

THE HIGH COURT

COMMERCIAL

[2022] IEHC 696

Record No. 2019/ 9399 P

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

SKYSCANNER LIMITED

SKYSCANNER HOLDINGS LIMITED

AND

SKYSCANNER 2018 LIMITED

DEFENDANTS

Judgment of Mr. Justice Quinn delivered the 9th day of December 2022 (Strike Out and Modular Trial)

1. The plaintiff claims that the defendants are engaged in activities, principally known as “*screen scraping*”, which is described as the unauthorised use of automated systems of software to access price, flight and time (“PFT”) data from the plaintiff’s website and its underlying computer programmes for the sale or facilitating the sale of the plaintiff’s products and services via the defendants’ website. The plaintiffs allege breach of contract,

infringement of trademarks, breach of copyright, passing off, conversion, conspiracy and other torts.

2. The defendants deny that they are engaged in such activity. They claim in their defence and counterclaim that if and insofar as they are engaged in such activities, the plaintiff is precluded from maintaining any cause of action or seeking any relief in respect thereof by reason of abuse of a dominant position in certain markets in contravention of Article 102 on the Treaty on the Functioning of the European Union (“TFEU”).

3. This judgment relates to two applications made by the plaintiff as follows.

4. Firstly, the plaintiffs have applied for an order pursuant to O. 19, r. 27 and/or r. 28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court striking out the defendants’ counterclaim and aspects of the defence which rely thereon on the basis that it is inconsistent with the defence and/or contains mutually exclusive pleas.

5. The plaintiff complains that on the one hand, the defendants traverse the plaintiff’s claims, and deny that they are engaged in screen scraping the plaintiff’s websites and/or selling its flights on its website, and at the same time, by the counterclaim, allege that the plaintiff has breached Article 102 of the TFEU by not sharing its flight data for purposes other than price comparison. The plaintiff says that the defendants are seek an order in the counterclaim to protect it from doing that which it has denied it is doing.

6. The plaintiff says that this is so fundamentally inconsistent that the court should now strike out or stay the counterclaim, and those aspects of the defence which rely on Article 102.

7. The second application (although initiated first in time) is an application by the plaintiff for an order pursuant to O. 63 A and/or O. 36, r. 9 directing a modular trial of the action. It proposes a Module One, which would determine what are referred to as “liability issues” and a Module Two, referred to as “competition law issues”. The plaintiff says that an

order for a modular trial is only required if the counterclaim survives the application to strike it out.

8. I have decided to refuse both applications.

Licence Agreement

9. In 2011, the parties entered into a Licence Agreement under which the plaintiff granted to the defendant a licence to access its PFT data it says, “for the sole purpose of comparing Ryanair’s flight prices with those of other airlines”.

10. The plaintiff does not say precisely when this agreement was entered into, other than to say it was entered into between April and September 2011. Before the court is a copy of a licence agreement signed on behalf of the parties on 11 April 2011.

11. The agreement recites that the plaintiff is engaged in the business of operating an airline and is the exclusive distributor of its goods and services through its websites and call centres. It recites that the plaintiff is the registered proprietor and beneficial owner of its websites and databases and all of their content, intellectual property rights, and the design, layout and operational know – how relating to its database. It recites that the “Price comparison website”, which is the defendant, is engaged in the business of comparing prices of flights, hotels and other travel products through the internet, and does not sell or purport to sell flight tickets.

12. The agreement recites that it is entered into on the condition that the defendant “will only use the information acquired under this agreement for price comparison purposes. It does so on the basis that it will not use that information to sell Ryanair flights or for any purpose other than to compare the price of Ryanair’s flights with those other airlines”.

13. By the operative part of the agreement, the plaintiff granted to the licensee “A non – exclusive licence to access information hosted on www.ryanair.com and

www.bookryanair.com on Ryanair's prices, flights and timetables (the "PFT) to enable the licensee to use that information for price comparison services only."

14. The licence contains a provision at Paragraph 1.4 to the following effect: -

"It is understood that the licensee, in its business as a price comparison website, will distribute the PFT to prospective consumers directly via the licensee's own website".

15. The licence agreement permitted the defendants to access the plaintiff's PFT data in accordance with specified procedures and restrictions including, according to the plaintiff, the fundamental restriction that the data be used for no purpose other than that of a price comparison website. The access was facilitated through a device known as an Application Programming Interface ("API").

16. It appears from the pleadings that there will be a dispute at the trial of the action as to the precise meaning of certain provisions of the licence agreement and as to whether and in what circumstances the licence agreement was terminated in 2019.

November 2019

17. During the course of 2019, a dispute arose between the parties on an unrelated subject, namely Ryanair's dissatisfaction with the manner of its rating on the defendants' "Greener Choice" platform, a feature by which the defendants publish comparative information regarding sustainability of the operations of airlines by reference to CO2 emissions and other sustainability criteria.

18. This dispute reached a critical point in November 2019. On 4 November 2019 the plaintiff notified the defendants that unless they updated the "CO2 filters so it presents accurate results or turned it off", it would be making the API connection unavailable from Monday, 11 November 2019.

19. Skyscanner rejected the plaintiff's complaints regarding its rating process and called on the plaintiff to confirm that it would not terminate the API access on 11 November 2019.

20. The parties are in disagreement as to whether and the mode by which or by whom the licence agreement was terminated. However, the correspondence exchanged is said by the plaintiff to be significant in that the defendants informed the plaintiff by letter dated 11 November 2019 that it had “no option but to commence using alternative means to access information relating to Ryanair flights”.

21. The plaintiff warned the defendants that it believed that screen scraping activity, which it described as “directly or indirectly extracting flight data from the Ryanair website via unauthorised channels” was in breach of the licence agreement and in breach of the terms of use (“TOUS”) of its website, to which it said that the defendant had adhered. The plaintiffs also confirmed in a letter of 22 November 2019 that it “continued to make a dedicated API available to Skyscanner, which facility of course would be subject to its terms and conditions and restrictions as to use,” broadly reflecting those in the licence agreement. In response to this correspondence, the defendant denied that its access or use of Ryanair flight information was unlawful and stated that it was of the view “that any restriction of consumer access to Ryanair flight information via its marketplace materially decreases choice and transparency for consumers and negatively impacts competition”.

22. In a further letter dated 25 November 2019, the defendants asserted that the plaintiff had terminated their permission to access the API by a termination of the licence agreement and informed the plaintiff that they had “commenced accessing Ryanair flight data from third party sources as and from the date Ryanair’s termination of the licence agreement took effect”, said by the defendants to be 11 November 2019.

23. By letter dated 26 November 2019, the plaintiff stated that it was willing to make API access available to Skyscanner for as long as the defendants complied with its TOUs and the licence agreement.

24. This impasse between the parties continued and on 5 December 2019 these proceedings were commenced.

The Plaintiff's Claims

25. In the statement of claim delivered on 2 February 2020, the plaintiff alleges the following: -

“The defendant is a price comparison website which compares inter alia Ryanair flights with those of other airlines and when a user selects a Ryanair flight, it redirects, or is required at least under the original licence agreement, to redirect that user to Ryanair’s website where the user purchases the flight, and ancillary services such as hotels, car rental, onward travel, airport services, seat booking etc.”

26. Para. 6 of the statement of claim contains a “Complaint Summary” : -

“Skyscanner, whether in its own right or vicariously on behalf of any of its servants or agents or as joint adventurer or co – conspirator for value, is liable to Ryanair for wrongs done arising out of its involvement in screen scraping type activities (sometimes referred to as “web scraping” or “web harvesting”) vis a vis Ryanair’s website (defined below) and in offering Ryanair products or services for sale, other than via Ryanair’s website (“the relevant activities”).

Without prejudice to the generality of the foregoing, at a basic technical level, the screen scraping aspect of the relevant activities appear to involve the use of an automated system of software that facilitates and/or enables access to Ryanair’s website and its underlying computer programmes and databases, extraction and reutilisation of information therefrom, and the “sale” aspect of the relevant activities involves the sale or facilitation of the sale of Ryanair products or services via Skyscanner’s website(s)”.

27. The plaintiff says that the relevant activities are “inherently furtive in nature” and therefore that the plaintiff is a stranger to the precise detail and method of implementation of the relevant activities and the extent to which the defendants may be assisted by others, particularly in the screen scraping of its website.

28. Particulars are given of what are described as the “relevant activities” which it is useful to summarise as follows: -

- (a) The use of Ryanair data for purposes other than the comparison of prices.
- (b) Unauthorised use and display of Ryanair data on Skyscanner’s website.
- (c) Selling Ryanair flights itself and/or facilitating the sale of Ryanair flights by persons other than Ryanair (at a mark up or otherwise) on Skyscanner’s website (either on its own domain or via linked domains).
- (d) Failure to display or explain the price differential between higher prices payable via Skyscanner’s website and the lower price payable on Ryanair’s website and presenting price information in a misleading and unfair manner.
- (e) When flights are sold on its website, failing to ensure that Ryanair is provided with a direct email address or telephone number of the purchaser, which deprives the plaintiff of a direct line of communication with the customer which it is said creates difficulties in complying with obligations pursuant to the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999 (the “Montreal Convention”) and, Regulation EC 261/2004 of the EU of 11 February 2004 (“Regulation 261”) which imposes information and obligations on air operators in relation to flight cancellations.
- (f) When flights are sold on its website, failure to ensure that Ryanair customers are in a position to sign into the booking on Ryanair’s own website such that the booking can be

managed appropriately, and/or such that Ryanair customers are presented with the opportunity to purchase Ryanair ancillary products and services.

(g) Instead of ensuring that Ryanair customers are offered Ryanair's ancillary products, the defendants facilitate the offering of ancillary products such as seat reservation, booking sports equipment, car hire, accommodation etc, prior to and after the flight booking which are not those provided by Ryanair.

(h) The defendants obtain Ryanair data from sources other than the procedure prescribed in the licence agreement and uses that data for purposes other than flight comparison and to present Ryanair's environmental credentials in an unfairly unfavourable light.

29. The plaintiff says that its website is a key part of its business and that over 99% of its bookings are made through its website. It says that the website is the focal point of Ryanair's expansion plans into the digital, online and mobile environments and is the key technological platform from which Ryanair conducts its business.

30. Particulars are given of the investment of the plaintiff in its website, running to many millions of Euros, including expenditure exceeding €14.9 million in 2019 alone. The plaintiff says that the website is its chosen route to market for its business model and is the vehicle by which users search for and purchase products and services offered by Ryanair. It says that its operations depend on direct contact with its passengers through the website.

