Neutral Citation [2013] IEHC 124

THE HIGH COURT

[2010 No. 8924P]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

ON THE BEACH LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 22nd day of March, 2013.

The proceedings and the application

1. These proceedings were initiated by a plenary summons which issued on 27th September, 2010. In the general endorsement of claim on the plenary summons the plaintiff claimed various reliefs. The first relief was a declaration that the terms of use of the plaintiff's website (www.ryanair.com) are binding on the defendant its servants and/or agents. There followed claims for various declaratory and injunctive reliefs and for damages for various alleged wrongs, namely, breach of contract, misrepresentation, passing off, trespass to goods, conversion, infringement of the plaintiff's registered trademarks, infringement of the plaintiff's database rights and suchlike. There was a statement at the end of the endorsement of claim to the effect that the Court has power under Council Regulation (EC) No. 44/2001 dated 22nd December, 2001 (Brussels 1 Regulation) to hear and determine the plaintiff's claim against the defendant and that the Court should assume power to hear and determine the claim under the provisions of Article 5(1) and/or Article 5(3) and/or Article 23(1) of the Brussels 1 Regulation.

2. The defendant, which is a limited liability company incorporated under the laws of the United Kingdom with a registered office in England, having been served with the proceedings in mid-December 2010, entered a conditional appearance on 24th January, 2011 for the purposes of contesting jurisdiction.

3. The application to which this judgment relates was initiated by a notice of motion which issued on 11th March, 2011 in which the defendant sought an order pursuant to Order 12, rule 26 of the Rules of the Superior Courts 1986 (the Rules) or, in the alternative, pursuant to the Court's inherent jurisdiction, setting aside the issue of the plaintiff's plenary summons, and the service of notice thereof, on the ground that this Court has no jurisdiction to hear and determine the claim against the defendant having regard to the provisions of the Brussels 1 Regulation.

The factual basis of the proceedings

4. This application has generated approximately the equivalent of four large lever arch folders of affidavits and exhibits. The principal deponents on behalf of the defendant are Gwendoline Parry, the Finance Director of the defendant, who swore a grounding affidavit on 11th March, 2011 and further affidavits on 1st December, 2011, 18th April, 2012 and 7th January, 2013, and Michael Gerard Robb, who is described as an I.T. consultant, who swore affidavits on 1st December, 2011 and 23rd April, 2012. The principal deponents on behalf of the plaintiff were Juliusz Komorek, the Company Secretary and Director of Legal and Regulatory Affairs of the plaintiff, who swore affidavits on 23rd June, 2011, 20th January, 2012 and 19th July, 2012, and Darran Thomas, who is described as a professional computer programmer, who swore affidavits on 23rd June, 2011, 16th January, 2012 and 19th July, 2012. Duncan Smith, the Service Operations Manager of the defendant swore an affidavit on 18th April, 2012 in which he addressed matters which had been deposed to in Mr. Komorek's second affidavit and in Mr. Thomas's second affidavit. Finally, an averment in Ms. Parry's affidavit sworn on 7th March, 2013 was the springboard for five further affidavits, three of which were sworn by Eric Neville, the Director of Information Technology with the plaintiff on 14th January, 2013, 25th January, 2013 and 31st January, 2013, and the remaining two having been sworn by Jonathan Smith, Chief Technology Officer with the defendant, on 21st January, 2013 and 29th January, 2013. The affidavits are replete with factual controversies which cannot be resolved on this application. Moreover, much of the factual material is irrelevant to the determination of the issue the Court has to determine, which is whether, given that the defendant is a company registered and carrying on business in the United Kingdom and thus domiciled in the United Kingdom, which is not in dispute, an Irish Court has jurisdiction to hear and determine the plaintiff's claim against the defendant. It is against that background that I will summarise what I consider to be the relevant facts.

5. Mr. Komorek has averred that Ryanair is the leading European low fares airline. It advertises flight information and sells seats on its flights through its websites. Its customers can avail of other services through the website, for example, car hire, hotel reservations and insurance services. It earns significant revenue by allowing other service providers advertise on its website. The website is a key part of the plaintiff's business, over ninety nine per cent of its bookings being made through it.

6. The plaintiff's "Terms of Use", which Mr. Komorek has emphasised are distinguishable from its "General Terms & Conditions of Carriage", are available to each user of the plaintiff's website by way of hypertext link at the bottom of each page and as part of the booking process. The position of the plaintiff is that the plaintiff's Terms of Use govern the use of its website and are binding on all persons using the website, irrespective of whether a booking is made or not, whereas its General Terms & Conditions of Carriage are only applicable in respect of a flight booked by a person. Mr. Komorek emphasised that the plaintiff is not relying on the General Terms & Conditions of Carriage in support of its position that this Court is seised of jurisdiction in respect of the substantive proceedings.

7. Although their application to the defendant is hotly disputed, there is no dispute as to the contents of the relevant Terms of Use in relation to use of its website which are relied on by the plaintiff as establishing the Court's jurisdiction to hear this action. They are headed "Terms of Use of the Ryanair Website". The terms are set out in seven clauses as follows:

> (a) Clause 1, which is prefaced "General", having stated that the owner of the website is the plaintiff, an Irish company, provides as follows:

> "By using this website you agree to be legally bound by and act in accordance with these Terms of Use and by all other applicable provisions; in particular you agree not to do acts prohibited under paragraphs 3 to 5 below. If you disagree with these Terms of Use and/or with any other applicable provisions, you are not permitted to, and agree not to, use this website."

(b) Clause 2, which is prefaced "Exclusive distribution channel", states that the website and the plaintiff's call centre are the exclusive distribution channels of the plaintiff's services and that its website is the only website authorised to sell its flights and that the plaintiff does not authorise any other websites to sell its flights.

(c) The prohibitions contained in paragraphs 3 to 5 include the following:

> (i) Clause 3 prohibits "use of any automated system or software to extract data from [the] website . . . for commercial purposes ("screen scraping") . . ., except in cases where third parties have entered into a written Licence Agreement directly with [the plaintiff] which permits that third party to access [the plaintiff's] price, flight and timetable information for the sole purpose of price comparison".
>
> (ii) Clause 4 deals with intellectual property and prohibits the use of information and data on the website except with the written consent of the plaintiff and warns that a breach may infringe the plaintiff's intellectual property rights.
>
> (iii) Clause 5 prohibits the establishment or operation of links to the website without the prior written consent of the plaintiff.

