THE HIGH COURT

2009 7959 P

Between

RYANAIR LIMITED

Plaintiff

- and -

BILLIGFLUEGE.DE GmbH

Defendants

Judgment of Mr. Justice Michael Hanna dated the 26th day of February, 2010

On Friday the 12th day of February, 2010 I informed the parties that I was finding for the Plaintiff who is the Respondent in the motion relating to a preliminary jurisdictional issue brought by the Defendant. I said I would give my detailed reasons later and I now do so. These proceedings were heard in tandem with related proceedings bearing Record No. 7960P/2009 and entitled Ryanair Limited v. Ticket Point Reisebüro GmbH. In both sets of proceedings, the defendants brought an application to have the plaintiff's proceedings dismissed for want of jurisdiction by virtue of the provisions of Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Brussels Regulation") as transposed into Irish law by the European Communities (Civil and Commercial Judgments) Regulations, S.I. No. 52 of 2002. It is with that application which this judgment is concerned.

The defendants rely on Article 2 of the Brussels Regulation which provides that a defendant should be sued in its own domicile. The defendants in these proceedings are German based and say that they should be sued in Germany, not in Ireland. The plaintiff claims that while the general rule is that a defendant should be sued in their domicile, a number of exceptions to that general rule exist and in this regard the plaintiff seeks to rely on Articles 5(1), 5(3) and 23.

The only issue I have to determine at this juncture therefore is whether or not this Court has jurisdiction to hear these proceedings pursuant to the Brussels Regulation.

The Plaintiff's Claim
The plaintiff claims the service offered by the defendants, whereby they run a price comparison website allowing users of their site to compare prices for flights, breaches the plaintiff's website's Terms of Use, trademark, copyright and database rights in that it takes information from the plaintiff's site, an activity known as "screen-scraping", and provides that information to its users for a fee. All of this is done without the permission of the plaintiff and, according to the plaintiff, in breach of its website's Terms of Use.

One of the issues which may ultimately fall to be determined by this Court if the plaintiff overcomes the initial hurdle of defeating the defendant's jurisdiction application, is whether or not the plaintiff's website's Terms of Use constitute a valid and legally binding contract which was entered into by the defendant's through their use of the said website. The plaintiff says, however, that in order to determine the jurisdiction issue, it is not necessary for the Court to adjudicate upon the validity of the Terms of Use but rather it shall be sufficient if the Court is satisfied as to the existence of a valid exclusive jurisdiction clause set out within that document. The plaintiff in this regard relies upon paragraph 7 of the Terms of Use which provides that the courts of Ireland are to have exclusive jurisdiction in respect of any dispute.

The Defendants' Case
The defendants claims that there is no contract in existence between the parties and that the plaintiff's Terms of Use lack contractual effect because they were never agreed or consented to by the defendants.

The defendants say the plaintiff's website's Terms of Use cannot form the basis of a contract because all of the traditional features of a legally binding contract are absent such as the date on which it may be said that a contract was entered into between the parties and the absence of any consideration. They say that as there is no legally enforceable contract in place between the parties to these proceedings, the plaintiff cannot rely on Article 23(1) of the Brussels Regulation to confer jurisdiction on this Court because of the absence of an agreement.

The Brussels Regulation
Article 23 of the Brussels Regulation provides:

> "If the parties, one or more of whom is domiciled in a Member State, **have agreed** that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with **a particular legal relationship,** that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise." (Emphasis added)

If Ryanair's website's Terms of Use can be said to be an "agreement", then the parties are in a legal relationship and the dispute that has arisen from the use of Ryanair's website falls to be governed by the exclusive jurisdiction clause

contained within that agreement.