31. The plaintiff says there are three methods by which it protects its investment in the website. One of these is referred to as a "shield" which is a software application to filter out certain IP addresses, and it continues to invest in and develop tools and methods to prevent screen scraping type activities.

32. There are also two contractual methods by which it seeks to regulate access to its data namely, a licence agreement, and the terms of use on its website.

33. The plaintiff says that it engages with internet providers who wish to use its property, particularly PFT Information, and it makes the relevant data and information available on terms which protect the plaintiff's business model, principally by ensuring that those parties redirect their users to the plaintiff's own website to book flights and other services.

34. The plaintiff says also that its website Terms of Use, ("TOUS") govern access to its website and prohibit the relevant activities.

35. The plaintiff says that in 2010 it was approached by the defendant for access to its data for commercial purposes and steps were taken to facilitate this through the Application Programme Interface ("API") and that under the terms of the licence agreement, such access was granted to the defendant.

36. The plaintiff says that a key term of the licence agreement was the provision that data could be accessed for the sole purpose of comparing Ryanair flight prices with those of other airlines. Other features of the licence agreement are intended to protect the plaintiff's proprietary interest in all information on the website. The plaintiff says that it was clearly understood and agreed that all users of the plaintiff's website were not permitted to in any way hamper the exclusive and direct delivery by Ryanair of its low cost fares and related products to its customers or to hamper any communication between Ryanair and its customers, and that this is an implied term of the licence agreement.

37. The plaintiff says that its terms of use of the website contains similar restrictions regarding the dissemination of information extracted and stipulate again that the website is the only website authorised to sell Ryanair Group flights and that parties such as price comparison websites, of which the defendants are one, may apply to enter into a licence agreement for the purpose of obtaining API access to data for the sole purpose of price comparison.

38. The plaintiff gives particulars of the manner in which it says that any party, including the defendants or any third parties functioning in cooperation with the defendants, accept the TOUS by clicking buttons having entered the website such as “Let’s Go” which uses a phrase “By clicking Let’s Go I agree to website terms of use”. Details are given of methods of acceptance at time of payment, “back end” acceptance and also the opportunity is given to users to read and consider the TOUS at various stages in the process of using the website. These stages are referred to as “click wrapping” and “browse wrapping”.

39. The plaintiff says that whatever about the history of the incorporation of the terms of use of its website, in the course of correspondence in 2010 and 2011 at the time when the licence agreement was entered into the defendants were expressly put on notice of its TOUS.

40. Before turning to the causes of action, it is important to note the contents of para. 32 of the statement of claim in which the plaintiff alleges the following: -

“In light of the relevant activities (which activities include facilitation of third parties in the sale of Ryanair flights and/or receipt of assistance from third parties in screen scraping type activities), Skyscanner is liable to Ryanair in its own right, and/or vicariously, or as joint adventurer or co – conspirator for value, as pleaded below.”

41. The causes of action are described as follows: -

41.1. Breach of contract, being breach of the licence agreement and breach of the terms of use.

41.2. Unjust enrichment, in respect of which the remedy of restitution is sought.

41.3. Breach of duty, including statutory duty and negligence.

41.4. Breach of copyright and database rights, including infringement of rights under the Copyright and Related Rights Act 2000 with regard to the plaintiff’s website and its database being both an original database, literary works copyright and

direct and indirect breaches of the plaintiff's interest in its database and interference with its investment.

41.5. Infringement of trademark in a manner prohibited by Article 9 of the EU Trademarks Regulation (No. 2017/1001) and Article 14 of the Trademarks Act 1996.

41.6. Conversion, trespass to goods and property and services.

41.7. Misrepresentation.

41.8. Passing off.

41.9. Economic torts comprising the following: -

(1) Wrongful interference in economic or contractual relations.

(2) Causing loss by unlawful means.

(3) Conspiracy.

(4) Inducing or procuring breach of contract.

41.10. Breach of the plaintiff's 'constitutional ECHR/EU law property rights, right to a good name, right to a livelihood and other related rights'.

42. The reliefs sought are in four parts as follows: -

(i) Damages for the breaches and infringements and conspiracies referred to above.

(ii) A declaration that the relevant activities are wrongful, unlawful and prohibited and that the display of Ryanair's prices on Skyscanner's website is in breach of statute, in particular, Article 23 of Regulation EC no. 1008/2008 concerning common rules for the operation of air services in the Community, and ss. 41 and 42 of the Consumer Protection Act 2007, regarding the display of prices.

(iii) Specific performance of agreements between the plaintiff and the defendant; and,

- (iv) Injunctions restraining the defendant from engaging in what are referred to as ‘relevant activities’ and in particular restraining the defendant from: -
- (a) Using the plaintiff’s flight data for purposes other than the comparison of price.
 - (b) Involving itself in screen scraping activities manifesting in the unauthorised use and display of Ryanair flight data on its website.
 - (c) Selling Ryanair flights or facilitating the sale of Ryanair flights.
 - (d) Failing to display or explain price differentials between prices payable on the defendant’s website and the lower prices payable on the plaintiff’s website.
 - (e) Failing to display prices of Ryanair’s flights in accordance with law and statute.
 - (f) Failing to ensure that when flights are sold on its website the plaintiff is provided with a direct email address or telephone number of the purchaser of the flight which the plaintiff says deprives it of a direct line of communication between it and the passenger which in turn creates difficulties for the plaintiff in complying with the Montreal Convention and other regulations regarding flight cancellations.

Defence and Counterclaim

43. On 21 October 2020, the defendants delivered their Defence and Counterclaim.

44. The defendants admit that they operate a website which “inter alia” compares Ryanair flights with those of other parties. They make no other admissions in respect of the allegations of relevant activities complained of by the plaintiff. They deny that they are engaged in screen scraping type activities either on their own, vicariously or as a joint

adventurer or co – conspirator. They deny that they have offered Ryanair products or services for sale or have engaged in any of the relevant activities.

45. Critically, at para. 6 (e) of the defence, the defendant pleads as follows: -

“Further and in the alternative, and without prejudice to anything herein before or hereinafter pleaded, if and insofar as Skyscanner has engaged or been involved in the alleged ‘relevant activities’ (all of which is denied), Ryanair is precluded from maintaining any cause of action or seeking any relief in respect thereof by reason of the abuse of its dominant position pleaded in the counterclaim hereinafter set forth. For the avoidance of doubt, this plea is advanced by way of answer to the entirety of the case sought to be advanced by Ryanair in the statement of claim”.

46. The defendant pleads that the plaintiff’s terms of use of its website and the terms of the licence agreement are in each case: -

“. . . an instrument utilised by Ryanair in furtherance of the abuse of its dominant position pleaded in the counterclaim and is precluded from relying thereon in any of the purported cause of action and the claims for relief asserted in these proceedings”.

47. The defendants plead that they adhered to the provisions of the licence agreement during its currency, but they deny that the licence agreement is now binding on it or has any continuing legal consequences.

48. The defendants plead that in respect of any rights enjoyed by the plaintiffs to copyright, databases, trademarks and the like all such rights are being exercised in furtherance of abuse of a dominant position in the market.

49. The counterclaim recites Article 102 of the TFEU which prohibits abuse of a dominant position “within the internal market or in a substantial part of it”. The counterclaim outlines the relevant markets in which it is asserted that the plaintiff holds a dominant position. These are divided into product markets and geographic markets.

50. The product markets referred to are “point of origin/point of destination (“O + D”) city pairs for air transport of passengers,” “the supply of price flight and timetabling (PFT) data for an airline’s own O & D route pairs,” “Online Travel Agents (“OTAs”) for air transport passenger services,” “online travel meta search sites for air transport passenger services” (it is said that the defendants are a meta search site provider), and “online sale of products/services ancillary to the purchase of air transport passenger services.”

51. The defendants then identify what are referred to as “geographic markets” being the following: -

- (a) Point of origin / point of destination city pairs for air transport of passengers.
- (b) Supply of PFT data for an airline’s own O&D route pairs.
- (c) OTA’s (online travel agents) for air transport passenger services.
- (d) Online travel meta search sites for air transport passenger services.
- (e) Products and services which are ancillary to the purchase of air transport passenger services.

52. Limited particulars are given in the statement of claim in respect of the plaintiff’s alleged dominance in these markets. The plaintiff identifies 1,157 O&D route pairs in which the plaintiff is the only operator, which gives it a 100% share of that market. It alleges that this market share gives rise to a presumption of dominance under Article 102 and says that it is incumbent on the plaintiff to rebut that presumption of dominance.

53. The defendants allege that the plaintiff holds a monopoly position in the supply of data for its own flights. They allege that this data is purely a by-product of the plaintiff’s main activity of operating air passenger transport services.

54. The defendants claim that by virtue of its dominant position in multiple O&D routes pairs and the supply of PFT data for its own flights, the plaintiff has a special responsibility

not to distort competition in those markets and is therefore prevented by Article 102 from engaging in conduct that maintains or strengthens its dominant positions in those markets.

55. As regards abuse of the dominant position, the principal focus of the counterclaim is to assert that the plaintiff's act in seeking to enjoin the relevant activities is seeking to leverage its monopoly and dominant positions in the relevant markets contrary to Article 102.

56. A number of the allegations of abuse of a dominant position appear from the statement of claim to be not derived exclusively from and therefore not dependent upon the making of the claims which the plaintiff makes in these proceedings. Therefore, they are not derived from what is characterised as the plaintiff's effort to "enjoin" certain activities by these proceedings. Examples are as follows.

57. In relation to ancillary services, the defendants allege the following as particulars of abuse of a dominant position: -

"That the plaintiff has been explicit that it will not conclude an API licence agreement, TOU's or other contractual relationships with any third party including OTA's and meta search sites that seek to sell ancillary products and services particularly those which might compete with those offered on the plaintiff's own website."

58. The defendants continue by alleging as follows: -

"The plaintiff via its insistence on particular contractual terms and conditions and its unilateral actions and refusing to permit the use of PFT data for purposes other than flight comparison, engaged in abusive leveraging in the form of self-preferring its own promotion of ancillary products and services. For purposes of Article 102 TFEU, a system of undistorted competition, as laid down in the TFEU, can be guaranteed only if equality of opportunity is secured as between the various economic operators. Ryanair's conduct in seeking to constrain the alleged relevant activities (all of which

are denied in any event) as respects ancillary products and services, fails to ensure equality of opportunity for Skyscanner (and other meta search sites and OTA's) compared to Ryanair itself and is an unlawful form of self – preferencing, contrary to Article 102 TFEU”.