(d) Clause 7 is prefaced "Applicable Law and Jurisdiction" and provides:

> "It is a condition precedent to the use of the [plaintiff's] website, including access to information relating to flight details, costs etc., that any such party submits to the sole and exclusive jurisdiction of the Courts of the Republic of Ireland and to the application of the law in that jurisdiction, including any party accessing such information or facilities on their own behalf or on behalf of others".

Clause 7 goes on to provide that, in its absolute and sole discretion, the plaintiff may bring a legal action "against any party in breach of these terms and conditions" at its election in Ireland or the place of the breach or the domicile of that party.

8. After the initiation of these proceedings by issuing the plenary summons, but before notice of service thereof, the plaintiff wrote to the defendant by letter dated 1st October, 2010 (the October 2010 letter). In that letter it was stated that use of the plaintiff's website is governed by its Terms of Use, which are clearly displayed on the website. Reference was made to Clause 3, which prohibits screen scraping. It was alleged that the defendant was involved in activity which constituted a breach of contract and an infringement of the plaintiff's intellectual property and other rights. It was also stated:

> "The Terms of Use of [the plaintiff's] website are binding on [the defendant] in circumstances where those terms are at all times available for inspection by [the defendant] as a user or visitor to the website via a clearly visible hyperlink on [the plaintiff's] website."

The defendant was informed that legal proceedings had been issued against the defendant in the High Court in Dublin and it was stated that the jurisdiction of the Irish courts with respect to the matter was "unequivocal", quoting a passage from the judgment of this Court (Hanna J.) delivered on 26th February, 2010 to which I will refer below. I have referred to this letter because the plaintiff places reliance on the fact that it drew the defendant's attention to the availability for inspection of the Terms of Use on the plaintiff's website via the hyperlink.

9. Ms. Parry in her grounding affidavit has averred that the defendant is one of the leading online travel agencies in the United Kingdom, through which more than 500,000 consumers, who are normally resident in the United Kingdom, every year book travel arrangements. Ms. Parry characterised the defendant's role as effectively acting for consumers "as a web search engine which facilitates for consumers bookings with charter flight providers, scheduled and low cost airlines, tour operators, airport parking providers, bed banks/hotels, airport transfer companies, car hire firms and insurance companies", primarily through its website (www.onthebeach.co.uk). Ms. Parry has averred that different methods are used by consumers to book flights: they can be booked online through the defendant's website or through its call centre. Both online and phone bookings are fully automated.

10. Both processes and the other relevant activities of the defendant are outlined in detail in Ms. Parry's grounding affidavit. For present purposes, in my view, it is sufficient to outline her evidence as to the process deployed where a consumer wishes to make a flight only booking through the defendant's website. On the homepage of the defendant's website the consumer enters the departure date, the airport he wishes to depart from and his destination and the party size (for example, two adults). The flight search results then appear on the screen and the consumer may choose a flight from the results. When he does, his final choice appears on the screen and he is apprised of the rules regarding carriage of hold luggage for the selected airline. The next step is that he has to fill in the "Book Your Holiday" page on the defendant's website, which involves entering his name, address, contact details and credit card information. He then confirms flight extras, such as hold baggage, if applicable. At that stage "the consumer payment" is "processed" via the relevant card supplier. Once the payment is confirmed, the defendant's "Order Request", which summarises the details of the consumer's booking, appears on the screen. As Ms. Parry averred, at this point, the booking has been created on the defendant's "back office system".

11. Ms. Parry has also outlined how the back office functions. In so doing she has explained that flight data from third parties, which obviously includes the plaintiff, is consolidated into "a local cache or database", which is physically located with the defendant's main servers in Manchester. She has averred that third party data suppliers, which are not connected to the defendant, provide the raw data which they gather from actual flight operators, which obviously includes the plaintiff. In the case of the defendant, the identity of the third party data supplier or suppliers has not been disclosed anywhere in the affidavit evidence. Ms. Parry has set out her understanding as to how the data is procured by the data supplier: either by direct data feeds where the flight operators provide the data supplier with a specific access point or database to collect data from; or by "screen scraping", which is a computer software technique for extracting information from websites involving the creation of an automated tool which interrogates the operator's

website. In her third affidavit sworn on 18th April, 2012, Ms. Parry has clarified the position of the defendant in relation to obtaining data in relation to, say, the plaintiff's flights, to which I will return.

12. As to the manner in which the consumers' booking is processed on the system of the service provider, for example, a flight operator such as the plaintiff, Ms. Parry has averred that there are a number of methods used by the defendant, the first of which is "auto book", which is a fully automated process for online bookings and does not involve human intervention. As regards the auto book process, in the case of a flight, it is necessary to confirm the flight and this is done through a "third party supplier which is not connected to the defendant". Ms. Parry has averred that in the case of the plaintiff's flights, she believes that this is done by automating the manual booking process on the plaintiff's website by sending to the plaintiff's system "the data it normally accepts from human users". The "returning data", presumably, from the plaintiff, confirms if the booking is successful. Credit card details, which I understand to be the defendant's details, and an e-mail address, which I understand is created by the defendant, are furnished to the plaintiff. The reference number returned (which I understand to mean the plaintiff's booking reference), is then saved into the back office system, following which the final confirmation e-mail is sent by the defendant to the consumer.

13. One of the other methods outlined by Ms. Parry whereby a consumer's booking with the defendant finds its way onto the plaintiff's system is by manual booking on the plaintiff's website. The plaintiff places particular emphasis on the fact that Ms. Parry averred that the following step is part of this process:

> "As agent for the consumer, the Defendant ticks the "*Important – Please check box to continue*" regarding the acceptance of [the plaintiff's] Terms and Conditions of Travel and Website Terms of Use."

However, Ms. Parry emphasised that when the defendant books "a Ryanair flight", it does so as agent for the consumer and, therefore, the contract is between the consumer and the plaintiff.

