the European Parliament than that of the Commission.

153. In 2016, after the Directive came into effect, the European Commission published Interpretative Guidelines on Regulation 261. At paragraph 2.2.6, the Commission expressed the view that neither Regulation 261 nor the Directive deals with the question of whether the package organiser or operating air carrier ultimately has to bear the cost of their overlapping obligations and states that resolving such a matter will thus depend on the contractual provisions between organisers and carriers and the applicable national law. The footnote to this passage in the Guidelines says '*However, see as regard 'right of redress' Article 13 of the Regulation and Article 22 of Directive (EU) 2015/2302*'. Ryanair submits that paragraph 2.2.6 supports their interpretation of Article 22. In reality, the paragraph provides no particular assistance as to what the Directive is intended to achieve. It seems to me that it says no more than that it is for national law to implement the right of redress and that the parties may also regulate their relationship by agreement. Certainly, the Guidelines do not cut across my conclusion that the Directive does require the United Kingdom to ensure a right of redress even though it leaves it to the Member States to decide how to ensure that right of redress.
154. So far as the Regulation is concerned:
- a. The Explanatory Note makes no detailed provision in respect of the right of redress it simply refers to '*the right of an organiser to seek redress from a third party*'. If the Note provides any assistance, it is the positive reference to the right of the organiser to seek redress from a third party.
  - b. The initial guidance for business published by the Department for Business, Energy & Industrial Strategy in 2018 made no reference to the right of redress.
  - c. The updated guidance published by the same department in July 2022 states that Regulation 29 provides organisers with an express right to seek redress from third parties if the organiser is required to pay compensation and the third party contributed to triggering the compensation payment. The view expressed in this guidance is consistent with the conclusion that Regulation 29 introduces a new right of redress. However, it is guidance produced four years after the PTRs came into force and cannot be regarded as evidence of the intentions of the legislator when they introduced the PTRs as opposed to being the view of the department as to the meaning of the PTRs.
  - d. Guidance from the Department for Transport in July 2022 suggests at paragraphs 3.10 and 3.11 that the department doesn't think that it is clear that the PTRs confer a right of redress on an organiser. Again, this is guidance which post-dates the PTRs by some four years and while it is an expression of the view of a relevant government department, it is not evidence of the intentions of the legislator and carries no more weight than the contradictory guidance from BEIS.
155. There was a debate during the hearing as to the weight to be given to the government guidance by reference to relevant extracts from *Bennion on Statutory Interpretation* but in the end it was common ground that I could look at the guidance and that I should

give it the weight I consider appropriate. Overall, I did not gain much assistance from the guidance.

156. Finally, I was referred to extracts from the sixth edition of *Holiday Law*. However, the commentary in that book is not conclusive either way and again did not provide any particular assistance in reaching a conclusion on the meaning of Regulation 29.
157. The remaining point of principle made by Ryanair in support of their position was the absence of any guidance in the PTR as to how any right of redress is to be exercised. This is a point of some force but not one which persuades me that Regulation 29 is permissive only. The right conferred by Regulation 29 is a right to redress from any third party which contributed to the event triggering compensation. The wording of the Regulation is sufficiently clear that parties can know the test by which any contribution is to be assessed so that they can either agree any contribution or understand the principle by which a court will assess a contribution. The court is also well versed in assessing what is the event triggering compensation and the extent to which a party has contributed to that event so as to determine the appropriate financial contribution.
158. It follows from my findings above that I conclude that Regulation 29 does provide a statutory right of redress to an organiser.

### **Application of Regulation 29 in this case**

#### *Major changes*

159. Having found that Regulation 29 provides a statutory right of redress, the next question is whether OTB Group have any right of recovery in relation to the sums claimed under the Regulation?
160. Although Ryanair have put OTB Group to proof both in relation to cancellations and major changes that they were not able to offer alternative holidays:
  - a. Ryanair admit in paragraph 35(3) of the Defence that the cancellation of flights by them constituted unavoidable and extraordinary circumstances for the purposes of Regulation 13.
  - b. There is no real challenge in Ryanair's evidence to paragraph 36 and 37 of Mr. Morton's first witness statement, which sets out the general effect of the pandemic on the travel industry and the reasons why travellers were prohibited or dissuaded from taking holidays. In particular, Mr. Morton identifies the following issues as reasons prohibiting or dissuading individuals from leaving their homes or local area or travelling overseas:
    - i. Three national lockdowns imposed by the UK governments prohibiting individuals leaving their homes.
    - ii. Local restrictions imposed by UK governments prohibiting individuals from leaving their homes.
    - iii. Advice from UK governments not to travel overseas.