59. The counterclaim continues: -

“It is manifestly neither necessary nor proportionate for Ryanair to seek to prevent customers who have chosen to use an OTA or a meta search site from also viewing, and availing of, relevant offers as respects ancillary products and services in connection with Ryanair flights. In the same way as consumers can access ancillary products and services on Ryanair’s own website, they should be free to do so on OTA’s or meta search sites. Such customers are not “Ryanair” customers, contrary to what is posited in the statement of claim. Ryanair is seeking to constrain the alleged relevant activities (all of which are denied in any event) in connection with ancillary products and services seek to limit consumer demand for Skyscanner and other meta search sites and involves limitations on technical progress and innovations”.

60. The following allegations are not derived exclusively from the assertions made in the statement of claim itself: -

“8. Ryanair also frequently engages in measures designed to supplement and reinforce the abuses outlined above, and which amount to abuses in their own right.

Such measures include –

(a) Disparaging claims intended to put consumers off using the services offered by Skyscanner and OTA’s.

(b) Making it difficult if not impossible for consumers who booked with OTA’s to obtain a refund from Ryanair.

(c) Insisting upon a passenger's own email address in order to verify a passenger for check in and/or other services provided by Ryanair (including customer care services) in circumstances where Ryanair could easily obtain other unique information from the passenger capable of amounting to acceptable verification of his/her identity".

61. The counterclaim expands on what it describes as a combination of direct and indirect effect of the plaintiff's conduct in respect of transport and ancillary services.

62. Finally, the defendants allege a particular strategy on the part of the plaintiff as regards meta search sites and online travel agents as follows: -

"Ryanair has a strategy to keep meta search sites like Skyscanner (as well as OTA's) as small as possible and to limit their opportunities to offer a direct or indirect constraint on Ryanair as respects flight retailing and intermediation as well as ancillary products and services."

63. By the counterclaim, the defendants seek declarations to the effect that Ryanair has infringed Article 102 TFEU and seeks damages. They also seek an order to the effect that the plaintiff should remedy its infringements by the following: -

- (a) Enter into an agreement with the defendants on fair, reasonable and non – discriminatory terms, including (but not limited to) the absence of any contractual term or unilateral practice mandating that Skyscanner can only access and use PFT data for the sole purpose of offering price comparison services;
- (b) Cease the disparagement of Skyscanner's products and services and those of OTA's listed on Skyscanner, and,
- (c) Refrain from engaging in conduct with equivalent objects or effects to the above.

Reply and Defence to Counterclaim

- 64.** On 19 November 2021, the plaintiff delivered a Reply and Defence to the Counterclaim.
- 65.** The Reply and Defence to Counterclaim contains certain preliminary objections. In particular it asserts in para. 2 as follows: -
- “Insofar as the defence consists of denials or non – admissions of Ryanair’s claims and pleads no positive case in this Commercial Court action, Ryanair will strenuously oppose any attempt by Skyscanner to make any form of positive case in answer to those claims, at a later date”.*
- 66.** The plaintiff denies the assertion that any of its activities constitute abuse of a dominant position in any market.
- 67.** The plaintiff denies that the licence agreement was terminated by it. It asserts that API access has not been terminated, and that API access is still available to the defendants or other parties provided they adhere to the restrictions contained in its form of licence agreement.
- 68.** The plaintiff disputes that Ryanair flights are not sold on any Skyscanner website. It pleads that even if they are not so sold the allegations of relevant activity are still made by reference to activities performed via the defendants’ website if not on its own website.
- 69.** The plaintiff asserts that the counterclaim is “frivolous, vexatious and/or bound to fail” and should be struck out “in limine”. It also asserts that the defendants have failed to plead or particularise its counterclaim adequately or at all and that the counterclaim should be struck out at the trial of the action.
- 70.** In para. B.9(j)(xiv) the plaintiff pleads as follows: -
- “It is denied that the enjoining or prohibition of the relevant activities (on which no admission is made) would lead to any breach of Article 102 TFEU...”.* (emphasis added)

71. It is significant that here and elsewhere the plaintiff itself makes no admission that it is enjoining or prohibiting relevant activities.

72. The plaintiff pleads that Article 102 TFEU is designed to protect competition and not undertakings such as Skyscanner, and that the operation of its website, “subject to the terms of use, protects and enhances competition rather than distorting or diminishing competition”.

73. The plaintiff asserts that its objection to the relevant activities is justified to protect its technology and systems, their content, intellectual property, business model, goodwill, customers and its investment.

74. Extensive notices for particulars and replies to notice for particulars were exchanged between the parties arising from the statement of claim and arising from the defence and counterclaim. Each party protests that the replies delivered under certain headings were inadequate, but there is not before this court any motion to compel the delivery of further and better particulars. Nor have I treated this application as such a motion.

Progress of the Proceedings

75. These proceedings were commenced by a Plenary Summons issued on 5 December 2019.

76. On 19 December 2019, the plaintiff served notice of the Plenary Summons and a Notice of Motion seeking interlocutory relief, returnable for 20 January 2020.

77. When the matter was mentioned before the court on 20 January 2020, the defendants stated that they were considering whether to challenge the jurisdiction of this Court and the matter was adjourned for three days.

78. On 23 January 2020, the defendants confirmed that no jurisdictional challenge would be made and the following orders were made:-

(1) Entering the proceedings in the Commercial List;

- (2) Fixing the hearing of the application for interlocutory relief for 30 April 2020.
- 79.** The injunction application was not heard on 30 April 2020 but was heard over six days in June 2020.
- 80.** On 30 July 2020, Twomey J. delivered judgment refusing the application for an interlocutory injunction.
- 81.** On 18 February 2021, the plaintiffs lodged their appeal against the order of Twomey J. refusing the application for interlocutory relief, without seeking priority for that appeal.
- 82.** On 28 and 29 October 2021, the Court of Appeal heard the appeal against the judgment and order of Twomey J.
- 83.** On 16 March 2022, the Court of Appeal delivered its judgment dismissing the appeal.
- 84.** Other significant dates in the proceedings are as follows:

7 February 2020	Statement of claim delivered.
2 March 2020	The defendants delivered a notice for particulars on the Statement of Claim.
16 July 2020	The plaintiff delivered its replies to the notice for particulars.
21 October 2020	The defendants delivered their Defence and Counterclaim.
14 November 2020	The defendants delivered a notice for further and better particulars. According to the papers presented to this Court on this application, no replies have been delivered to that notice.
19 November 2021	The plaintiff delivered its Reply and Defence to the Counterclaim.
23 February 2022	The plaintiff delivered a notice for particulars on the Defence and Counterclaim.

30 March 2022	The plaintiff delivered its replies to the notice for particulars on the Defence and Counterclaim.
3 May 2022	The plaintiff delivered rejoinders arising from the replies to particulars on the defence and counterclaim
3 June 2022	The defendants delivered replies to the rejoinders arising from their replies to particulars of the defence and counterclaim.

85. In January 2022, the plaintiff issued a motion for directions regarding case management including an order to transfer the proceedings from the Commercial List to the Chancery List.

86. On 28 March 2022, the plaintiff’s application to transfer the matter to the Chancery List was withdrawn and an order made against it for the costs of that motion. Further directions were made including directions regarding exchange of discovery requests and replies and regarding the issue of any discovery motions.

87. On 30 May 2022, the plaintiff issued and served its notice of motion for a modular trial. On 6 July 2022, the plaintiff issued and served its notice of motion to strike out the counterclaim and parts of the defence. These are the motions in which this judgment relates.

The injunction

88. Reliefs sought in the plenary summons were a series of declarations, specific performance, damages and a number of permanent injunctions restraining the defendants from breaching or further breaching the licence agreement and/or the plaintiff’s Terms of Use. The interlocutory relief sought was limited to an injunction obliging the defendant to require that where flights are booked on a Ryanair flight, facilitated by the defendant on its website, that the relevant OTAs (online travel agent) would provide the plaintiff with the

correct personal email address of the passenger rather than the email address created by the OTA for the passenger in order to book the flight.

89. Twomey J. concluded that the injunction sought was a mandatory injunction and that the plaintiff had failed to establish that it had a strong case that it is likely to succeed at the hearing of the action for a permanent injunction.

90. Twomey J. also concluded that, even if the injunction was regarded, in substance, as a prohibitive injunction, the balance of justice favoured refusal of the injunction for the following reasons: (a) that the plaintiff was in a position to alleviate the prejudice it claims it was being caused by the provision of OTA email addresses by the use of other passenger or personal information; (b) that, although the injunction was sought against Skyscanner, the primary target of the alleged prejudice to Ryanair was the OTAs who were providing the OTA email addresses to the plaintiff; and (c) much of the alleged prejudice relied on by the plaintiff related to the activities of OTAs who were not using the defendants' website or related to instances which occurred prior to 11 November 2019, being the date upon which the alleged unlawful facilitation of the sale of flights on the Skyscanner website began.

91. The plaintiff appealed and the Court of Appeal dismissed the appeal.

92. On the hearing of these applications, extensive references were made by the parties to the judgments of Twomey J. and of the Court of Appeal (Murray J.) (Twomey J., *Ryanair DAC v. Skyscanner* [2020] IEHC 399) (Court of Appeal, *Ryanair DAC v. Skyscanner Ltd* [2022] IECA 64). Each of those courts emphasised the well-established principle that their function was not to make findings of fact, but to determine whether it was appropriate to grant interlocutory relief. Nonetheless, each of the parties on these applications have made extensive references to the findings and statements of the court on the injunction proceedings. Furthermore, the examination of the initial evidence available at the interlocutory hearing, both by Twomey J. and by Murray J., was extensive. Therefore, insofar as the parties seek to

invoke those judgments, I shall refer to a number of important aspects of the findings of those courts.

Court of Appeal

93. Murray J. defined the term “*screen scraping*” by quoting the licence agreement which provides as follows:-

“You are not permitted to use this website... its underlying computer programs... databases, functions or its content other than for private non-commercial purposes. Use of any automated system or software, whether operated by a third party or otherwise, to extract any data from this website for commercial purposes (‘screen scraping’) is strictly prohibited.”

94. Murray J. noted that the concept of screen scraping has generated substantial academic literature and legal and judicial commentary. He said that claims arising from screen scraping have variously been based upon not only contract but also intellectual property rights, particular statutory provisions in certain jurisdictions, theories of trespass, intellectual property rights and the contractual rights of the owners of a website. He observed the following:-

“Of these the contractual claim is that most persistently and universally invoked and, as the law presently stands in this jurisdiction, the clearest.”