14. The clarification contained in Ms. Parry's affidavit sworn on 18th April, 2012 to which I have referred earlier was for the purpose of clarifying a statement contained in paragraph 43 of her second affidavit sworn on 1st December, 2011, which addressed the issue with which the Court is concerned, namely, whether the defendant is bound by the jurisdiction clause contained in the plaintiff's Terms of Use. Having stated that the defendant fundamentally disagreed with the plaintiff's stance regarding jurisdiction, whether justified by its Terms of Use or otherwise, Ms. Parry averred that raw data for the defendant's website is provided by data suppliers, who again have not been identified, and the defendant has no involvement or role in the collection of such data by such suppliers and that the defendant is not involved in any screen scraping activities. Ms. Parry's clarification confirmed that that statement was correct when her affidavit was sworn on 1st December, 2011 and she continued:

> "However, as of 1st February, 2012, [the defendant] started screen-scraping but only at the booking stage (that is, when a consumer has submitted his/her booking form to [the defendant]). However, as previously advised, raw data for [the defendant's] website continues to be provided by third party data suppliers and [the defendant] has no involvement or role in the collection of such data by such suppliers."

Ms. Parry went on to aver that this did not change the defendant's view that the defendant is not the ultimate user of the plaintiff's website, asserting that there is no contract between the defendant and the plaintiff; rather that it is the consumer who contracts with the plaintiff for a flight, so that the defendant is at all material times the agent of the consumer and does not itself contract with the plaintiff.

15. In elaborating on its submission that it is the defendant, not the consumer, which "ticks the box" confirming acceptance of the plaintiff's Terms of Use, the plaintiff has analysed the evidence and has pointed to various factors which it was submitted support its contention. For example, it was submitted that at no point during the search and booking process on the defendant's website is the consumer transferred to the plaintiff's website or made aware of the plaintiff's Terms of Use. Other elements of the process are pointed to as demonstrating that the consumer has no involvement in the actual booking of the flight. The plaintiff also pointed to a clause in the defendant's own "Terms of Business" which, under the heading "On line bookings", provides:

> "By clicking to book and entering your personal and payment details on our website, you are requesting us to make an offer to the Principal/Flight provider to purchase the products on your behalf. At this point we immediately re-contact the Principal. Each Principal will still require a short period of time to confirm that your chosen flight/hotel is still available. Although the e-mail confirmation sent to you is NOT contractual acceptance of the Principal's ability to provide this product, it is an acknowledgment that we have received your offer, and should the product be available as detailed on our website then you have entered into a legally binding agreement to purchase this product subject to the Principal's Terms and Conditions."

16. The averment in Ms. Parry's final affidavit which introduced a factual matter which had not been adverted to previously was to the effect that, from the defendant's investigations, she believed that the plaintiff's on-line and booking services are hosted in the United Kingdom and Germany, so that any data "allegedly" accessed by the defendant is hosted outside Ireland, which it was asserted substantiates the defendant's belief that the Irish courts do not have jurisdiction to hear the dispute which is the subject matter of these proceedings. Predictably, that averment has given rise to a factual controversy. While the plaintiff has had the last word on the issue on this application, because the final affidavit was sworn by Mr. Neville, it may not be that that is the last word in the overall context of the proceedings. However, for present purposes, as I understand the evidence, it is that the plaintiff has three data centres which receive incoming traffic from the internet, one located in Dublin, one located in London and one located in Frankfurt, which in combination host the plaintiff's on-line search and booking engines as accessible through its websites. The internet traffic is distributed, in other words, load balanced among all three centres to avoid any centre crashing due to excess demand. The centres are, in effect, automatons supporting access to the plaintiff's websites. The back end database on which a booking is recorded is hosted in London, but it is not the search and booking engine initially accessed by a user of the plaintiff's websites. It is merely a storage facility for data relating to the plaintiff's flights and bookings on to which data is loaded by the plaintiff's staff in Dublin. Bookings are not performed on the back end database.

The relevant provisions of the Brussels 1 Regulation

17. Article 2(1) of the Brussels 1 Regulation provides that, subject thereto, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. It is common case that the defendant is domiciled in the United Kingdom, because, by virtue of Article 60, as a company with a registered office in the United Kingdom, it is domiciled there. Therefore, Article 2(1) applies by default, if the plaintiff does not establish compliance with the requirements for the application of Article 5(1) or (3) or Article 23.

18. Article 5, insofar as it is relevant, provides as follows:

"A person domiciled in a Member State may, in another Member State, be sued:

1.(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

. . .

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;"

19. Article 23, which comes under the heading "Prorogation of Jurisdiction", provides:

"1. 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. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

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

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

The plaintiff relies on paragraph (a) and paragraph (c) of Article 23(1). Although Article 23(2), which provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing", was not expressly referred to, it was submitted on behalf of the plaintiff that the jurisdiction clause contained in the plaintiff's Terms of Use is evidenced in writing.

20. It is convenient at this juncture to address a submission made on behalf of the defendant the relevance of which in the context of the single issue the Court has to determine, that is to say, the jurisdiction issue, is not obvious. The submission refers to the application of Directive 2000/31/EC, commonly known as the "E-Commerce Directive", which has been transposed into Irish law by the European Communities (Directive 2000/31/EC Regulations) 2003 (S.I. No. 68 of 2003) (the E-Commerce Regulation). It is in the context of an argument that the defendant merely performs its role as agent for the consumer when booking a flight with the plaintiff that the E-Commerce Directive is referred to in the defendant's written legal submissions. It is stated there that the defendant's role as agent has relevance where the status of a contracting party as a consumer has an immediate bearing on the range of rights enjoyed against an entity, such as the plaintiff, which transacts business over the internet, the example given being the rules regarding the placing of orders through technological means contained in Article 11 of the E-Commerce Directive, which preclude contracting out in the case of consumers. In the same context, counsel for the defendant referred to Regulations 13 and 14 of the E-Commerce Regulation. While acknowledging that I may not have understood the true import of the argument, nonetheless, it seems to me that the invocation of the E-Commerce Directive is a "red herring", as counsel for the plaintiff submitted, pointing to Article 1.4 of the E-Commerce Directive, which expressly provides that it does not establish additional rules on private international law, nor does it deal with the jurisdiction of the Court. The only issue the Court is concerned with is whether the Court has jurisdiction. In particular, the Court is concerned with whether the choice of jurisdiction provision in Clause 7 of the Terms of Use is applicable by operation of Article 23 of the Brussels 1 Regulation. That is a mixed question of law and fact.