The Case-law

In *Ryanair Ltd. v. Bravofly* and Travelfusion Ltd. [2009] IEHC 41, the second named defendant brought an application to dismiss the proceedings against it for want of jurisdiction under the Brussels Regulation. Travelfusion was based in the UK and the relevant jurisdiction clause in Ryanair's website's Terms of Use at that time specified the UK Courts as having exclusive jurisdiction over any disputes arising as a result of the breach of those terms. Travelfusion therefore sought to have the Irish proceedings against it dismissed for want of jurisdiction in favour of the UK courts pursuant to the exclusive jurisdiction clause set out in Ryanair's Terms of Use. Ryanair have since changed their Terms of Use to nominate Ireland as the appropriate jurisdiction in the event of a dispute. In *Bravofly*, it was argued successfully by Travelfusion that a choice of jurisdiction clause must be upheld and given effect to even though one party may be challenging the validity of the entire contract including the validity of the jurisdiction clause. Ironically, in an attempt to defeat Travelfusion's jurisdiction application, it was Ryanair who put forward an argument in that case that the requirements of Article 23 had to be strictly construed, in particular with regard to whether there was a consensus between the parties in relation to the clause, an argument which is now being advanced by their opponents in these proceedings. Clarke J. held that there was sufficient consensus as to the exclusive jurisdiction clause and granted Travelfusion's application to have those proceedings against it dismissed for want of jurisdiction.

In *Estas Salotti v. Rua* [1976] ECR 1831 , the European Court of Justice held, at para. 7 of the judgment, that Article 23:

> "… imposes upon the Court before which the matter is brought the duty of examining first , whether the clause conferring jurisdiction upon it was in fact the subject of a **consensus between the parties** which must be clearly and precisely demonstrated."

Again, in *Benincasa v. Dentalkit* [1997] ECR 1 6767, the European Court of Justice explained, at paras. 28 and 29, that Article 23 should be interpreted strictly, since the purpose of the Article is to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus between the parties. The *Benincasa* decision is of particular significance to the issue before the Court here as in that case, the ECJ had to consider whether the courts of a Member State specified in a jurisdiction clause can have exclusive jurisdiction, pursuant to what was then Article 17 and is now Article 23, where there was a dispute as to the validity of the agreement setting out that clause. The ECJ found that a distinction must be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated and that a validly concluded jurisdiction clause remains valid despite either party seeking a declaration that the contract which contains the clause is void. Hence, while the defendants in this case dispute the existence of a valid contract and indeed say that there was never any agreement entered into by the parties, the jurisdiction clause is severable and distinct from the agreement in terms of validity and capable of surviving independently of it. The Court therefore must pay special attention to the exclusive jurisdiction clause in the plaintiff's website's Terms of Use, notwithstanding the fact that the defendants dispute that document's validity. In *Bravofly,* Clarke J. also quoted from the decision of the ECJ in *Soc.Trasporti Castelletti Spedizioni Internazionali SA v. Hugo Trumpy SpA* [1999] ECR 1/597, where at paras. 48 to 51, it was stated:

> "As the court has repeatedly stated, it is in keeping with the spirit of certainty, which constitutes on of the aims of the Convention that the national court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case."

In addition to the case law of the European Court of Justice, the Court also has regard to a number of American authorities referred to by the plaintiff on the issue of exclusive jurisdiction clauses in website terms of use or terms and conditions. Given the dearth of case law on this issue in this jurisdiction, the Court has found the jurisprudence of the U.S. courts useful. In *Decker v. Circus Circus Hotel* 49 F. Supp. 2. d 743, the plaintiffs brought a personal injury action against the defendants in the State of New Jersey arising out of an accident which occurred in Nevada. The plaintiffs entered into the relevant contract with the defendant via the defendant's internet website. Judge Walls of the United States District Court in the District of New Jersey deemed the jurisdiction clause contained in the contract entered into over the internet was enforceable and the matter was transferred to Nevada.

In *Caspi v. Microsoft Corporation* 323 N.J. Super. 118, 732 A.2d 528, the Superior Court of New Jersey, Appellate Division, was asked to determine the validity of an exclusive jurisdiction clause contained in an online subscriber agreement of Microsoft. The clause stated that proceedings were to be heard in the State of Washington. Before subscribing to Microsoft's online service a user was required to click "I Accept". Registration could only occur after this. The Court took the view that the ordinary contract law principles ought to apply and the fact that the contract was entered through the medium of the internet made no difference. The exclusive jurisdiction clause was therefore deemed enforceable.

In *Specht v. Netscape* 306 F.3d 17, Judge Sotomayor of the United States Court of Appeals (as she then was) held that it was more likely than not that a user of the website in question would not scroll down the webpage sufficiently enough to see the software licence terms which were placed below the download button they would have to press in order to download the product they were looking for. In other words, the terms in question were not readily identifiable or sufficiently visible to the users of the website and were placed in such a position on the webpage that a user may never see or look at them before the transaction was completed by the clicking on the download button. In *Specht,* the Court addressed the issue of having knowledge of and therefore being bound by terms of use. The Court referred to the manner in which traditional contracts are formed and then provided a useful analysis of contracts formed over the internet as follows, at p. 16:

> "These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to 'Download now!'"