- iv. Advice from the Foreign, Commonwealth and Development Office (“FCDO”) against all or non-essential travel, at times on a global basis and at times in relation to specific countries.
  - v. Requirements to take Covid-19 tests before departure and return, and associated requirements to complete immigration forms such as Passenger Locator Forms.
  - vi. Requirements to quarantine at specified Government hotels, or to self-isolate, both on arrival at the destination and on return to the UK.
  - vii. A general reluctance to travel given the risks posed by Covid-19 to health.
- c. I have already found above that in relation to all the bookings, Ryanair offered flight refunds which were accepted by the travellers.
  - d. The parties have engaged in extensive correspondence and exchange of witness evidence without any examples being identified in which OTB Group could have offered a traveller an alternative package notwithstanding the cancellation or change to the Ryanair flights in question.
  - e. I have before me two very detailed schedules verified by Mr. Foggo under a statement of truth.
161. Accordingly, while I acknowledge that disclosure has not taken place, I do not accept Ryanair’s submission that the application of Regulation 29 in this case cannot be decided without a full trial. I am conscious that I must not conduct a mini-trial, but in determining whether Ryanair have a realistic prospect of establishing that OTB Group cancelled holidays in circumstances where they could have provided an alternative holiday to the travellers, it seems to me that I am entitled to take account of (i) the unchallenged evidence as to the impact of the pandemic (ii) the absence at this time of any evidence to establish a likelihood that Ryanair would be able to show that OTB Group cancelled holidays in circumstances where an alternative acceptable to the travellers could and should have been provided and (iii) Ryanair’s admission that the cancellation of flights constituted unavoidable and extraordinary circumstances.
162. Ryanair’s primary challenge to OTB Group’s case, at least in relation to major changes, turns on the impact of OTB Group’s own terms and conditions. Ryanair submits that under the terms and conditions of the different OTB Group companies, an insignificant change was defined as including an alteration of the outward or return flights by less than 12 hours and that OTB Group companies were entitled to make insignificant changes to a traveller’s arrangements without liability. Accordingly, Ryanair submit that OTB Group were not required to cancel bookings if Ryanair made changes of less than 12 hours by Ryanair to a flight and were not required to pass on to travellers any offers of refund made by Ryanair to such flights. Ryanair also say that the definition of ‘insignificant changes’ binds OTB Group and their travellers for the purposes of Regulation 11 of the PTR (which permits an organiser to make insignificant changes to a package travel contract without an obligation to make a refund). More generally Ryanair say in relation to both cancellations and major changes that OTB Group have not established that they could not offer passengers alternative holiday arrangements.

163. OTB Group's position is that whether the change to the flight time was insignificant within the terms of the package travel contract or not, they were unable in practice to provide the holiday booked by the traveller and had to cancel the holiday given the on-going effect of the pandemic. They also say that in circumstances where Ryanair offered a refund, they were obliged under the terms of their contract with the traveller or because they acted as agent for the traveller to pass on the offer of a refund and when that offer was accepted by the traveller, they had no alternative but to cancel the holiday.
164. As already set out above, there is no evidence before me which suggests a realistic possibility of establishing that OTB Group cancelled holidays where alternative flights or alternative holidays were available. I am also not necessarily persuaded that OTB Group's definition of an insignificant change in their booking conditions is determinative for the purposes of the PTRs. But, in any event, I accept OTB Group's submission that they had an obligation to pass on Ryanair's offer to travellers and that where the traveller accepted that offer they had to cancel the associated booking. In this regard, I accept that OTB Group's booking conditions do not expressly require OTB Group company to pass on any offer of a refund provided by a supplier but equally they do not expressly allow OTB Group companies to decide not to pass on an offer of a refund. OTB's Group's booking conditions may provide that there is no liability in the event of an insignificant change made by a supplier, but those provisions do not go far enough to permit OTB Group companies not to pass on offers of a refund from a supplier in the event of such a change. In this regard, I accept the submission that as agent for their travellers OTB Group had an obligation to pass on the offer of a refund from Ryanair and to accept that offer if the traveller wished to do so. I also accept OTB Group's evidence in these circumstances that they had to cancel the holidays.
165. In light of the findings above, I find that in relation to the holidays which are the subject of this claim, OTB Group were prevented from performing the contract because of unavoidable and extraordinary circumstances within Regulation 13 of the PTRs, thereby triggering a potential right to contribution under Regulation 29 equivalent to the refund offered by Ryanair. I have already found that OTB Group were obliged to pass on the offers of refund to their travellers and that OTB Group are also entitled in principle to rely on their claim in unjust enrichment.