95. Having emphasised that, on an interlocutory application the court is not making any findings of fact, Murray J. said that the evidence before the court on the interlocutory application disclosed a number of facts which were undisputed as follows:-

“(i) The plaintiff displays on its website information regarding its flight details and prices.

(ii) Those accessing the website can only do so upon confirming their agreement to the Plaintiff’s terms and conditions of use.

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

96. This is a description by Murray J. of facts he considered undisputed. Being an injunction judgment, it is not a finding of facts.

97. Murray J. continued:-

"Based upon those undisputed facts I would have little difficulty in concluding that the plaintiff has established that it has a strong arguable case that generally and in theory it is entitled to enforce the TOU against the defendant."

98. Murray J. then considered the competition law defence and the counterclaim. Before the court in the injunction applications were the reports of competition law experts for the parties, namely Dr. Miguel de la Mano, for the defendants, and Dr. Parker, for the plaintiff.

99. Murray J. concluded:-

"...it must follow that the competition defence urged by the defendant has the effect of rendering what might otherwise be a strong and clear case based upon the terms and conditions to a claim lacking the clarity and solidity necessary to ground mandatory interlocutory relief. Specifically, (a) if it is the case that the plaintiff is dominant in a

large number of flight routes across Europe, (b) if it is the case that those routes collectively, individually or through some combination comprise an appropriate and relevant market for the purposes of the complaints in these proceedings, (c) if it is the case that the plaintiff's PFT is proven to be objectively necessary or indispensable for the provision of goods or services by the defendants or OTAs in order to compete on an identified downstream market, (d) if it is the case that a refusal to supply is likely to eliminate effective competition on that market and (e) if there is no objective justification for that refusal, then the proposition that Ryanair breaches Article 102 TFEU by denying access to its PFT to either the defendants or to OTAs who themselves wish to sell Ryanair flights unless they agree not to exploit the material on that website themselves, is clearly a plausible one. In that eventuality, the defendants have raised a serious issue as a basis for resisting the relief claimed in the proceedings."

100. Murray J. continued by observing that the establishment of abuse and the control of information in a downstream market is complex and, from the perspective of the plaintiff, would be highly significant. He said that the mere fact that the plaintiff is a successful airline with consequent significant market strength in at least some routes or that OTAs are dependent on the ability to access the plaintiff's PFT and to exploit it in the manner objected to by the plaintiff do not in themselves establish either the existence of a dominant position in the market or abuse thereof.

101. His conclusion was that the defence put forward by the defendants "*has the effect of sufficiently diluting the strength of the plaintiff's claim so as to require refusal of this application*". He expressed the view that the defendants' claim was not based upon bald assertion and he refers to a number of elements of the evidence which were before the court on the injunction application.

102. Both the High Court and the Court of Appeal considered that the competition claim was not “*merely arguable*” or a “*bald assertion*”. Murray J. went so far as to say, with reference to the plaintiff’s well-established position in relevant markets that “*the prospect that this could affect competition between airlines, and that it could do so to the advantage of the plaintiff, is not an unreal one*”.

103. In a passage having direct relevance for the determination of the application for a modular trial, Murray J. said the following:-

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

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104. Extensive reliance was placed by the plaintiff in these applications on the judgment of Sanfey J. in the above proceedings, which are also a “screen scaping” case. Vola is an OTA (online travel agent) and not a meta search/comparison only site.

105. Sanfey J. had before him applications similar but not identical to those brought in this case.

106. The plaintiff had applied to strike out the counterclaim, similarly grounded on abuse of a dominant position contrary to Article 102 of the TFEU, for failing to disclose a reasonable or sustainable cause of action, being bound to fail or being frivolous and vexatious and/or constituting an abuse of the process.

107. Ryanair claimed that the counterclaim was so lacking in particulars that it did not disclose a reasonable or sustainable cause of action and should be struck out. In the alternative, Ryanair sought orders staying the prosecution of the counterclaim pending determination of the plaintiff's claim or, alternatively again, a modular trial whereby the plaintiff's claim would be heard and determined first, and the first defendant's counterclaim tried and determined thereafter as a second module.

108. In that case, the defendant had also brought an application to stay the plaintiff's claim pending the determination of the counterclaim or, alternatively, a modular trial in which the counterclaim would be tried and determined first.

109. This case was also a claim based on Ryanair's allegations of screen scraping, with the difference that the defendant was an on online travel agent which, not only provides internet search, but also booking facilities for airline flights and other services through its website.

110. Vola's defence was a complete traverse of the statement of claim and it delivered a counterclaim seeking a declaration that the actions of Ryanair constituted abuse of a dominant position.

111. It was acknowledged in that case by the defendant that the "*nub*" of the counterclaim regarding Article 102 was that, should Ryanair succeed in its claim in the proceedings (emphasis added) against the defendant thereby preventing the defendant from offering for

sale and selling Ryanair flights, this would have the likely effect of elimination of competition or harm to competition.

112. In considering the application to strike out the proceedings pursuant to O. 19, r. 27 or r. 28 or under the inherent jurisdiction of the court, Sanfey J. cited with approval the summary of the principles made by Haughton J. in *Togher Management Company Ltd v. Coolnaleen Developments ltd* [2014] IEHC 596 as follows:-

- “*The jurisdiction exists to ensure than an abuse of the process of the courts does not take place.*
- *The jurisdiction should be exercised sparingly and only in clear cases.*
- *It enables the court to avoid injustice.*
- *If a statement of claim admits of an amendment which might "save it" and the action founded on it, then the action should not be dismissed.*
- *A variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial.*
- *It is a jurisdiction to dismiss where the proceedings are bound to fail.*
- *Such an application may be of particular relevance to cases involving the existence or construction of documents - in which it may be possible for a party to persuade the court that no reasonable construction of the document(s) concerned could give rise to a claim on the part of the plaintiff, even if all the facts alleged by the plaintiff were established.*
- *Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed.*

· *The plaintiff should not be required to show a prime facie case at the stage of an application to dismiss.*

· *The onus lies on the defendant to establish that the plaintiff's case is bound to fail.*

· *It follows from the foregoing point that the defendant must demonstrate that any factual assertion on the part of the plaintiff that the defendant contests could not be established.”*

113. Sanfey J. quoted from Murray J. in *Jodifern Ltd v. Fitzgerald* [2000] 3 IR 321, where he said:-

“It is for the Judge hearing the application, within the scope of his discretion, to determine whether any points of law raised can be so clearly and readily resolved in favour of the Defendant that to allow the action to proceed would constitute an abuse of the process of the courts. Legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of that action in those proceedings.”

114. A principle feature of the application to strike out the counterclaim in *Vola* was the plaintiff's complaint as to the inadequacy of particulars of the competition law counterclaim.

115. Sanfey J. found that, in relation to the counterclaim by reference to an upstream market, the plaintiff understood in broad outline the case it had to meet. However, in relation to the separate question of whether the downstream market was sufficiently defined, Sanfey J., having examined the exchanges of particulars, found that the case made by the defendant in relation to the downstream market was unclear in a number of respects. He then decided, having continued as follows:-

“I am not disposed to strike out the counterclaim on the basis of what in my view is a lack of clarity and precision. However, I do consider that Ryanair, in order to understand the parameters of the market contended for, and the way in which its

actions or proposed actions are alleged to harm consumers, requires, as a matter of urgency, answers to the following queries...”

116. The court identified the queries concerned and ordered that, as a condition of being allowed to proceed with the counterclaim, the defendant should deliver substantive replies to those queries.

117. As a separate submission, Ryanair had contended that Vola’s entire claim pursuant to Article 102 was premised upon Ryanair succeeding in preventing Vola from selling Ryanair flights and therefore the counterclaim was entirely hypothetical and did not constitute a sustainable cause of action. Ryanair also submitted that, should it succeed in its claims based on breach of contract, copyright, trademark infringement, conversion, trespass to goods, passing off and more, competition law could not then render lawful what is otherwise found to be an unlawful act.

118. Sanfey J. rejected this submission as follows:-

“It seems to me that there is a substantial argument that Vola is entitled to proceed with the counterclaim notwithstanding that Ryanair has not yet achieved its object in vindicating its alleged rights and preventing Vola from selling its tickets. The harm apprehended by Vola is not hypothetical – there is a clear and present assertion in Ryanair’s claim of its entitlement to relief which Vola contends is consequent upon abuse by Ryanair of its alleged dominant position. Whether this contention is correct is a matter which can be considered by the trial judge in due course.”

119. Sanfey J. continued:-

“...the Ryanair claim does not canvass any competition issues, which are raised only in the counterclaim, which is in reality offered as a defence to the Ryanair claim. The possibility that exercise by Ryanair of its contractual rights could be deemed to be anti-competitive cannot be discounted at this preliminary stage.

In the circumstances, it does not seem to me that I can strike out the claim on the basis that resolution of the plaintiff's claim in its favour necessarily precludes a counterclaim."

120. In relation to the application for a modular trial, Sanfey J. considered the authorities extensively and I shall refer to a number of these later. A significant feature of the *Vola* case was that Sanfey J. noted that both parties had contended that each of their cases is discrete and could be prosecuted independently of the other with little fear of overlap or duplication. He noted that a perusal of the pleadings would suggest that this is correct.

121. Sanfey J. continued as follows:-

"Both sides are agreed that claim and counterclaim are each discrete, with little or no evidential overlap between the two. If Ryanair's claim against Vola did not succeed, there would be no need to hear the counterclaim at all, resulting in a saving of court time and costs. While Vola's submissions before me emphasise that the counterclaim is effectively a defence against Ryanair's claim, I was not given any reason to believe that Vola does not intend to defend Ryanair's claim vigorously and in accordance with its defence."

122. That concession as to the discrete nature of the cases as between the claim, on the one hand, and the counterclaim is not made in the application before me.

123. The defence and counterclaim in *Vola* was not put before this court. On a reading of the judgment, it appears that the competition law plea is made in the counterclaim and not, by contrast with this case, pleaded in the defence although Sanfey J. noted the submission that the counterclaim "is effectively a defence against Ryanair's claim."

124. Another distinguishing feature of the *Vola* case was that, by the time the matter had come before Sanfey J., a second defendant, Ypsilon.net, had been added. The court concluded that it would be permissible for the court to hear and determine the liability issues

in Ryanair's claim against both defendants but, in the event of a determination of liability in favour of Ryanair to defer the making of any orders in the proceedings until the counterclaim had been heard and determined. He found that, in that case, if *Vola* prevailed in its defence of the liability issues, the counterclaim did not arise.