21. For completeness, it is to be noted that the plaintiff did not advance any argument that the evidence of Ms. Parry in relation to third party data suppliers was inadmissible. I have considered it prudent to record that, because since the hearing, I have become aware of the judgment delivered on 13th March, 2013 of the Supreme Court in *Ryanair Limited v. Unister GmbH* [2013] IESC 14, in which Clarke J. commented (at para. 11.3) that the admissibility of what could "properly be characterised as extremely bald" evidence in relation to the involvement of third party providers in that case would be an issue for the hearing of a jurisdiction issue in that case similar to the issue in this case.

22. There have been two decisions of the High Court on the application of the Brussels 1 Regulation to the plaintiff's Terms of Use on its website, and, in particular, the application of Article 23 to the jurisdiction clause in the Terms of Use, namely, the decision of Clarke J. in *Ryanair Ltd. v. Bravofly & Anor.* [2009] IEHC 41; and the decision of Hanna J., already referred to, in *Ryanair Ltd. v. Billigfluege.de GmbH* [2010] IEHC 47. Although the jurisdiction clause at issue in the *Bravofly* case differed from the jurisdiction clause under consideration in these proceedings and although there is an appeal pending in the Supreme Court against the judgment of Hanna J. in the *Billigfluege* case, it is necessary to consider the decisions in each case in some detail.

The Bravofly case

23. The aspect of the *Bravofly* case which is of relevance for present purposes is the Court's decision on an application brought by the second named defendant, Travelfusion Ltd., to dismiss the plaintiff's proceedings against it on the basis that the Irish courts had no jurisdiction to hear the matter by virtue of the provisions of the Brussels 1 Regulation. Travelfusion Ltd. was a company incorporated under the laws of England, with its registered office in England and its principal place of operation in London and with no place of business in Ireland. The basis of its application was that at the relevant time the jurisdiction clause in the plaintiff's then Terms of Use conferred exclusive jurisdiction in all disputes arising out of the use of the website on the English courts. As is recorded in the judgment (at para. 6.3), at the time Clause 7 of the Terms of Use provided as follows:

"Disputes arising from the use of this website and the interpretation of these Terms of Use of the Ryanair website are

> governed by English Law. All disputes relating to these Term of Use and the use of the Ryanair Website are subject to the exclusive jurisdiction of the English court, save that Ryanair may, at its sole discretion, institute proceedings in the country of your domicile."

The case made on behalf of Travelfusion Ltd. was that the High Court in this jurisdiction had no jurisdiction to hear the proceedings by virtue of Article 23 of the Brussels 1 Regulation. The dispute between the parties as to jurisdiction was characterised by Clarke J. as "highly unusual", in that the party who had produced the standard form containing a choice of jurisdiction clause (the plaintiff in these proceedings) was the one saying that it did not apply, while the party denying that there was any contract at all (Travelfusion Ltd.) was the one which was placing reliance on a clause, which arose out of a contract alleged to exist by its opponent but denied by it (para. 7.2).

24. Clarke J. found (at para. 7.17) that the choice of jurisdiction clause was operative and that the courts of Ireland had no jurisdiction and that the claim against Travelfusion Ltd. should be struck out for want of jurisdiction. In reaching that conclusion he held that: –

> (a) a defendant is entitled, while denying the existence of any contract, to rely on a choice of jurisdiction clause which will necessarily be contained in any contract should same be found to exist (para. 7.15); and
>
> (b) while the national court is concerned to ensure that the jurisdiction clause "was in fact the subject of consensus between the parties which must be clearly and precisely demonstrated" (*per* the judgment of the ECJ in *Ditta Estasis Salotti v. RUWA* [1976] ECR 1831), there was sufficient consensus to meet the requirements of Article 23.

On the latter point, in the unusual circumstances of the case, Clarke J. stated that it would create no unfairness or injustice to permit a party in a position such as Travelfusion Ltd. to accept, for the purposes of jurisdiction, the existence of the relevant choice of jurisdiction clause and he continued:

> "Travelfusion is, in this case, happy to accept the jurisdiction clause. The clause itself was inserted into any contractual relations that might be said to exist by Ryanair. That, in my view, is a sufficient consensus to meet the requirements of the Regulation even though Travelfusion asserts the absence of any contractual relationship."

Counsel for the defendant, referring to that passage, emphasised what was characterised as the "narrow and highly unusual basis" for the decision. It is also to be noted that the Court determined the Travelfusion issue solely by reference to the application of Article 23, not by reference to the application of Article 5(1) or (3).

The Billigfluege case

25. The jurisdiction clause in the plaintiff's Terms of Use under consideration in the *Billigfluege* case was the same as Clause 7 of the Terms of Use under consideration in this case, which has been quoted earlier.

26. As in this case, in the *Billigfluege* case the plaintiff relied on Articles 5(1), 5(3) and 23 of the Brussels 1 Regulation. Billigfluege, which was domiciled in Germany, contended that the German courts had jurisdiction under Article 2. As outlined in his judgment by Hanna J., the position adopted by Billigfluege was that there was "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" Billigfluege. As there was no legally enforceable contract in place between the parties, the plaintiff could not rely on Article 23(1) to confer jurisdiction on the Irish High Court because of the absence of agreement.

27. Hanna J. set out the position adopted by the plaintiff both in the summary of its claim at the commencement of the judgment and in answering the question which he posed as to whether there was assent to jurisdiction at the end of the judgment. In answering that question he stated:

> "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."

While, in so finding, Hanna J. appears to have gone further than the plaintiff's case advocated, in finding that "the Terms of Use formed a legally binding agreement for the purposes of Article 23", as regards the applicability of the jurisdiction clause by operation of Article 23, which was the issue he had to determine, he concluded as follows:

> "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."