### *Causation*

166. Ryanair also put in issue the question of causation in two respects:
- a. They say that OTB Group finds itself in the position it does because it breached the terms of use of Ryanair's website.
  - b. They say that there is an issue as to whether the cancellations of flights caused the cancellation of the package holidays.
167. As to the first ground, I accept that Ryanair believes very firmly that OTB Group has abused access to their website. In turn, OTB Group says that they access the site in the way they do because it is the only way they can access Ryanair's flights for their travellers and that Ryanair's restrictions are anti-competitive. The issues associated with the parties' respective positions on access to Ryanair's website is the subject of litigation elsewhere. It is not an issue with which I am concerned save as to whether (i)



it breaks the chain of causation and (ii) whether it is a factor which prevents a claim in unjust enrichment.

- a. On the issue of causation generally, I do not accept that the way in which OTB Group accessed Ryanair's website breaks the chain of causation.
  - i. Whatever the route by which the travellers booked their tickets, they had a contract for carriage by air with Ryanair for a flight which was ultimately either cancelled or changed. They had paid Ryanair for that flight.
  - ii. Ryanair offered a refund for the flights concerned, which was accepted by the traveller.
  - iii. For the reasons set out above, I have accepted that as a consequence of the cancellation or changes to Ryanair's flights and subsequent offers of refund, OTB Group cancelled the relevant holidays such that a potential right of contribution under Regulation 29 has arisen.
  - iv. Ryanair accept that had the travellers booked directly, they would have been entitled to a refund under Regulation 261.
  - v. Questions of causation are always fact sensitive but against the above background I consider it goes too far to suggest that OTB Group's use of Ryanair's website breaks the chain of causation or otherwise prevents OTB Group exercising a right of contribution.
- b. For the reasons set out in sub-paragraphs (i) to (iv) of the previous paragraph, I also do not accept that the circumstances of OTB Group's use of Ryanair's website is a factor which would otherwise prevent them advancing a claim in unjust enrichment.

168. On the question of causation more generally, Ryanair say that there is an issue as to whether the cancellation of flights caused the cancellation of holidays. It is for OTB Group to prove that they took reasonable steps to avoid cancelling the holiday and that would depend on what reasonable steps would be available to them at the time, and the particular circumstances which arise in the case of each and every decision to cancel.

169. In other words, Ryanair are saying that this investigation has to be undertaken for each of the 4,191 bookings which are the subject of this action. I reject that submission.

170. I accept that there may be cases where the factual investigation suggested by Ryanair is necessary but this is not that case.

- a. It is not necessary for the purposes of OTB Group's claim in unjust enrichment.
- b. It is not generally necessary in relation to the claim under Regulation 29. For the reasons set out in paragraphs 160 to 165 above, I am satisfied that extraordinary and reasonable circumstances justifying termination of the package travel contract were present.
- c. More generally, the question of causation in relation to Regulation 29 is not whether the cancellation or change to the flight caused the event triggering

compensation but whether it contributed to that event. In other words, the cancellation of Ryanair's flight does not have to be the sole cause, there may be one or more contributors, each of whom is liable to make a contribution.

171. Ryanair raise two specific issues on causation.
- a. They point to instances where OTB Group cancelled the holidays before Ryanair cancelled the flights.
  - b. They point to examples of flights where they say Ryanair offered refunds to travellers but OTB Group did not pass on the refunds to the travellers.
172. As to the former, Mr. Foggo explains at paragraph 43 of his third witness statement the circumstances in which OTB Group came to cancel some holidays in circumstances where it was inevitable that Ryanair would cancel the flight. Ordinarily, that evidence could raise questions of fact, which would justify giving leave to defend at least in relation to the flights concerned. However, the basic fact is that in each case, Ryanair did cancel the flight in question and did offer the traveller concerned a refund. Against this background, it is not realistic to suggest that it is necessary to examine for each holiday whether the cancellation of the flight contributed to the cancellation of the holiday. I am prepared to accept that cancellation of the flights did contribute to the cancellation of the holiday (even if other elements of the holiday would inevitably have been cancelled as well).
173. So far as the two examples of situations where OTB Group did not pass on offers of refunds to travellers, the allegation is broadly similar in each case, namely that Ryanair made an offer of a full refund to a traveller whose flight had been changed but OTB Group moved the traveller to the later flight without passing on the option of a full refund leading to subsequent complaints from the travellers. Ryanair says that this evidence undermines OTB Group's evidence that when they received an offer of a refund from Ryanair, they inevitably passed that offer on to the travellers. OTB Group dispute Ryanair's account of the facts behind each incident and point to the fact that both incidents relate to early 2023 rather than the period in issue in this action.
174. It is clear that there is a dispute of facts between Ryanair and OTB Group as to what happened in each incident. However, I do not need to decide that dispute. Even on Ryanair's account, I do not accept that either incident justifies discounting the evidence in the Revised Reply Schedule as to refunds made by OTB Group and refunds offered by Ryanair given that the Schedule is verified by a Statement of Truth and given the degree of investigation done by both parties in relation to the information contained in the Schedule. Further, it is striking that evidence is available that raises questions in relation to the two incidents identified by Ryanair in relation to flights which are not the subject of this claim. However, no similar incidents have been identified in relation to flights which are the subject of this claim.