125. Finally, Sanfey J. concluded that if Ryanair were to be successful in relation to the "liability" aspect of its claim, the success of any argument by *Vola* that orders in favour of Ryanair should be deferred until the determination of the counterclaim would depend to a large extent on there being no undue delay with *Vola* prosecuting its counterclaim. That, in turn, required that pretrial procedures relating to the counterclaim had been completed and advanced, such that an early hearing of the counterclaim module would be possible.

126. The court dealt with arguments in relation to the potential prejudice to the defendant of the modularisation by concluding that, in the event that Ryanair would succeed at trial of the first trial, there would be scope for orders in the plaintiff's favour to be deferred until determination of the counterclaim. Importantly, Sanfey J. said that this would be a matter for determination at a later stage, assuming that there had been no undue delay on the part of *Vola* in prosecuting the counterclaim.

The application to strike out

127. The essence of the grounds for the application to strike out may be summarised, by reference to the plaintiff's grounding affidavit and its submissions as follows:-

- (1) A lack of specificity of pleading.
- (2) The claim that the competition law defence is fundamentally inconsistent with the defendants' denial that they are screen scraping. The plaintiff says that the defendants have pleaded that they are unaffected by the plaintiff's alleged abuse of dominant position because they are not engaging in the activities which the plaintiff seeks to enjoin. The plaintiff says

that, by carrying through this denial of involvement in screen scraping into its counterclaim, the defendants have eroded the entire basis for that claim.

(3) Linked to point (2) above is a submission that the defendants have no *locus standi* to pursue the counterclaim because they deny that the claims and enjoinders sought by the plaintiff are enforceable against them, leaving them unaffected by the plaintiff's actions.

(4) That the claim is frivolous or vexatious and is bound to fail.

(5) That the court should take into account the fact that the competition law counterclaim was not made until after these proceedings were issued and served. It submits that, if the defendant felt so aggrieved by the conduct of the plaintiff, it ought to have sought to "*clear the way*" by commencing its own Article 102 proceedings.

128. The submissions between the parties extend interchangeably between a series of submissions by reference to O. 19, r. 27 and r. 28 and the inherent jurisdiction of the court, which is not limited to objections by reference to the pleadings.

129. Extensive reference has been made to case law on the jurisdiction to strike out, in this case a counterclaim. The principles which are relevant to this case may be summarised as follows:-

(1) The jurisdiction to strike out a pleading or a claim is discretionary.

(2) The burden of persuading the court to exercise the jurisdiction to strike out a claim without affording a full hearing to the party asserting same rests on the applicant.

(3) The jurisdiction should be exercised sparingly (see *Togher Management Company Limited v. Coolnaleen Development Limited, op. cit.*, and *(D)K. v. (A)K.* 1990/5306 P, 2 October 1992, Costello J.) and in clear cut cases only and where there is no basis in law or in fact for the case to succeed (*Scotchstone Capital Fund v. Ireland and Attorney General* [2022] IECA 23).

(4) There will be cases where the very complexity of the issues, even if the court should form a clear view on them on such an application, makes it difficult to determine within the confines of a motion heard on affidavit that the case made is such that it can safely be said that it is bound to fail (*Moylist Construction v. Doheny & ors* [2016] IESC 9 and *Scotchstone Capital Fund v. Ireland and Attorney General*).

(5) McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] 1 IR 425, put it thus:

“It must be recognised that experience has shown that the trial of an action will, in many cases, identify a variety of circumstances, perhaps not entirely contemplated at earlier stages in the proceedings, and it may appear that the facts are clear and established for the purpose of an application of this nature, but in fact the trial will disclose an entirely different picture.”

(6) The jurisdiction exists, not to prevent hardship to a party in having to defend the case, but to prevent an abuse of the court process (*Scotchstone Capital*).

(7) Pleas which are inconsistent and not particularised adequately may prejudice, embarrass, or delay the fair trial of action or reveal a claim to disclose no cause of action. But this does not preclude alternative pleas or defences provided they are properly expressed and particularised (see *IBB v. Motorola* [2011] 2 ILRM 321).

130. The central feature of the plaintiff’s submission on this application is that, because the defendants have denied that they are engaged in the relevant activities, namely screen scraping, or that they are bound by the licence agreement or the plaintiff’s terms of use of its website, they are unaffected by the very restrictions or limitations which they claim are an abuse of a dominant position. It is claimed that this is a fundamental inconsistency. The plaintiff says that, if the defendants succeed in their defence to the claims it makes then they are not subject to the constraints it complains of by reference to Article 102 and, therefore,

that (a) they will have no standing to pursue the competition law claim and (b) they are unaffected by the restrictions or limitations complained of.

131. A similar theme, although not identical, was considered by Sanfey J. in *Ryanair v. Vola*. In *Vola*, the facts were not identical, but the cases were very similar. *Vola*'s defence was a complete traverse of the statement of claim. It also made a counterclaim by reference to Article 102 alleging abuse of a dominant market position. *Ryanair* had contended that *Vola*'s entire claim pursuant to Article 102 was premised on *Ryanair* succeeding in preventing *Vola* from selling *Ryanair* flights and, therefore, claimed that the counterclaim was entirely hypothetical and did not constitute a stateable cause of action for that reason.

132. Sanfey J. rejected this argument and stated that the counterclaim was not hypothetical.

133. Sanfey J. continued:-

“...the Ryanair claim does not canvass any competition issues, which are raised only in the counterclaim [which is quite different from the position here where the competition claim is asserted also in the defence], which is in reality offered as a defence to the Ryanair claim. The possibility that exercise by Ryanair of its contractual rights could be deemed to be anti-competitive cannot be discounted at this preliminary stage.

In the circumstances, it does not seem to me that I can strike out the claim on the basis that resolution of the plaintiff's claim in its favour necessarily precludes a counterclaim.”

134. Sanfey J. rejected also a submission by *Ryanair* that, if the court were to hold in its favour on its claim, this would constitute a determination that, of itself, precluded a contra finding that *Ryanair*'s actions were anticompetitive. He assessed that argument as being based on some concept of a hierarchy of laws and the concept that, if the claim is upheld by reference to contract, copyright, trademarks, conspiracy, conversion and other torts, such a

finding could not be “usurped” by competition law. Sanfey J. rejected that argument, which may explain why it was not seriously advanced in this case.

135. Not every element of the counterclaim in this case is dependent on the assertions made by the plaintiff in its statement of claim. The counterclaim alleges that, apart from the plaintiff seeking to “*enjoin*” actions of the defendants by reference to its terms of use, its licence agreement and other such rights, the plaintiff is engaged in such activities as:-

- (a) Refusal to grant an API licence agreement or to vary its terms and conditions or any contracts with any third party which seeks to sell ancillary services and products, particularly those which compete with those offered on Ryanair’s own website (para. 6(d)(ii) of the counterclaim).
- (b) Refusal to permit the use of PFT data for purposes other than flight comparison.
- (c) Abuse of leveraging in seeking to self-prefer its own promotion of ancillary products and services (para. 6(d)(iii) of the counterclaim).
- (d) Measures designed to supplement and re-enforce the alleged abuses which the defendants claim amount to abuses of a dominant position in their own right including (i) disparaging claims to put customers off the use of the defendants’ website, (ii) making it difficult for passengers to secure refunds other than by direct booking on its own website, (iii) insisting on the provision of passengers’ own direct email addresses (albeit that the right to so insist is itself under test in the plaintiff’s own claim) (see para. 8 of the counterclaim).
- (e) The defendants claim that the plaintiff has a strategy to keep metadata search sites like the defendants and OTAs as small as possible and to limit their opportunities to offer a direct or indirect bookings of flights and other products and services (see para. 9(d) of the counterclaim).

136. As to inconsistency of pleas, the starting point is that the defendants are entitled to put the plaintiff on proof of all of the allegations it makes in its statement of claim. This, of

course, applies equally to the defendants when it comes to the proof of the counterclaim. But it is well-established as there is no rule precluding a defendant from relying on alternative defences. In *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 IR 504, Keane J. said:-

“I am satisfied that the defendants are correct that there is nothing to prevent a defendant in a case such as this from relying on a number of alternative defences. This is a well accepted method of pleading which should not, of itself, be the cause of any prejudice, embarrassment or delay to the plaintiff within the meaning of Order 19, rule 27. I am accordingly satisfied that this application should also be refused.”

137. This particular point was not appealed, but the finding of Keane J. on this subject was endorsed in the Supreme Court by Murphy J., where he said:-

“Keane J. preferred the contention of Counsel on behalf of the Defendants to the effect that her clients were entitled, like any defendants, to rely on alternative defences and in particular were entitled to require the Plaintiffs to prove their ownership of the copyright in the recordings allegedly played by her clients whilst at the same time disputing that the remuneration sought was equitable or that the appropriate machinery for determining such remuneration was under section 32 of the Copyright Act of 1963.”

138. This approach was followed by Kelly J. in *IBB Internet Services Ltd v. Motorola* [2011] 2 ILRM, p. 321, where he restated the principle that, as a general rule, either party may “*in a proper case*” include in its pleading two or more inconsistent sets of material facts and claim relief thereunder in the alternative. He went on to say that a pleading is unlikely to be regarded as embarrassing simply because it sets up inconsistent claims.

139. Kelly J. entered the cautionary words as follows:-

“...if mutually contradictory claims are made then they must be properly expressed in the alternative and fully particularised. They are permissible unless one of the alternatives is unsupported by any evidence. This places an obligation on the pleader not to plead an inconsistent averment which he must know is untrue.”

140. In this case, the plaintiff attaches great significance to the fact that in the correspondence of November 2019, and, in particular, in the defendants’ letter of 25 November 2019, the defendants referred to the fact that they had obtained access to the plaintiffs’ PFT information through third parties. They refer also to a number of the references in the judgment of the Court of Appeal to *“undisputed facts”*. Each of these references, and others, they say shows that the denial now made in the defence of the activity of *“screen scraping”* is so inconsistent with facts as already found and the defendants’ own correspondence of November 2019 that it is impermissible.

141. This submission on the part of the plaintiff strays into a further proposition concerning the prohibition on the giving of inconsistent evidence such as was discussed by McDonald J. in *HKR Middle East Architects Engineering LLC & ors V. English* [2021] IEHC 376, where he stated:-

*“I completely accept that it is permissible for alternative pleas to be made by a party in his or her pleadings in High Court proceedings. This is clear from the authorities cited by the plaintiffs in their written submissions in support of this application, namely the decision of the Supreme Court in *Phonographic Performance Ireland Ltd v. Cody* [1998] 4 I.R. 504 and the decision of Kelly J. (as he then was) in *IBB Internet Services Ltd v. Motorola Ltd* [2011] 2 ILRM 321. However, as counsel for the defendant argued, Mr. Ryan was the principal witness on behalf of all of the plaintiffs including HKRME. As counsel submitted, there is no difficulty in pleading alternative facts or alternative claims. However, Mr. Ryan could not give evidence to the court*

on the basis of alternative facts. He could only give evidence as to a single version of events.”