28. Before reaching that conclusion, Hanna J. had considered a number of decisions of the United States courts, which had been relied on by the plaintiff for the purpose of demonstrating how consensus between the parties is identified in internet interaction. Counsel for the plaintiff relied on the same authorities from the United States on this application and also on a more recent Canadian authority, the decision of the Supreme Court of British Columbia in *Century 21 Canada Limited Partnership v. Rogers Communications Inc* [2011] BCSC 1196. I propose considering that authority to throw light on the plaintiff's contention that, as regards the jurisdiction clause in the plaintiff's Terms of Use, consensus existed between the plaintiff and the defendant through the concept of "click wrapping" and the concept of "browse wrapping", upon which the plaintiff relies.

29. Before doing so, however, it is necessary to make some observations in relation to the submissions made on behalf of the defendant that the reasoning of Hanna J. in his judgment in the *Billigfluege* case is flawed because:

> (a) he did not consider the issue regarding the non-liability of agents under contracts concluded for principals;
>
> (b) he did not have regard to the E-Commerce Directive;
>
> (c) he attached undue weight to the U.S. case law regarding the making of contracts via computer;
>
> (d) he misapplied case law governing the incorporation of contractual terms (which turns on whether one contracting party has brought a term to the attention of the other contracting party) to a situation where the very existence of any

agreement at all is the issue, so that a test relevant to the inclusion of a particular term within an existing contract is both irrelevant and inappropriate; and

(e) he purported to find as a fact in the context of a jurisdiction motion that a legally binding contract existed between the plaintiff and Billigfluege and that the Terms of Use was a contractual document entered into by the parties.

30. Despite the fact that this Court was inferentially invited not to follow the decision of Hanna J., there was no discussion as to the extent to which this Court is bound by that decision. In the interests of clarity, I think it is useful to record that in the recent decision of the Supreme Court in *Kadri v. Governor of Wheatfield Prison* [2012] 2 ILRM 392, having stated that the jurisprudence regarding the proper approach of a Judge of the High Court when faced with the previous decision of another Judge of that Court has been consistent since 1976, Clarke J. stated (at para. 2.2):

> "It seems to me that that jurisprudence correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that jurisprudence, for so doing."

Century 21 case

31. The first plaintiff (Century 21) was a limited partnership and the master franchisor of all independent real estate brokerage offices operated under the "Century 21" brand and trademarks in Canada. As was stated in the overview at the commencement of the judgment of the Supreme Court of British Columbia, the case arose from its desire to allow public access to its website, yet at the same time limit commercial access by its competitors. The defendant competitor was a company doing business as Zoocasa Inc (Zoocasa), which maintained a website, which functioned as a type of search engine, indexing property listings from a number of real estates websites, including the Century 21 website and returning relevant listings in response to search queries by a site visitor. Century 21 alleged that Zoocasa was bound by the Terms of Use on the Century 21 website and had breached them and also that Zoocasa had breached the copyright held by Century 21. The judgment concerned the substantive issues in the proceedings, and it was in that context that the Court addressed the issue whether the Terms of Use were an enforceable contract between the parties. The Terms of Use prohibited, *inter alia*, "screen scraping". While emphasising that this Court is not concerned with the issue whether the defendant is bound by the plaintiff's Terms of Use and is only concerned with the applicability of Clause 7 in relation to jurisdiction, the judgment in the *Century 21* case is instructive in understanding the concepts of click wrapping and browse wrapping relied on by the plaintiff.

32. According to the judgment, a "click wrap" agreement arises in a situation where the user of the website indicates his agreement by clicking on an "I Agree" box. In support of this proposition, one of the U.S. authorities relied on by the plaintiff in this case, *i.Lan Systems Inc v. Netscout Service Level Corp* 183 F. Supp 2d 328, a decision of the United District Court in the district of Massachusetts, is cited. In that case, the click was characterised as explicit assent.

33. As regards a "browse wrap" agreement, the judgment states it does not require that the website user indicate agreement by clicking on an "I Agree" button. All that is required is that the user "use the product after being made aware of the product's Terms of Use". On this point, many of the decisions of the courts of the United States relied on by the plaintiff are considered including *Specht v Netscape Communications Corp* 306 F. 3d 17, a decision of the United States Court of Appeals, Second Circuit, which laid down that two requirements must be met before a contract is found: "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers . . .". Summarising the position in relation to "browse wrap" agreements, the Canadian Court stated (at para. 107):

> "As noted in the authorities referred to above, the law of contract requires that the offer and its terms be brought to the attention of the user, be available for review and be in some manner accepted by the user. Such an analysis turns on the prominence the site gives to the proposed Terms of Use and the notice that the user has respecting what they are agreeing to once they have accepted the offer. To establish a binding contract consideration will also be given to whether the user is an individual consumer or a commercial entity and in addition a one-time user or a frequent user of the site."

34. In addressing an argument made on behalf of Zoocasa that it would be contrary to public policy to accede to the arguments of Century 21 respecting the binding nature of the Terms of Use, as it would have negative effects on the operation of the internet, in a passage specifically relied on by counsel for the plaintiff in this case, the Canadian Court stated (at para. 114):

> "The evolution of the internet as an 'open' medium with its ability to hyperlink, being key to its success, does not mean it must function free of traditional contract law. It is simply the manner of contracting that has changed not the law of contract. The acceptance of click wrap and browse wrap agreements acknowledges the right of parties to control access to, and the use of, their websites."

Later, the Canadian Court stated (at para. 119):

> "Taking the service with sufficient notice of the Terms of Use and knowledge that the taking of the service is deemed agreement constitutes acceptance sufficient to form a contract. The act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the Terms of Use if those terms are provided with sufficient notice, are available for review prior to acceptance, and clearly state that proceeding further is acceptance of the terms."