And at p. 20, Judge Sotomayor said:

> "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."

Here, Ryanair argue that the terms were clearly visible to all visitors to and users of their website. They say that in carrying out the screen-scraping activity, the defendants were making use of the website for their own commercial advantage and as such that use constitutes an unambiguous manifestation of assent to its terms.

In *Forrest v. Verizon Communications* Inc. 805 A.2d 1007, the District Court of Columbia commented, at p. 6, that:

> "A contract is no less a contract simply because it is entered into via a computer"

In *Register.com Inc. v. Verio* Inc. 356 F.3d. 393, a decision of the United States Court of Appeals, Second Circuit, the plaintiff company provided an internet domain search facility. A person who conducted a search for a domain name would receive a reply together with a statement of terms providing that the information only be used for lawful purposes. It was claimed that the defendants breached these terms. The court was of the view that it is not necessary to click "I Accept" in order to manifest acceptance of an offer. Rather, in keeping with traditional contract principles, conduct in the form of making repeated searches in the knowledge of the existence of the terms of use bound the offeree to the terms.

Do the Terms of Use constitute an Agreement for the purpose of Article 23 of the Brussels Convention?
In order to find that Article 23 applies, the Court must first be satisfied as to the existence of a contract between the parties and the existence of a contract is strenuously denied by the defendants who argue that the Terms of Use on Ryanair's website lack contractual force because they are nothing more than a set of unilaterally imposed conditions which they never agreed to. I find this argument unconvincing. By way of analogy, if I enter a shop and see an item on sale for €10, the fact that I never agreed to the €10 price tag or the fact that the shop owner unilaterally imposed that price without consulting me about it does not mean that I am not bound to pay that price if I go to the counter and seek to buy the product. In today's market, given the change in economic conditions, it may very well be that we have a return to a system of haggling but as matters stand, the defendant's argument that one cannot impose certain unilateral terms is not an accurate description of the law on contract as I understand it. It will often be the case that one party will set out certain terms, such as not using information on a website for commercial purposes without the owner's consent, and if another party wishes to flout those terms, they cannot then say that because the term was unilaterally imposed, it had no legal effect. That seems to me to be what the defendants in this case have been attempting to argue.

The defendants claim that they never consented to the Terms of Use or entered into any agreement with the plaintiff. The plaintiff says this is not the case and that at all material times its Terms of Use governed its relationship with the defendants. As regards whether or not the Terms of Use were binding on the defendant, it is a well established general principle of law that parties to a contract cannot be bound by terms which they have not had an opportunity of reading prior to making the contract. That is not to say that a party will not be bound because they have not read the terms – they will only escape being bound if they can show they were not afforded a reasonable opportunity to read the term in question before entering into the contract. In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433 it was held that where a condition is particularly onerous or unusual, the party seeking to enforce it must show that that condition was fairly brought to the notice of the other party. As per Dillon L.J., at p. 439:

> "… if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party."

Similarly, in *Thornton v. Shoe Lane* [1971] 2 W.L.R. 585, a case involving an exclusion of liability clause and a ticket issued by an automatic machine in a car park, Lord Denning M.R. made the following observations, at p. 588:

> "The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise."

In *Thornton,* the House of Lords held that the defendant's had not taken sufficient steps to ensure that the notice containing the exclusion of liability clause was brought to the attention of customers of the car-park before they purchased their tickets and in those circumstances that the clause was invalid and of no effect. Here, the exclusive jurisdiction clause was contained in the Terms of Use on the plaintiff's website, highlighted by way of a hyperlink. In such circumstances, the Terms of Use on Ryanair's website were "fairly brought to the attention of the other party". It seems that the Terms of Use were clearly accessible by way of a hyperlink which was at all times clearly visible to users of the plaintiff's site. The Terms were not hidden in an awkward part of the screen or in any way concealed or difficult to find. The inclusion by Ryanair of their website terms of use via a hyperlink that the website user is required to view and assent to results in the user entering into what is known as "a click-wrap agreement" with Ryanair. The plaintiff referred to the U.S. cases of *Caspi v. Microsoft Network* 323 NJ Super. 118; 732 A. 2d 528 (New Jersey Appellate Division, 1999) and