142. These findings arose from conclusions by McDonald J. in that case that there were inconsistencies between assertions advanced by the plaintiffs and the evidence of witnesses on behalf of the plaintiffs at the trial of the action.

143. The proof of the screen scraping activity which the plaintiff alleges is perpetrated by the defendants cannot be treated, at least for the purpose of this application, as conclusively established simply by exhibiting correspondence from November 2019 or by reference to discussions of undisputed facts in the judgment of the Court of Appeal in its consideration of the injunction. The factual and legal issues associated with the allegation of screen scraping are acknowledged by all parties to be complex, both as a matter of evidence and of law, and it has been recognised that the law related to screen scraping is itself still in a state of development. To expect the defendants to relinquish their right to put the plaintiff on proof of such a complex and serious allegation, by availing of a conventional and permissible mode of pleading in the alternative, is a step too far. Therefore, I am not persuaded that it would be safe on this application to dismiss the counterclaim, or any part of the defence, because of the manner in which the defendants have pleaded the case.

144. In conclusion as regards the application to strike out:-

- (1) The defendants’ denial of screen scraping and other relevant activities does not mean that it has no *locus standi* and the counterclaim is not hypothetical.
- (2) The allegation of screen scraping requires proof of complex matters and the denial is not so contradictory of claims by reference to Article 102 of the TFEU, as to be impermissible alternative pleas.
- (3) The counterclaim is not lacking in specificity or so contradictory of the defence that it should be dismissed *in limine*.

- (4) The complexity of the issues identified in the counterclaim is such that it would be unsafe on this motion to strike it out without affording the defendant the opportunity to advance it to full plenary hearing.

Application for a modular trial

145. The plaintiff's application for a modular trial was issued on 30 May 2022. It is therefore first in time of the applications issued but falls to be considered only in the event that the court declines to strike out the counterclaim and parts of the defence, which I have decided to do.

146. The application is for the following orders: -

- (i) An order under O. 63 A rr. 5 and/or 6 (1)(b)(ii) of the Rules of the Superior Courts and/or O. 36, r. 9 and/or the inherent jurisdiction of the court directing a modular trial via a Module 1 (liability issues) and Module 2 (competition law issues).
- (ii) An order under O. 63 A (in particular rr. 5 and/or 6 (1)(b)(vi) or otherwise), staying and deferring discovery on Module 2 until after the determination of Module 1.
- (iii) Further directions under O. 63 A modifying an existing direction made in the proceedings.

147. The application is grounded on an affidavit sworn by the plaintiff's Director of Legal, Mr. Thomas McNamara on 27 May 2022.

148. In several places the plaintiff's affidavit when referring to Module 2 says "Should Skyscanner successfully defend Ryanair's claim in Module 1 on grounds other than competition law grounds, Module 2 becomes moot". That proposition is disputed by the defendants.

149. The principal reasons given for the necessity of a modular trial are as follows.

150. First, the plaintiff says that there is a logical division between Module 1 and Module 2. It says that the counterclaim is an independent cause of action entirely unconnected with Ryanair's action. It says that the issues arising in the statement of claim are readily capable of determination in isolation from the issues in the counterclaim. It says that the fact that the counterclaim is also proffered as a defence does not alter the conclusion that there is a logical division of issues. The plaintiff says that there will be little or no overlap between witnesses to be called in respect of the modules and that different questions of fact and law arise in each context.

151. Secondly, the plaintiff says that the determination of Module 1 may render Module 2 unnecessary. The plaintiff says that the counterclaim is that the plaintiff's abuse of dominance arises from a desire to prevent screen scraping and "other relevant activities" by online travel agents and other travel services providers. It says that no abuse can arise should the plaintiff fail in its claim on the statement of claim and therefore the counterclaim would become unnecessary.

152. Thirdly, the plaintiff says that there would be a clear saving of the court's time and the parties' time and resources if a modular trial is ordered. It says that this is particularly so given that staged discovery could follow. It submits that there would be no increase in costs if a modular trial was ordered.

153. Fourthly, the plaintiff says that there is no prejudice to the defendants in proceeding by way of a modular trial. It asserts that on the face of it the defence pleaded is incompatible with the issues raised in the counterclaim. It suggests that a modular trial would likely benefit the defendants because if the plaintiff is unsuccessful in its breach of contract and tortious claims, there would be no need to determine the issues covered by the counterclaim.

154. Fifthly, the plaintiff submits that because the case is complex, and because the issues are also the subject of proceedings initiated by the plaintiff in other jurisdictions it is

reasonable and appropriate to approach the issues in a serial, sequential and modularised manner.

155. Sixthly, the plaintiff refers to the fact that a modular approach was ordered by the High Court (Sanfey J.) in *Ryanair v. Vola* (op. cit.). Mr. McNamara says that in that case, both parties accepted that the liability and competition issues were discrete with little or no evidential overlap between the two. Obviously the defendants are not bound by such a concession made by *Vola*.

156. In his grounding affidavit, Mr. McNamara says that the plaintiff reserves the right to bring various further applications, including an application to strike out the counterclaim (which it subsequently did, and which application was heard together with this application), interrogatories, Norwich Pharmacal relief, or applications for a “focused category of discovery on Skyscanner’s involvement in screen scraping etc.” He says that the plaintiffs “next move” would depend on further replies which at that time were pending to the plaintiff’s rejoinders arising from exchanges of particulars on the counterclaim. Of these, only the motion to strike out was issued.

157. The plaintiff refers also to affidavits which are before the court in the context of other applications previously made in these proceedings including the application made in January 2022 to transfer the proceedings out of the Commercial List and to the Chancery List for future case management.

158. Mr. McNamara says that it has been necessary over the past approximately thirteen years for the plaintiff to take steps to proactively protect its business model by suing a number of those parties which it says are involved in screen scraping. He provides a description of the resources dedicated by the plaintiff to litigating “the screen scraping question” and says that the plaintiff “cannot commit endless resources to this goal”. He refers to the pressures which these and other proceedings apply to the plaintiff’s legal department

and states that there is a limit to the extent to which external counsel can assist the plaintiff in this litigation.

159. Mr. McNamara says that the plaintiff's approach to screen scraping litigation has evolved "as it began to experience the delaying tactics (primarily around jurisdiction) adopted by certain defendants".

160. Mr. McNamara makes a number of revealing observations in relation to the problems with this litigation generally. Some of these have no relevance to these proceedings such as the objection made by certain defendants regarding jurisdiction, an issue which was disposed of by the defendants in these proceedings within a matter of days of the return date of the application to enter the matter in the Commercial list. He points out also the following: -

- (i) That to his knowledge no defendant in an Irish action has ever conceded, in its pleadings, that it screen scraped Ryanair's website.
- (ii) That this denial or non – admission increases the burden of proof on Ryanair, and in particular the discovery which Ryanair must seek against the defendant entities.
- (iii) That if the plaintiff had information on who is doing what, vis-à-vis its website and the dispute was then confined to legal questions as to the lawfulness of these activities or whether they were "saved" by competition law, the case would be more straightforward. This appears to reflect a submission by the plaintiff that it should be relieved of the onus it carries as plaintiff of proving the relevant activities described in its statement of claim.
- (iv) He says that "while it seems inescapable that every entity will ultimately defend their actions on competition law grounds, none has ever attempted to proactively bring that case on, in Ireland". He says that no party has ever attempted to "clear the way" for their activities by initiating applications for injunctive relief on competition law grounds.

161. The defendants say that, if the court were to direct a modularised trial, the competition law module should be heard first.

162. The plaintiff says that the defendants lost the chance to seek priority for the determination of their competition law claim by failing to institute proceedings against the plaintiff before 11 November 2019, which it says would have forced it to share its data on competition law grounds.

Flightbox SP

163. In a supplemental affidavit sworn by Mr. McNamara on 8 July 2022 he refers to what he describes as a new issue which has only, on 6 July 2022, come to the plaintiff's attention concerning the role of a different entity, namely Flightbox SP. He says the plaintiff has evidence to show that Flightbox might be the entity assisting the defendants in the process whereby the plaintiff's data is found on the defendants' website. Mr. McNamara does not say how this "new" information came to light or when it was first discovered. He says that the plaintiff has a long history with Flightbox, including proceedings between it and Flightbox in Poland in which the plaintiff claims that Flightbox had screen scraped the plaintiff's website. He refers also to separate proceedings in the State between the plaintiff and Flightbox itself.

164. Mr. McNamara suggests that this information strengthens the case for striking out the counterclaim and says that the connection with Flightbox further complicates the defendants' counterclaim and supports the division of the action into modules.

165. The clear implication of the references to Flightbox is that the role of Flightbox in the alleged screen scraping activities is relevant to the plaintiff's allegations of those activities in the statement of claim. If anything, this aspect has the potential to complicate the plaintiff's claim. It may also complicate the defence, but it does not strengthen the case for modularisation.

The defendants' submissions

166. The first objection made by the defendants is one of delay. It refers to the fact that these proceedings were commenced on 5 December 2019. The defendants say that any

examination of the chronology of events shows that, for much of the currency of the proceedings, the plaintiff's focus has been on the injunction proceedings. They refer to the fact that, after Twomey J. delivered his judgment refusing the injunction on 20 July 2020, no steps were taken to expedite the appeal. The notice of appeal was filed on the last possible day for doing so, with no request for priority.

167. The defendants refer to the fact that, while the judgment of the Court of Appeal was pending, on 28 January 2022, the plaintiff issued its motion to have the proceedings removed from the Commercial List and transferred to the Chancery List, only to abandon that application on 28 March 2022, the date on which it was listed for hearing before McDonald J.