Insofar, if at all, as the decision in the *Century 21* case and the other decisions of the U.S. and Canadian courts relied upon by the plaintiff may assist in resolving the issue before this Court, they can only do so in the Court's consideration of the application of Article 23 of the Brussels 1 Regulation. That is because the application of Article 23 requires, on the facts of this case, that the parties, the plaintiff and the defendant, have "agreed" that the courts of this jurisdiction are to have jurisdiction to settle disputes "in connection with a particular legal relationship", such agreement to be made in the manner prescribed in paragraph (a), paragraph (b) or paragraph (c) of Article 23(1). It is worth reiterating that apart from the application of Article 23(1), the Court is not concerned with whether a contractual relationship based on the Terms of Use exists between the parties.

35. Notwithstanding that the plaintiff has invoked Articles 5 and 6 of the Brussels 1 Regulation, in addition to Article 23, the primary focus of the plaintiff's submissions on jurisdiction is reliance on Article 23 and, accordingly, I propose considering the application of that provision first.

Article 23
36. A very considerable body of jurisprudence has emerged from the courts of this jurisdiction on Article 23, much of which has been relied on by the parties in these proceedings. There is a very lucid, comprehensive and up to date analysis of the jurisprudence in Delany & McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) at paragraphs 1 – 379 *et seq*. A number of basic principles are discernible in that commentary and, indeed, in the submissions made on behalf of the parties.

37. First, it has been held that a strict approach must be adopted in determining whether the formalities for jurisdiction clauses have been complied with, and also in the interpretation of such clauses. Secondly, the onus is on the party who asserts that Article 23 applies to establish that the choice of jurisdiction clause relied upon complies with the requirements of Article 23. In this case, that onus is on the plaintiff. Thirdly, by making the validity of a jurisdiction clause subject to the existence of an "agreement" between the parties, the predecessor of Article 23 (Article 17 of the Brussels Convention) imposed on the Court before which the proceedings were brought the duty of examining, first, whether the clause conferring the jurisdiction upon the Court was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated. The purpose for the requirements as to form imposed by Article 17 was to ensure that consensus between the parties is in fact established. Fourthly, notwithstanding the introduction of what is now paragraph (c) of Article 23 into Article 17, which post-dated some of the early decisions, for example, the decision of the Court of Justice in the *Estasis Salotti* case, the Court of Justice has consistently followed the earlier jurisprudence.

38. Both parties in this case recognised the significance of the decision of the Court of Justice in *Mainschiffahrts-Genossenschaft MSG v. Les Gravièrers Rhénanes SARL* [1997] ECR 1 – 911. Having reiterated the earlier jurisprudence, which I summarised in the next preceding paragraph, the Court of Justice stated (at paras. 16 and 17):

> "However, in order to take account of the specific practices and requirements of international trade, the aforementioned Accession Convention of 9 October, 1978 added to the second sentence of the first paragraph of Article 17 of the Convention a third hypothesis providing that, in international trade or commerce, a jurisdiction clause may be validly concluded in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.
>
> Yet that relaxation incorporated in Article 17 . . . does not mean that there is not necessarily any need for consensus between the parties on a jurisdiction clause, since it is still one of the aims of that provision to ensure that there is real consent on the part of the persons concerned. The weaker party to the contract should be protected by avoiding jurisdiction clauses incorporated in a contract by one party alone going unnoticed."

However, the Court went on to emphasise that the relaxation thus introduced did not merely eliminate the need for a written form of consent and continued (at para. 19):

"Thus, in the light of the amendment . . ., consensus on the part of the contracting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware."

39. Counsel for the plaintiff emphasised the guidance given by the Court of Justice in the *MSG* case to a national court applying paragraph (c) of Article 23(1), as set out in paragraphs 21 – 25 inclusive of the judgment. The content of those paragraphs is summarised as follows in Delany & McGrath (at para. 1 – 395):

> "The court held that it is for the national court to determine whether:
>
> (i) the contract in question comes under the head of international trade or commerce;
>
> (ii) there was a practice in the branch of international trade or commerce in which the parties are operating; and
>
> (iii) the parties were aware or are presumed to have been aware of that practice.
>
> However, an indication of the objective evidence required by a national court in order to make these determinations was provided. In this regard, the first consideration should be whether a contract concluded between two companies established in different Member States in the particular field in which the parties to the proceedings are operating comes under the head of international trade or commerce. The national court should not determine whether a practice exists within the meaning of sub-clause (c) by reference to the law of either of the parties to the proceedings. In relation to the second requirement – whether such a practice exists – the national court should consider the particular branch of trade or commerce in which the parties to the contract are operating. In this regard, the Court stated that 'there is a practice in the branch of trade or commerce in question in particular where a particular course of conduct is generally and regularly followed by the operators in that branch when concluding contracts of a particular type'. Finally, in relation to the third requirement, it was held that actual or presumptive awareness of the question is made out where the parties previously had commercial or trade relations between themselves, or with other parties operating in the sector in question, or a particular course of conduct is sufficiently well known in that sector because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice."

40. The well established principle that a choice of jurisdiction clause will be upheld and given effect to, even if one of the parties challenges the validity of the entire contract including that clause, was recognised by counsel on behalf of the defendant, citing the decision of the Court of Justice in *Benincasa v. Dentalkit Srl* [1997] ECR 1 – 3797. That principle is, of course, reflected in the decision of Clarke J. in the *Bravofly* case.

41. The passage from the judgment of the Court of Justice in *Benincasa* relied on by counsel for the defendant (paragraphs 24 – 31 inclusive) makes it clear that the objective of Article 23 is to secure legal certainty. Counsel for the defendant also cited the decision of the Court of Justice in *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* Case C – 159/97 (16th March, 1999), where the Court stated (at para. 48):

> "As the Court has repeatedly stated, it is in keeping with the spirit of certainty, which constitutes one 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 *Benincasa*, at paragraphs 28 and 29, the Court explained that the aim of securing legal certainty by making it possible reliably to foresee which court will have jurisdiction has been interpreted, in connection with Article 17 of the Convention, by fixing strict conditions as to form, since the purpose of that provision 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."

Those well established principles were reiterated in the *Hugo Trumpy* case in the context of the consideration of a question referred to the Court as to whether, under Article 17 of the Convention, there were any limitations as to the choice of court, the answer given by the Court of Justice being that it followed from the general principles quoted above that the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17. Of perhaps more relevance for present purposes is a passage from the judgment of the Court of Justice relied on by counsel for the plaintiff (at para. 21) to the effect that what is now paragraph (c) of Article 23(1) –

> ". . . is to be interpreted as meaning that the contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware."