#### *Vouchers and Refunds*

175. Three issues arose in relation to vouchers and refunds:
- a. Ryanair say that they have issued vouchers by way of refunds for 2,844 bookings.

- b. Ryanair say that they have paid full cash refunds in respect of 704 flight bookings (OTB Group says that it was 621).
  - c. Whether where a single leg of a flight is cancelled, any refund should be just in relation to the single leg or both legs of the flight.
176. So far as the refunds by voucher are concerned, there is no evidence that the vouchers have been redeemed by travellers or that they have any cash value to OTB Group. I do not consider that the sums represented by the vouchers discharge any liability owed by Ryanair either under Regulation 29 or as a matter of unjust enrichment.
177. So far as direct refunds to travellers are concerned, OTB Group submit that the sums paid by Ryanair direct to travellers do not discharge any liability owed by Ryanair to OTB Group whether they are paid before or after Ryanair knew that the booking had been made by OTB Group. Mr. Sutcliffe submitted that the sum to which this issue relates is £126,000 of which less than £18,000 relates to refunds issued before OTB Group paid.
178. So far as refunds paid by Ryanair after OTB Group have already paid the traveller are concerned, I am satisfied that the refunds do not provide Ryanair with a defence whether as a matter of unjust enrichment or under Regulation 29. In relation to unjust enrichment, OTB Group's right to reimbursement arose at the time it made the payment to the traveller. So far as Regulation 29 is concerned, a similar analysis applies. OTB Group's right of contribution arose at the time it made payment to the traveller and I do not consider that a subsequent direct payment to the traveller by Ryanair is a reason to deprive OTB Group of that contribution.
179. In relation to the refunds made by Ryanair prior to payment by OTB Group, it seems to me that a different position applies. So far as unjust enrichment is concerned, I do not see that it can be said that Ryanair is being unjustly enriched at the time OTB Group made the payment to the travellers if Ryanair has already paid the travellers. Under Regulation 29, it is also more difficult to see why OTB Group is entitled to a contribution from Ryanair if a traveller has received a contribution from Ryanair and knowingly takes money from OTB Group which includes a refund for the flights particularly in circumstances where OTB Group require the traveller to confirm that they have not already received a refund for their flights from the airline at the time they make the refund. I am not therefore prepared to find that Ryanair have no defence to OTB Group's claim in respect of refunds paid by Ryanair before payment is made. Accordingly, if OTB Group decide that they still wish to pursue reimbursement of this sum, then I will give directions for the determination of this claim on the basis that the issue for the court is whether on the facts, OTB Group is entitled to recover a contribution from Ryanair under Regulation 29 and, if so, in what amount in respect of flights where Ryanair has paid a cash refund to the passenger prior to OTB Group refunding the passenger. Given that the sum in dispute is apparently £17,929.07, this is a question which it would seem can sensibly be referred out of the Commercial Court to a King's Bench Master, but I will hear the parties further on appropriate directions.
180. So far as refunds to be made where only one leg of return flights has been cancelled, Ryanair challenge whether (i) the cancelled leg led to the holiday being cancelled and (ii) the amount of refund to which OTB Group was entitled. On the first of these issues, it is Ryanair's evidence that where the cancelled leg was cancelled before the outward

departure date, the traveller was offered a refund for both legs of the flight but still had the option to take the leg which was not cancelled. Ryanair say, however, that where the inbound leg was cancelled after the travellers had boarded the outbound leg, they were only offered a refund for the inbound leg and that it is a question of fact in each case whether (i) the travellers opted to change their flights, (ii) what sums were refunded to the travellers and (iii) whether the OTB Group were entitled to cancel the holiday.