168. The statement of claim was delivered on 7 February 2020 and the Defence and Counterclaim on 21 October 2020, and yet the Reply to the Defence and Defence to the Counterclaim was delivered more than one year later again on 19 November 2021. In the replying affidavit sworn by Mr. Nolan, general counsel of the defendants, he says of the plaintiff's conduct, the following:-

“The notion that Ryanair now wishes to elongate the present proceedings by dividing them into modules, each of which could then be the subject matter of a variety of interlocutory motions and appeals (which Ryanair is never shy about issuing), is a matter of grave concern to Skyscanner. Indeed the sabre rattling in paragraphs 4 and 25 of Mr. McNamara’s most recent affidavit concerning the issuing of a motion to strike out Skyscanner’s counterclaim is but the latest manifestation of this as far as the present litigation is concerned. In circumstances where Ryanair’s record in so-called ‘screen scraping actions’ suggests that, when it does engage, it is more concerned with attrition rather than actually pursuing the action to conclusion, I cannot see how it could be said that the modularisation motion is a bona fide application brought in the interests of both sides to these proceedings. This is

particularly so when the unabashed objective of the application is to push out the eventual hearing and adjudication of Skyscanner's counterclaim, which is an independent cross action instituted by Skyscanner because it wishes to have the serious and substantive issues identified therein determined."

169. The essence of the submission by the defendants on this subject is that the motivation and objective of this application is for the plaintiff to defer the day on which there is an adjudication of the merits of the competition law allegations.

170. The defendants say that the plaintiff's approach in this application reveals what it describes as a "*fundamental misunderstanding of the potential outcomes (and thus supposed advantages – which are in fact illusory) of the modularisation contended for by Ryanair*".

Mr. Nolan says that it is wrong to presume that, if the plaintiff fails in its claims, the defendants would then be content with having defeated the plaintiff's case and would, therefore, be prepared to walk away.

171. The defendants say that they have a competition law grievance as against the plaintiff which they wish to have adjudicated:-

"Come what may, not least because of a result in (a) an important determination regarding behaviour on the part of a commercial colossus with enormous market power and (b) if deemed just and appropriate, an award of damages as against Ryanair in Skyscanner's favour. In short, the outcome of module 1 as fashioned by Ryanair will not bring these proceedings to an end, regardless of whether it is Ryanair or Skyscanner that succeeds."

172. In his replying affidavit, Mr. Nolan posits a timeframe for the disposal of the proceedings assuming the case was modularised. This timetable envisages the possibility of a trial on Module 1 only in Quarter 4 2023, with the judgment following in Quarter 1 2024 and any appeal being disposed of on a date in 2025. He then assumes that, only after those

matters have been disposed of, discovery would commence on Module 2 and that, after further exchanges of discovery, witness evidence, and legal submissions, a trial would only occur in Quarter 4 2026. By contrast, he suggests that if the proceedings progress on a unitary basis, the matter could be heard in 2023 with judgment in early 2024 and any appeal being disposed of promptly thereafter.

173. Experience shows that it can be difficult to predict definitively the timeframe to any trial before a date is fixed, and there is a measure of exaggeration in the defendants' projection of the timing consequences of ordering a modular trial. Equally the defendants' prediction of a date for a unitary trial may be ambitious. Nonetheless, the defendants' description of the future stages of the litigation illustrates the scale of the potential delays to finality.

174. The defendants submit that from both an operational and reputational perspective it is prejudicial to their interests to have a fundamental aspect of their business model under challenge for any longer than is necessary and that the competition law question is as important to the fundamentals of the case as those proposals for Module 1.

175. The defendants submit that this is not the type of case in which there is a classic and obvious division between the potential issues arising from one module to the next, such as would arise in a case where liability should be adjudicated first, to be followed in a separate module by quantum.

176. The defendants distinguish the decision of Sanfey J. in *Ryanair v. Vola*, which they submit was premised on a determination, based in turn on concessions by the parties, that if the plaintiff's claim against Vola did not succeed there would never be a need to hear the counterclaim. The decision of Sanfey J. was indeed grounded on an acceptance in that case that if Vola prevailed in its defence of the liability issues, the counterclaim would not arise.

177. Although there are similarities between this case and that of Vola, Vola was an OTA (online travel agent) and not a meta search site and it was accepted by the parties that the issues raised on the counterclaim were sufficiently discrete from those raised in the statement of claim as to make the case appropriate for a modular trial.

The rules and principles

178. Order 63 A, r. 5 provides as follows: -

“5. A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings”.

179. Order 63 A, r. 6 (1) (b) (iii) provides that: -

“Without prejudice to the generality of rule 5 of this Order, a Judge may . . .
(b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing, give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule
. . . .
(ii) fixing any issues of fact or law to be determined in the proceedings”.

180. Order 36, r. 9 provides as follows: -

“9. (1) Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:
(a) that different questions of fact arising therein be tried by different modes of trial;
(b) that one or more questions of fact be tried before the others;
(c) that one or more issues of fact be tried before any other or others”.

181. There is no dispute between the parties on the general principle that the court has jurisdiction to order a modular trial in an appropriate case and that making such an order is discretionary. I have been referred also to extensive case law on the question of modular trials including *Ryanair v. Vola* (op. cit), *Weaving Macro Fixed Income Fund v. PNC Global Investment Servicing Europe Limited* [2012] IEHC 25 and [2012] IESC 60, *Cork Plastics (Manufacturing) v. Ineus Compound UK Limited* [2008] IEHC 93, *P.J. Carroll & Company Limited v. Minister for Health* (no. 2) [2005] 3 IR 457, *Inland Fisheries Ireland v. O’Baill* [2015] 4 IR 132, *McCann v. Desmond* [2010] IEHC 164, [2010] 4 IR 554, *Atlantic Shellfish Limited v. Cork County Council* [2010] IEHC 294, *B. v. Wexford County Council* [2021] IEHC 205, *Nolan v. Dildar Limited* [2020] IEHC 243, and others.

182. While many of these cases are cited by each side, the principles which can be derived from the cases and which are relevant to the circumstances of this case are as follows: -

(1) The default position is a unitary trial. Only this method affords each party the opportunity to advance all its claims and counterclaims and all of its evidence and submissions on both the facts and the law.

(2) If the case is capable of being divided into distinct modules a modular trial presents advantages in terms of a saving of court time and costs for both the court and the parties.

Those advantages include the following: -

(a) The possibility that the determination of a first module will render a second or further modules moot. A classic example of this is a case where a liability module can be determined first to be followed by a quantum module which may, depending on the outcome of the first module, become moot or the future efficient conduct of which may be informed by the manner in which liability has been determined in the first module. There will be certain shorter and simpler cases (of which this is not

one) in which even those clearly distinct modules should not be separated because doing so would impose additional burdens of time and cost on all concerned.

(b) Even if a second or subsequent modules are not rendered entirely moot by the determination of a first module, the possibility that subsequent modules or even the entire balance of the dispute somehow come to be resolved as a result of the determination of the first module has its attractions.

(c) The prospect that later modules will, even if not rendered moot, be shortened.

(d) Savings in costs and time may be achieved if burdensome pretrial procedures, most notably discovery, can be modularised or phased.

(e) In certain cases, a party who is not necessarily or directly concerned in a module or modules can be insulated from participation in particular modules. This objective can in certain cases be achieved by a different method namely excusing such a party from participating in the parts of the hearing even if it is a unitary trial.

(f) Even if a later module will not obviously or necessarily become moot or come to be otherwise resolved by the first module, modularisation can assist the parties and the court in focusing on discrete issues which can bring focus and concision to the preparation for and the hearing of those modules.

(3) Where issues are capable of subdivision the “prize” in terms of the potential efficiency of time and cost saving is significant and has proved beneficial in complex and protracted cases.

(4) In determining whether to order a modular trial, the court must carefully examine whether such a deviation from the classic unitary trial is safe in terms of the administration of justice. In *Desmond v. McCann*, Charleton J. put the question thus: -

“If a case can be described as an organic whole the taking out from which a series of issues would tear the fabric from what the parties need to litigate, so that the case of

either the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing of a number of limited issues...it may be unsafe to direct a modular trial.”

(5) Consideration needs to be given to whether a final result determining all necessary questions of the rights and liabilities of the parties to the litigation can truly be achieved in a fashion which is not only more efficient, but which is just and fair to the parties and not unfairly prejudicial to either of them. While efficiency and cost saving will always be attractive, those considerations cannot be an overriding consideration if there is jeopardy to the fair and just trial of the case.

(6) Leaving aside questions of enforcement or deferred enforcement of orders when a first module is determined, if one party has consideration of its claims deferred, a measure of prejudice arises. The question is whether that prejudice is of such a scale or nature as to cause injustice. If the potential savings are attractive, as will frequently apply in protracted and complex cases, the court must test the balance between the apparent benefits of a modular trial and the risk of injustice to either party.

(7) The court must consider whether the purpose of the modularisation application is truly to achieve cost or other efficiencies and focus on a consistent and just determination of the entire case or whether, as the defendant alleges in this case, it serves only the tactical or strategic purposes of one party.

(8) Consideration needs to be given to whether savings will in fact be achieved overall, or whether an order for modularisation will lead instead to additional complexities and costs in terms of further interlocutory stages such as discovery, interrogatories, exchanges of witness evidence and other pre-trial processes.

This case

183. At first pass, this case is clearly capable of modularisation between on the one hand the “liability issues”, as they have been characterised by the plaintiff and the “competition law issues”. Those terms used to describe of the modules are convenient labels but are in themselves pejorative of the defendants. They imply that the competition law issues do not impact on liability but are somehow relegated such that they are only capable of mitigating or modifying any finding of liability made in the first module.

184. The evidence in Module 1 as proposed would largely focus on the conduct of the defendants, but of course the plaintiff will be required to advance its own case and its own evidence relating to the defendants’ actions.

185. In Module 2 as proposed, much of the evidence would focus on such questions as the markets in which the plaintiff conducts its business, whether the plaintiff enjoys a dominant position and in which markets and, if so, whether its conduct either in asserting the rights in the statement of claim or otherwise amounts to an abuse of that dominant position. Whilst there is a certain attraction in viewing the modules as characterised by the plaintiff as discrete, it has to be said that many of the factual and legal questions arising even within that Module 1 are themselves discrete. I have earlier in this judgment summarised them, but it is appropriate to recap: -

- (i) Breach of contract under the license agreement.
- (ii) Breach of contract under the terms of use of the plaintiff’s website.
- (iii) Unjust enrichment seeking the remedy of restitution.
- (iv) Breach of duty and negligence.
- (v) Breach of copyright and database rights pursuant to the Copyright and Related Rights Act 2000 with regard to the plaintiff’s website and its database, literary works copyright, direct and indirect breaches of those rights and compensation for the loss of its investment.

(vi) Infringement of trademarks under the EUTM regulations Article 9 and under the Trademarks Act 1996.

(vii) Conversion, trespass to goods, property and services.

(viii) Misrepresentation.

(ix) Passing off.

(x) Economic torts including the following: -

(a) Wrongful interference in economic or contractual relations.