Application of Article 23(1)(c) to the facts

42. In determining whether the plaintiff and the defendant have agreed to the courts of Ireland having exclusive jurisdiction arising out of the use by the defendant of the plaintiff's website in the form provided for in paragraph (c) of Article 23(1), the first question which the Court has to determine, in accordance with the principles laid down in the *MSG* case, is whether the contract comes under the head of international trade or commerce. The answer to that question must be in the affirmative. The plaintiff is an international airline which sells flights and other services through its website. The defendant is a travel agent specialising in online business and it is in the course of that business that, whether directly or through the medium of third party data providers, it utilises the data on, and interacts with, the plaintiff's website. That conclusion is based on an objective assessment of what the plaintiff makes available on its website and the manner in which the defendant utilises the data on, and interacts with, the website. The second question is whether a practice exists in the branch of trade or commerce in which the parties are operating. The evidence clearly establishes that in the airline business and in the travel agency online business the practice is that the website user becomes contractually bound by means of clicking, or ticking a box, whereby he demonstrates his assent or agreement to terms which the website owner has displayed. Moreover, in accordance with the standard internet practice in that business, the Terms of Use of a particular website are available throughout by way of hyperlink with the objective that, by utilising a provision such as Clause 1 of the plaintiff's Terms of Use, the use of the website, browsing or viewing the website, binds the user to the Terms of Use. In Mr. Komorek's first affidavit he has exhibited a range of screen shots from websites, focusing in particular on websites of airlines, which bear this out. Accordingly, in my view, the evidence does establish that there is a practice in the airline and online travel agency sectors of contractually binding web users by click wrapping or browse wrapping, which practice is generally and regularly followed by the operators in those sectors. In reality, it is difficult to see how online trade could be carried on in the absence of those devices. As regards the third question which arises from the *MSG* decision, in this case it is whether the defendant was aware or is presumed to have been aware of the practice. The evidence before the Court, in my view, clearly demonstrates that the defendant was aware of the practice, it being a practice which is generally and regularly followed when making bookings with online travel agents and with airlines and which, in the words of the Court in the MSG case, may be regarded as being a consolidated practice.

43. Accordingly, in my view, by application of Article 23(1)(c), the defendant is bound by the jurisdiction clause in the Terms of Use on the plaintiff's website by its use, either through the medium of an automaton or a manual operator or a third party data provider, of the website.

44. It is true, as was submitted on behalf of the defendant, that for Article 23(1) to apply so as to override not merely Article 2 but all other bases upon which jurisdiction can be established, for example, Articles 5 and 6, the parties collectively, and not simply one party, must bring about the nomination of a specified jurisdiction, as the requirements of the parties having "agreed" and the reference to such an "agreement conferring jurisdiction" in Article 23(1) clearly indicates. The defendant's interpretation of what happens between the plaintiff and a user of its website is that the user encounters terms which are entirely unilateral and the plaintiff purports to dictate as to when others shall be bound by the terms. It was submitted that, in circumstances where the defendant does not seek, or intend on its own behalf, to enter into a contract of any kind with the plaintiff and, in particular, does not assent to the Irish courts having jurisdiction over it in accordance with the plaintiff's Terms of Use, the Court will search in vain for "real consent" as required by the decision in the *MSG* case.

45. In my view, whether, in accessing the plaintiff's website for the purpose of searching and booking on behalf of a client, the defendant is acting as agent or principal is irrelevant to the Court's determination as to the applicability of Article 23(1)(c). The defendant's reliance on a passage from *Bowstead and Reynolds on Agency* (19th Ed.) (at para. 9 – 001) to the effect that "[in] the absence of other indications, when an agent makes a contract, purporting to act solely on behalf of a disclosed principal, whether identified or unidentified, he is not liable to the third party on it", fails to have regard for the court's function in applying Aricle 23(1). As Clarke J. stated (at para. 7.4) in the *Bravofly* case, the Court of Justice has been –

> "at pains to point out that the question of whether the requirements set out in the . . . Regulation for a choice of jurisdiction clause to apply are met (and whether they are met is to be determined on the basis of an autonomous application of Community Law) is wholly separate from any questions concerning the validity or enforceability of the contract in which the clause may be found".

Accordingly, whether, vis-à-vis the plaintiff, the defendant, in using the plaintiff's website, acted as an agent or a principal and, if it acted as agent, whether it has liability in contract or, indeed, in tort, which also forms a basis of the plaintiff's claim against the defendant, are not issues which require to be determined on the application of Article 23(1) under European Union Law. The Court's function is as outlined in para. 42 above.

46. Further, on the issue of agency, counsel for the plaintiff took issue with the defendant's contention that, notwithstanding that it had admitted to screen scraping, it is not bound by the plaintiff's Terms of Use, because it acts as agent for the consumer on a number of grounds. The actual wording of Clause 7 was emphasised and, in particular, that it expressly provides that the choice of jurisdiction provision covers "any party accessing such information or facilities on their own behalf or on behalf of others". It was submitted, correctly in my view, that even if the defendant was acting as an agent for a consumer, that is to say, on behalf of another person, it is still bound by the jurisdiction clause. It was also submitted on behalf of the plaintiff that whether the defendant is to be deemed to be an agent on behalf of a consumer is an issue for the substantive proceedings. Again, in my view, that is correct. That being the case, I think it is neither necessary nor appropriate to address the submissions made on behalf of the plaintiff in relation to whether the defendant acted as agent or not and, if it did, whether and to what extent it might have incurred liability either in contract or in tort.

47. The ultimate objective of the defendant's use of the plaintiff's website, whether by procurement of the cache of data, or by

searching, or by booking, whether automatically or manually, is to create a legal relationship. En route to the fulfilment of that objective, indeed, at the very outset, the defendant encounters the hyperlink connection to the plaintiff's Terms of Use, of which I have already held the defendant is aware or ought to be aware. The defendant proceeds to use the website with such awareness. That, in my view, is all that is necessary to give rise to real consent on the part of the defendant to be bound by the jurisdiction clause. If the defendant does not wish to be bound by the jurisdiction clause, it should desist from proceeding beyond its first encounter with the hypertext link. If it does not, in relation to what ensues, there are two active participants because, as the saying goes, it takes two to tango. The participation of the defendant is both a manifestation of "real consent" in the words of the Court in the *MSG* case and "unambiguous manifestation of assent" in the words of the Court in the *Specht* case.

