

THE HIGH COURT

COMMERCIAL

[2015 No. 9973 P]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

GOOGLE IRELAND LIMITED, VACACIONES EDREAMS S.L. AND GOOGLE INC.

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 16th day of February, 2017.

1. The first and third named defendants ("the defendants") have brought a motion to strike out paras. 50 – 61 of the amended statement of claim delivered in these proceedings pursuant to O. 19, r. 27 of the Rules of the Superior Courts and under the inherent jurisdiction of the court. This application is brought on the grounds that the defendants claim that the pleas in paras. 50 – 61 disclose no reasonable cause of action and/or are frivolous, vexatious and/or bound to fail.

2. The plaintiff is the holder of a community trademark ("C.T.M.") and claims various declarations, prohibitory injunctions and other relief (including damages) on the basis of an alleged infringement of the plaintiff's intellectual property rights. Although the plenary summons did not set out a claim for breach of competition law pursuant to Article 101 and 102 of the Treaty on the Functioning of the European Union or ss. 4 and 5 of the Competition Act 2002, an amended statement of claim included pleas in respect of those matters. The defendants argue that paras. 50 – 61 of the amended statement of claim contain a competition law claim which is indistinguishable from and parasitic upon the C.T.M. infringement claim.

3. Paragraph 33 of the plaintiff's first reply to particulars dated 16th May, 2016, states that the alleged anti-competitive object of the agreement complained of is "...to deceptively divert consumers who seek to book flights onto the eDreams website in order to generate revenue both for eDreams and for Google". The defendants argue that the object as pleaded amounts to a plea that the defendants have infringed the protection enjoyed by the plaintiff in its Ryanair Word C.T.M.. If the C.T.M. has not been infringed then it follows that there can be, in law, no infringement of Article 101 or 102 T.F.E.U. or s. 4 or s. 5 of the Act of 2002. If there is an infringement, then that constitutes a breach of the plaintiff's C.T.M. rights and such breach does not in and of itself amount to a breach of competition law or constitute an anti-competitive object. The defendants complain that the competition law claim effectively asserts that the plaintiff is entitled to a greater level of exclusivity than it enjoys under trademark law.

4. In summary, the defendants argue that the competition law claim is indistinguishable from the plaintiff's trademark claim in that it goes no further than alleging damage to the plaintiff's interest through the use of its trademark and that it has repackaged a claim for infringement in the guise of a competition law claim. Furthermore, the defendants allege that the competition law claim does not include the fundamental elements of a genuine competition law claim.

5. If the court permits the competition law claim to proceed, the defendants apprehend it will give rise to a longer and more expensive trial involving extensive discovery and imposing an unnecessary burden on the defendants.

6. The plaintiff for its part claims that the competition law claim is a "stand-alone claim" and that it has particularised its claim sufficiently.

The Law on Striking Out Applications

7. The jurisdiction on the issue of striking out a claim that is frivolous, vexatious and/or bound to fail is well trodden ground. In this application, the defendants rely on O. 19, r. 27 of the Rules of the Superior Courts and also the inherent jurisdiction of the court. Order 19, r. 27 states:-

"The Court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client."

The court has an inherent jurisdiction to strike out or stay proceedings if they are frivolous or vexatious or bound to fail. In *Barry v. Buckley* [1981] I.R. 306 at 308, Costello J. stated that the court has an inherent jurisdiction to stay proceedings and is not limited to the pleadings of the parties:-

"Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* [1908] 1 K.B. 761 at p. 765."

He went on to state that the jurisdiction should be exercised sparingly and only in clear cases.

8. In *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21 at para. 2.2 and 2.3, the Supreme Court approved of the following analysis of Clarke J. in *Salhill Properties Limited v. Royal Bank of Scotland* [2009] IEHC 207:-

"It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salhill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to

dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim."

9. In *Jodifern v. Fitzgerald* [2000] 3 I.R. 321, Murray J. set out what should be the approach of the court where the plaintiff raises legal issues in response to an application to strike out or dismiss. He said at p. 335:-

"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 court. Legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of that action in those proceedings."

10. In *Sun Fat Chan v. Osseous Ltd.* [1992] 1 I.R. 425 at 428 McCarthy J. said that "[g]enerally the High Court should be slow to entertain an application of this kind...". He continued:-

"Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture".

11. In *Delahunty v. Players and Wills (Ireland) Ltd.* [2006] 1 I.R. 304 at para. 16 Fennelly J. stated that a strike out application is not suitable to cases involving complex issues of law and/or fact. At para. 16 he said:-

"In my opinion, this is not a suitable case for the remedy either under the Rules of the Superior Courts 1986 or the inherent jurisdiction of the court. There are complex and difficult issues of both law and fact to be decided, which are more appropriately argued and tested at the full hearing of the action."