181. I do not accept that the situation is as factually complex as Ryanair suggest.

- a. The Revised Reply Schedule shows the refunds offered by Ryanair for all flights (column AZ) and the corresponding sums claimed in respect of those refunds by OTB Group (column BD). OTB Group are not claiming more than the refund offered by Ryanair whether what was cancelled is both legs of a flight booking or only one leg.
- b. If Ryanair cancelled one leg of a flight before the departure date and the traveller took the option of a refund of both legs of the flight as offered by Ryanair and OTB Group cancelled the holiday, then they have a claim in both unjust enrichment and under Regulation 29 for the amount of the refund.
- c. If Ryanair only cancelled one leg of the flight and that cancellation did not lead to the cancellation of the holiday or did not contribute to the holiday being cancelled, then OTB Group would not have a claim under Regulation 29 but they would have a claim for unjust enrichment in respect of the sum paid in respect of the refund offered by Ryanair for the cancelled leg.

### **Conclusion on Liability**

182. For the reasons set out above:

- a. I dismiss Ryanair's application to strike out passages from OTB Group's Reply and Ryanair's application for reverse summary judgment.
- b. I find that Regulation 29 does as a matter of principle provide OTB Group with a right of redress.
- c. I find that OTB Group also has a claim in unjust enrichment in respect of sums paid to travellers in respect of refunds offered by Ryanair, which were accepted.
- d. I find that OTB Group's claims under Regulation 29 and unjust enrichment succeed on one or both bases save in respect of refunds paid by Ryanair to travellers directly before any payment made by OTB Group.
- e. If OTB Group still wish to pursue their claim in respect of refunds paid by Ryanair to travellers directly before any payment made by OTB Group then I give leave to defend on this issue but limited to the question of what amount if any, is payable by Ryanair as a contribution under Regulation 29. This is a dispute which it would seem appropriate to transfer to the King's Bench Master but I will hear further from the parties on further directions if necessary.

## Quantum

183. In light of my findings above, I calculate that OTB Group's claim succeeds in the amount of £2,074,674.37 less £17,929.07 so £2,056,745.30.

## Declaratory Relief

184. OTB Group seek declaratory relief in the terms currently set out in a draft order before me. They submit that the declarations are appropriate both because of points of general principle I have been asked to decide and because there is another claim pending between OTB Group and Ryanair in respect of a later period of time. Ryanair oppose the grant of declaratory relief even if I otherwise give judgment for OTB Group on the grounds that it is not necessary or appropriate for me to make declarations.
185. Declaratory relief is a discretionary power vested in the court pursuant to s.19 of the Senior Courts Act 1981 and section 16 of the Judicature Act 1873. It is not a remedy which I have to grant as of right even where the rights, facts or principles have been established. Rather I have to consider whether in all the circumstances, it is appropriate to make the declaration sought, which requires, inter alia, consideration of the utility of the declaration; Financial Services Authority v Rourke [2002] C.P. Rep. 14.
186. I accept the submissions made by Ryanair that in assessing whether the relief sought has utility, a court:
- a. Should be alert where there is a lack of positive evidence on utility or concrete facts, to the risk that a declaration may lack utility and create confusion; BNP Paribas SA v Trattamento Metropolitani [2020] EWHC 2436 (Comm) at [78(vi)].
  - b. May have regard to whether the grant of a declaration would bring the dispute to an end or substantially narrow the dispute; Lewis v. Green [1905] 2 Ch. 340 at 344.
187. In addition, I refer to the point made in the BNP Paribas SA at [78(iii)], the prime purpose of the relief is to do justice in the particular case.
188. Even though I have found in OTB's favour on the two issues of principle I was asked to decide, I do not consider that this is an appropriate case in which to grant declaratory relief.
- a. To the extent that this case will be authority for the two issues of principle decided, my findings are set out above and the reasons for the decisions I have reached are clear from the judgment.
  - b. Justice in this case does not require me to grant declaratory relief.
  - c. There is no obvious reason why it is necessary for me to make declarations for the purposes of similar litigation between OTB Group and Ryanair. To the extent that litigation raises the same issues as this case, the reasons for my decisions in this case will have no greater weight if I embody them in a declaration.

**Finally**

189. I would be grateful for the assistance of the parties in drawing up a final order. If the parties cannot agree the form of that order then the parties should liaise with the listing office to fix a hearing to deal with the form of order and consequential matters.
190. I would like to express my gratitude to counsel, their instructing solicitors and the parties for the work done in preparation for and presentation of the hearing.