Specht v. Netscape & AOL 306 f. 3d 17 in this regard. In addition to claiming that the terms of use lacked contractual effect, the defendants also argued that regardless of the validity of the terms, they did not "use" the plaintiff's website, the customer did. In this regard, while the defendants may not be the actual customer or person who will sit on the seat in the plane, they are commercial entities who nonetheless engage with the plaintiff's website for the purpose of gleaning or "scraping" information from it for onward transmission to their own customers. To claim that that activity is not "use" of the plaintiff's website by the defendants is an exercise in semantics and an unconvincing argument.

In resolving this issue of the validity of the plaintiff's Terms of Use, the Court has had regard to the traditional contract principles of offer, acceptance and consideration and has asked itself what was the consideration provided in the instant case? The defendants claim there was no consideration, or, for that matter, no acceptance.

Consideration must be provided by the party who seeks to enforce the contract. Here, Ryanair are seeking to enforce their Terms of Use. Ryanair, therefore, must satisfy the Court that they have provided the defendant with consideration. It seems to me that the plaintiff, through their website, offer information for use, subject at all times to their Terms of Use policy, to the users of their website, including the defendants. Although the defendants deny that they use the plaintiff's website and claim that it is the customer or the consumer who does so, it again seems to be that the defendants accept the offer of information made by the plaintiff when they systematically access the Ryanair website though the screen-scraping mechanism. In my view, the provision of information as to flights and prices of flights by Ryanair on their site, subject at all times to their Terms and Conditions, constitutes a sufficient act of consideration for the purposes of making the contract legally binding.

I therefore find for the plaintiffs on the issue of whether or not a legally binding contract exists in this case, being convinced for the reasons set out above that the Terms of Use constitute a contractual document entered into by the parties and in respect of which consideration was provided by the plaintiff in the making available of the information for use by the defendant.

Is the exclusive jurisdiction clause binding?
As the Terms of Use have contractual effect, it follows from that the exclusive jurisdiction clause contained therein is also binding. In *Bravofly,* referred to above, Clarke J. made the following helpful observations with regards to exclusive jurisdiction clauses:

> ".. it is said a contract in which a jurisdiction clause is located may be held to be voidable or otherwise unenforceable but not the jurisdiction agreement within it. The principles in *Benincasa* were applied by Laffoy J. in *Minister for Agriculture v. Alte Leipziger* [1998] IEHC 45, as the fundamental principles which must guide a court in determining issues in relation to jurisdiction clauses under the Brussels Regulation."

I would therefore find for the plaintiff on this point also.

Was there an assent to jurisdiction?
The plaintiff argued that they do not need to show the existence of a valid agreement at this stage and that once they can show an assent to jurisdiction, then the exclusive jurisdiction clause will have effect. Again, I find for the plaintiff on this point. The defendants used the plaintiff's website. They access the site and screen-scraping activity is routinely carried out. The information gleaned therefrom is used for a commercial purpose as a result of which the defendant makes a profit or earns a fee. By using the site in this way, the defendants must be taken to have assented to the plaintiff's website's Terms of Use. In this case, we are dealing with commercial entities and the existence and effect of the website's Terms of Use are clear and unambiguous. If you use the site, you agree not to breach its terms and if you do so, the exclusive jurisdiction clause set out in the Terms of Use make is clear that Ireland is the appropriate jurisdiction for the purposes of litigating any disputes that may arise as a result.

Conclusion
The exclusive jurisdiction clause contained in the plaintiff's website's Terms of Use was binding on the defendants in circumstances where those Terms were at all times available for inspection by the defendants as users of or visitors to the website, the plaintiff having taken appropriate steps to ensure that the Terms were brought to the user's attention through their inclusion on the website via a clearly visible Hyperlink. As I have found that the Terms of Use formed a legally binding agreement for the purposes of Article 23 of the Brussels Convention and as the exclusive jurisdiction clause contained therein was at all times available for inspection by the defendants, I would dismiss the application for an order dismissing the plaintiff's claim for want of jurisdiction.