12. The burden rests on the defendants to persuade the court that the competition law claim discloses no reasonable cause of action, is frivolous or vexatious or is bound to fail and incapable of being saved by way of amendment to the pleadings or the emergence of any evidence at the trial of the action.

Issues

13. In these proceedings, Ryanair alleges that Google Ireland and/or Google Inc have a dominant position in what Ryanair describes as the market for internet search and electronic paid internet referencing/advertising services and that they have abused a position of dominance by their refusal to respect and give effect to the Ryanair Word C.T.M. and/or their use and/or exploitation of the Ryanair Word C.T.M. in the AdWords programme and/or that they have entered into an anti-competitive agreement with eDreams. These matters are pleaded in paras. 50 to 61 of the amended statement of claim which the defendants seek to have struck out in this motion. At the hearing of this motion, the court heard lengthy submissions and was referred to three extensive notices for particular and replies thereto wherein these claims were probed further.

14. The defendants ask how can competition law be used to extend an exclusive right given by the C.T.M., the effect of which is to exclude competition? They argue that the purpose of a C.T.M. is not to protect its owner against practices inherent in competition and to this end they rely on a decision of the C.J.E.U. in *Interflora Inc & Anor v. Marks and Spencer plc & Anor* (Case C-323/09); [2012] Bus. L.R. 1440. In that case, the defendant selected "Interflora" together with variants of it as a key word for a referencing service operated by a well-known internet search engine. When an internet user entered the word "Interflora" or one of its variants into the search engine, an advertising link to the defendant's website was generated under the heading "sponsored links". The claimants contended that their trademark had been infringed and the High Court in England and Wales referred certain questions to the C.J.E.U. summarised in the headnote to the reported judgment as follows:-

"First, whether under Article 5(1)(a) of Council Directive 89/104/EEC and Article 9(1)(a) of Council Regulation (EC) No. 40/94 a trade mark proprietor was entitled to prevent a competitor which sold goods or provided services identical to those covered by the trade mark, from selecting a sign identical to that trade mark as a keyword for an internet referencing service. Secondly, whether by Article 5(2) of the Directive 89/104/EEC and Article 9(1)(c) of Regulation 40/94, the proprietor of a trade mark with a reputation was entitled to prevent a competitor from basing its advertising on a keyword corresponding to the trade mark which the competitor had selected in an internet referencing service.

On the reference –

Held (1)...that the mere fact that the use, by a third party, of a sign identical with a trade mark in relation to goods or services identical with those for which the mark was registered obliged the proprietor of that mark to intensify its advertising in order to maintain or enhance its profile with customers was not a sufficient basis for concluding that the trade mark's advertising function was adversely affected; that when the use by a third party of a sign identical with the trade mark substantially interfered with the proprietor's use of its trade mark to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty, the third party's use had to be regarded as adversely affecting the trade mark's investment function and the proprietor was, as a consequence entitled to prevent such use under Article 5(1)(a) of Directive 89/104 or, in the case of a community trade mark, under Article 9(1)(a) of Regulation 40/94; and that, accordingly, Article 5(1)(a) of Directive 89/104/EEC and Article 9(1)(a) of Council Regulation (EC) 40/94 entitled the proprietor of a trade mark to prevent a competitor from advertising, on the basis of a keyword which was identical with the trade mark and which had been selected in an internet referencing service by the competitor without the proprietor's consent, goods or services identical with those for which that mark was registered, where that use was liable to have an adverse effect on one of the functions of the trade mark..."

15. Counsel for the defendants place particular emphasis on para. 57 of the *Interflora* judgment which states:-

"However, the mere fact that the use, by a third party, of a sign identical with a trade mark in relation to goods or services identical with those for which that mark is registered obliges the proprietor of that mark to intensify its advertising in order to maintain or enhance its profile with consumers is not a sufficient basis, in every case, for concluding that the trade mark's advertising function is adversely affected. In that regard, although the trade mark is an essential element in the system of undistorted competition which European law seeks to establish (see, in particular, Case

16. For the purposes of this application, counsel for the defendants invites the court to assume that the defendants hold a dominant position in two markets; namely, the market for internet search and the market for online search advertising. The court was informed that Google AdWords allows advertisers to bid on specific keywords and that the defendants exploit its search engine and AdWords service by allowing a party that has bid for a specific keyword a prominence on the website so that when a user performs a search on Google search with such a keyword, a link to the advertiser's website is displayed on the Google search results page generated by such keywords. Thus, when a customer types in "Ryanair" using the defendants' search engine the eDreams website comes up ahead of the Ryanair official website in the search results.