(b) Causing loss by unlawful means.

(c) Conspiracy.

(d) Inducing or procuring breach of contract.

(xi) Breach of “constitutional ECHR/EU law” in relation to: -

(a) Property rights.

(b) Right to a good name.

(c) Right to earn a livelihood.

(d) Other related rights.

186. Questions arise also in the manner in which the plaintiff has pleaded that the defendants’ liability arises as “co – conspirator or joint adventurer for value”, vicarious liability, and “wrongful facilitation of third party action.”

187. All of these claims invoke different legal concepts which require to be tested.

188. The defendants somewhat colourfully describe the plaintiff’s claims as “throwing the McMahon and Binchy book at it.” This Court does not fault the plaintiff for invoking all of these causes of action and remedies, particularly since the plaintiff says that this action goes to the protection of its business model. But, whilst there will be extensive overlap in the facts relied on, each of these causes of action and remedies carries its own set of proofs and legal

tests. Therefore, it is not obvious that the competition law “Module” is the only one which should be separated if there were to be modularisation.

189. The plaintiffs submit that the determination of Module 1 would be significantly shorter than Module 2. That is possible but also not obvious, when one considers the range of causes of action. A module based on competition law claims, would indeed require extensive evidence regarding the relevant industries, the markets, the role of the parties in the market, and the conduct of the plaintiff and perhaps of others and will be lengthy and complex. However, when one views the range of claims made in the statement of claim, there is no reason to conclude that the disposal of Module 1 would be so much shorter than the proposed Module 2. Wisely, the parties did not offer to the court any estimates as to the time which individual modules, or for that matter a unitary trial, would take at hearing.

190. The plaintiff submits that if it loses the case, the proceedings are over. The defendants say that this is presumptuous and that they would in any event wish to proceed with the counterclaim. Earlier in this judgment, I have identified a number of aspects of the counterclaim which are not necessarily or exclusively dependent on the assertions made in the statement of claim, such as claims arising from disparagement. (see paras. 56 to 62 above). I am not persuaded that it is safe to conclude on this application, that a determination of the plaintiff’s case against it would render the counterclaim moot.

191. There was discussion in submissions as to whether, after a determination of a Module 1, a court would defer making any orders which would be enforceable pending a determination of Module 2, such as is envisaged by the judgment of Sanfey J. in *Vola* and of Barniville J. in *Nolan v. Dildar*. (op. cit.) But as Sanfey J. acknowledged, it is not for the court on this application to predetermine that there should be such a deferral and this in turn may depend on how diligently the preliminary or interlocutory steps towards a trial of the second module have been progressed. This being the case, the defendants are presented with

a real prejudice, that Module 1 would be determined and could result in a declaration or an order which is not deferred or stayed in circumstances where the defendants have not had the opportunity to advance and be heard on their claims which, on any view of the matter, are as important to their business model as the plaintiff's claims are to its own. Even if an order was deferred or stayed a declaratory judgment could have prejudicial effects from a business and reputational perspective.

192. Leaving aside questions of prejudice in the short or medium term, there is a significant risk that a "once and for all determination" of the respective rights and obligations of the parties is not achieved until all modules are disposed of.

193. In the injunction application and appeal there appears to have been no substantive examination of the possibility of a modular trial. On the contrary, the remarks of Murray J. quoted at para. 103 above, indicate that the Court of Appeal was of the view that if the parties consider it so important to bring this litigation to finality, the proper course is to advance it to a trial as early as possible.

194. I am reinforced in my concerns as to how this case would progress if a modular trial is ordered by the closing paragraph of Mr. McNamara's affidavit of 27 May 2022 in which he says the following: -

"Given the complexity of the competition law issue, it seems inevitable that discovery under Module 2 would be a similar undertaking. In circumstances where it may never be necessary to move to Module 2, this could put the parties to enormous expense for nothing. If similar work was involved in discovery for both modules, this could double the amount of time it will take for any hearing to occur".

195. Whilst he does not go so far as to say this, this is an indication that the plaintiff would seek to defer important exercises such as discovery in Module 2 until after the determination

of Module 1, thereby deferring even further the final determination of issues between the parties.

Timing of this application

196. The defendants say that they would be prejudiced by the delay caused by the modularisation proposed by the plaintiff, because they need a determination for their business purposes. The plaintiff says that the defendants ought to have “cleared the way” by initiating their own proceedings earlier if they felt so aggrieved in the context of competition law.

There is no basis for the claim that the defendants ought to have issued their proceedings first. This dispute may have been “simmering” before November 2019 but relations between the parties appear to have broken down to the point of triggering these proceedings only in November 2019 when the plaintiff warned the defendants that it would discontinue access to the API. The plaintiff then commenced these proceedings very promptly thereafter on 5 December 2019.

197. The plaintiff has known from the outset that it would face issues alleged against it by reference to Article 102. This is mentioned in the correspondence of November 2019 and the issue was well ventilated in the injunction proceedings in the first half of 2020 to the point of each side exhibiting expert reports regarding Article 102. Therefore, the plaintiff has been on notice from the earliest stages of these proceedings that it would have to face this counterclaim and yet chose only in May 2022, two and a half years after the commencement of the action, to apply for modularisation.

198. It is worth repeating a number of the important dates: -

- (i) 5 December 2019 – Plenary Summons.
- (ii) 7 February 2020 – Statement of Claim.
- (iii) 21 October 2020 – Defence and Counterclaim.
- (iv) 19 November 2021 – Reply and Defence to Counterclaim.

199. The injunction application was first returnable for January 2020 and was heard by the court in June 2020 with a judgment delivered in July 2020.

200. It was not until 18 February 2021 that the plaintiff lodged its appeal against the order of Twomey J., without seeking any priority.

201. On 16 March 2022 the Court of Appeal delivered its judgment affirming the refusal of the injunction.

202. On 28 January 2022, the plaintiff notified the defendants of its intention to apply to transfer the case out of the Commercial List. That motion was withdrawn on 28 March 2022, twelve days after the delivery of the judgment of the Court of Appeal on the injunction. No detailed explanation is given as to why it was only on 13 May 2022 that the plaintiff brought this application, other than references in a number of affidavits to its own review of screen scraping litigation generally and its views as to how these should be efficiently progressed in the system, both in this and other cases.

203. Much has been said on both sides as to why the case has moved at the pace which it has moved which in terms of the Commercial List of this Court is leisurely. The parties criticise each other for the quality of replies to notices for particulars delivered under different headings and for positions adopted. But the only inference to be drawn from the chronology above is that the plaintiff has been more focused on the injunction proceedings, although slow to progress its appeal, than advancing the core pleadings.

204. It is to the plaintiff's credit that the injunction was limited to very particular aspects of the treatment of passenger email addresses. However, there is no evidence of any alacrity in progressing the core pleadings.

205. The plaintiff claims that a unitary trial will impose excessive burdens on its time and attention which are unnecessary in circumstances where there is a possibility of the counterclaim becoming moot. It does not say that it does not have the resources to deal with

the case as a unitary trial. Its submission on this aspect reveals instead a desire on the part of the plaintiff to deploy resources in a manner which focuses on its claims and not on defending the counterclaim or addressing the competition law plea in the Defence. It is clear from the pre – commencement correspondence and from information placed before the court in relation to other proceedings that it was on notice of the prospect that litigation with these defendants would engage the defendants allegations by reference to Article 102.

Balance of justice

206. A modular trial can be desirable for the reasons I have discussed earlier, particularly in complex and protracted commercial cases. It is the policy of this Court to support the constructive use of such procedures. However, the default remains a unitary trial and there is no entitlement to a modular trial, even in cases where parties can identify issues which are discrete and capable of being modularised.

207. The fact that a case is capable of being modularised does not necessarily mean that the court should order a modular trial. In exercising its discretion, the court should balance the potential benefits against the disadvantages and the risks of causing injustice.

208. The principal factors favouring a modular trial in this case are;

- (a) The case is capable of modularisation and two possible modules have been identified by the plaintiff.
- (b) A result of Module 1 may shorten the time and cost to hear and determine Module 2.
- (c) An order for modularisation may bring focus and concision to pretrial preparation and further interlocutory processes.

209. The factors weighing against modularisation are:

- (a) The first module as proposed is an overly simplistic description of what the plaintiff describes as “liability issues”.

- (b) I am not persuaded that a determination of Module 1 against the plaintiff will render the proposed Module 2 moot or unnecessary.
- (c) If the plaintiff is permitted to pursue its claims to trial before a court in a module at which the defendants are precluded from articulating and presenting their competition law claims both as a defence and counterclaim, the defendants will suffer prejudice at two levels;
- (i) Most importantly there is a real risk that the defendants' case will be damaged by, as Charleton J. put it in *Desmond v McCann* (op cit), "tearing the fabric from what the parties need to litigate", such that it would be unsafe on this application to direct a modular trial
 - (ii) If a first module were determined in the plaintiff's favour, the delay in hearing the competition law claim would be unfair to the defendant, whether or not the court defers making final orders or grants a stay, in that the defendant would remain under business and legal uncertainty for a protracted further period which is extended unnecessarily by the modularisation. The plaintiff could but does not make the same argument, but its affidavit as to its approach to further stages of the case (see paragraph 194 and 195) reveals an intention to contribute to such delay.
- (d) Finality between the parties requires that both the claim and the counterclaim be heard and determined. A modular trial will delay such a final determination.
- (e) When account is taken of further pretrial measures and interlocutory applications for each module there is no evidence that in reaching a final determination of all issues an overall saving of time and cost will be achieved. A "staged" discovery may not serve this purpose.

210. Taking all these considerations into account it has not been demonstrated that this application is brought in the interests of saving court time and saving the time and costs of the parties, as distinct from serving the plaintiff's strategic interests. The possible benefits of directing a modular trial are outweighed by the risks of injustice in getting to a fair and final determination of all issues between the parties.

Conclusion

211. The application to strike out the counterclaim and competition plea in the defence will be dismissed.

212. The application for a modular trial will be dismissed.

213. As a consequence of this decision, the court will need to find time to hear a lengthy trial. This decision does not mean that the parties should not, as they are always expected to do, strive to bring the action to trial on a timely basis and to prepare for it in a manner which will save time and costs. Pretrial measures such as discovery, possible interrogatories and exchanges of witness statements may be lengthy, but the parties are obliged to utilise and implement those or any other measures in a focussed manner which will assist in the preparation for an efficient hearing of the action. The court will expect the parties to turn their attention now to proposing realistic timeframes for these processes which can be submitted to the court at the adjourned directions hearing.