17. There can be no doubt from reading the amended statement of claim that within para. 50 – 61 is a claim that the defendants' conduct is in breach of competition law. Furthermore, the defendants accept, as they must for the purpose of this application, that the matters pleaded in the amended statement of claim can be proved. Therefore, the only issue to be decided at this stage is whether or not legal issues of a sufficiently substantial nature have been raised so that it cannot be said that the plaintiff's claim on the competition law point is bound to fail.

18. Having set out in paras. 50 – 61, a claim based on breach of competition law and in particular an abuse by the defendants of a dominant position, the plaintiff goes on to particularise their claim in a number of replies to various notices for particulars. For example, in para. 26 of the first replies to particulars, the plaintiff sets out the claim that the market for online search advertising is a recognised and defined market for the purpose of competition law and that the market for online search advertising is closely linked to the market for internal search. In the replies furnished at para. 29(d), the plaintiff pleads references to European Commission decisions in support of its allegation of abuse of conduct on the part of the defendants. In para. 33 of the first replies to particulars dated 16th May, 2016, the plaintiff alleges that the anti-competitive object of the alleged agreement is to "deceptively divert consumers who seek to book flights on the website onto the eDreams website in order to generate revenue both for eDreams and for Google".

19. The plaintiff's claim for abuse of a dominant position is pleaded in paras. 52 – 61 of the amended statement of claim and particularised at paras. 25(d) and (e) of the first replies to particulars and then paras. 25(d) and (e) and 28 of the third replies to particulars. Paragraph 28(d)(iv) of the third replies to particulars sets out how it is alleged that the defendants have failed to uphold their special responsibility by operating their AdWord service on terms that are unfair and misleading to consumers and further particulars furnished by the plaintiff set out the effect of the defendants' conduct on competition in the market. These are but some examples to be found in the pleadings but they are not exhaustive.

20. What is quite clear from the pleadings, with reference to the replies to particulars furnished by the plaintiff, is that it has set out a claim in some detail for breach of competition law and has offered reasons as to why it should be entitled to maintain such a claim. What the court has to decide is whether that competition claim is, in reality, a dressing up of the C.T.M. infringement claim and cannot give rise to a separate cause of action.

21. In legal argument, both sides to this dispute referred to authorities in support of their position. The plaintiff maintains that on the basis of the material contained in the amended statement of claim and the particulars furnished in respect thereof that it has set out a good arguable case for a breach by the defendants of Article 101 and 102 T.F.E.U. and ss. 4 and 5 of the Competition Act 2002. It points to the fact that the European Commission has analysed the market for internet search in which the defendants operate and define that market for the purposes of competition law. It has made reference to European Commission decisions in support of those markets. (e.g. Case No. COMP/M.6163 - AXA/Permira/Opodo/GO Voyages/eDreams Commission decision 30th May, 2011)

22. The plaintiff has also cited a number of cases of the C.J.E.U. on the issue of abuse of a dominant position and relies in particular on Case 322/81 *Michelin v. Commission*, and Case T-321/05 *AstraZeneca v. Commission* on the issue of the special responsibility of a dominant undertaking not to allow its behaviour to impair genuine, undistorted competition in the internal market through conduct falling outside the scope of competition on the merits.

Conclusion

23. This application was heard over two days and involved very extensive legal submissions by the parties. It is impossible to read the transcript of the hearing without coming to the conclusion that weighty and substantial arguments were made on the issue as to whether or not it is legally permissible for the plaintiff to maintain a claim for breach of competition law in addition to the infringement of its community trademark and whether an attempt to do so is an attempt to extend the plaintiff's right under the C.T.M. in a manner that is not permissible. Even a cursory reading of the transcript establishes that these issues can neither properly nor appropriately be dealt with in a motion to strike out a portion of the plaintiff's claim having regard to the authorities in this jurisdiction.

24. It is likely that the competition law claim will add significantly to the time and expense involved in litigating the issues in this case. And it is also, of course, possible that the judge hearing the action may accept the defendants' submission that the competition law claim is indistinguishable from and parasitic upon the C.T.M. infringement claim and can confer no additional benefit on the plaintiff. But if a judge so concludes, this is a matter that can be dealt with by way of costs.

25. The court has to deal with this strike out motion on the basis of well established jurisprudence which involves exercising jurisdiction sparingly and only in a clear case. In my view, the hearing of the motion raised complex and difficult issues of law which are more appropriately decided at a full hearing of the action and it cannot, at this stage, be said that the claim in paras. 50 – 61 of the statement of claim are bound to fail.

26. Accordingly, I refuse the defendants' application to strike out paras. 50 – 61 of the amended statement of claim.