48. Although, having regard to the finding that the plaintiff has established compliance with Article 23(1) by an agreement which comes within paragraph (c), strictly speaking, it is not necessary to consider the plaintiff's invocation of the other provisions of the Brussels 1 Regulation to confer jurisdiction on the courts of Ireland, they will be considered briefly below.

Article 23(1)(a)
49. As is pointed out in Delany & McGrath at para. 1 – 391, it is the agreement of the parties to be bound by the jurisdiction clause which must be in writing, rather than the jurisdiction clause itself. The manner in which the plaintiff has sought to establish that the agreement conferring jurisdiction is "in writing or evidenced in writing" is to point to the October 2010 letter, in which the plaintiff informed the defendant of the Terms of Use and the plaintiff's allegation that the defendant was acting in breach thereof, but, nevertheless, the defendant, with the knowledge of the Terms of Use, continued to use the plaintiff's website routinely thereafter. On this basis, it is alleged that the defendant "through its conduct" accepted the plaintiff's Terms of Use and, as a consequence, is bound by the jurisdiction clause by compliance with paragraph (a) of s. 23(1). That submission is misconceived because the reality is that the plaintiff is not relying on the defendant's assent to the Terms of Use being in writing or evidenced in writing, but rather on its conduct. Accordingly, in my view, the plaintiff has not established compliance with the requirement in paragraph (a) that the agreement be either in writing or evidenced in writing.

Article 5(1)
50. In its submissions, the plaintiff has made a bald assertion that the plaintiff and the defendant entered into a contract in relation to the use of the plaintiff's website. The existence of any such contract has been denied by the defendant. The plaintiff has not addressed how, on the facts, the interaction of the defendant with the plaintiff's website complies with either paragraph (a) or paragraph (b) of Article 5(1) and such compliance has not been demonstrated.

51. The defendant, on the other hand, referred the Court to the decision of the Supreme Court in *Handbridge Ltd. v. British Aerospace Communications Ltd*. [1993] 3 I.R. 342, in which in setting out a statement of principle, Finlay C.J. stated, first, that the onus is on the plaintiff who seeks to have his claim tried in the jurisdiction of a contracting state other than the contracting state in which the defendant is domiciled to establish that such claim unequivocally comes within the relevant exception to Article 2. He then continued (at p. 358):

> "(2) In a case of a claim for breach of contract, therefore, what he must prove is that the obligation in question in that claim is, by virtue of the terms of the contract or by some generally applicable principle of Irish law, an obligation which must be performed in Ireland.
>
> (3) It would follow from this that where the evidence adduced by a plaintiff seeking to have a claim for breach of contract tried within the jurisdiction of a contracting state other than the state of domicile of the defendant amounts to no greater standard of proof than establishing that the obligation which it is claimed was breached could have been performed in such state, he has failed to establish his entitlement to sue pursuant to art. 5 (1), the necessary proof being that the obligation which it is claimed has been broken by the defendant according to the contract or according to some general principle of law, must be performed in the state concerned."
>
> (Emphasis in original).

As regards reliance on Article 5(1), the plaintiff has definitely not discharged that onus. There is no evidence whatsoever that such contractual obligation (i.e. the service to be provided) as the plaintiff may be under to the defendant must be performed in Ireland. On the contrary, the only reasonable inference from the evidence is that it is more likely to be performed in foreign jurisdictions, for example, between Stansted and Bergamo, than in this jurisdiction, say, between Dublin and Cork.

52. The defendant also emphasised that the primary objective of the Brussels 1 Regulation is legal certainty, referring to the decision of the Court of Justice in *Besix* [2002] ECR 1 – 1699. There the Court stated (at para. 26):

> "That principle of legal certainty requires, in particular, that the jurisdiction rules which derogate from the basic principle of the Brussels Convention laid down in Article 2, such as the rule in Article 5(1), should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued . . .."

In the context of Article 5(1) counsel for the defendant referred the Court to the succeeding paragraphs of that judgment, which are in similar terms to the principles set out by Finlay C.J. quoted earlier. The Court stated (in paras. 28 and 29):

> "It follows from the foregoing that Article 5(1) of the Brussels Convention is to be interpreted as meaning that, in the event that the relevant contractual obligation has been, or is to be, performed in a number of places, jurisdiction to hear and determine the case cannot be conferred on the court within whose jurisdiction any one of those places of performance happens to be located.
>
> Rather, as is clear from the very wording of that provision, which, in matters relating to a contract, confers jurisdiction on the courts for the place of performance of the obligation in question, a single place of performance for the obligation in question must be identified."

It was submitted on behalf of the defendant that the contractual obligations arising from the Terms of Use contended for by the plaintiff, many of which are prohibitive or restrictive in nature, are not alleged to be confined in effect or operation to the State alone or to persons within the State. While reiterating that the Court is only concerned at this stage with the jurisdiction issue, I am satisfied that the plaintiff has failed to identify a single place of performance of the contractual obligations it contends for and has failed to establish that Article 5(1) applies.

Article 5(3)
53. The tortious activity which the plaintiff alleges against the defendant is that it has committed passing off, infringement of intellectual property rights, trespass to property and infringement of the plaintiff's economic interests and contractual relations and thereby caused loss to the plaintiff in Ireland. Apart from that assertion, the plaintiff has not demonstrated that the underlying harmful event or events occurred in Ireland.

54. Moreover, the only authority upon which the plaintiff relied was a decision of the Landgericht Hamburg in *Re The Maritim Trade Mark* [2003] I.L. Pr 17. The plaintiff relied on the following passage from the judgment (at para. 2):

> "In the case of trademark infringements via the internet, the place of the tort is any place at which the internet domain can be called up. Websites used on the internet and their content are technically not restricted to specific countries, so that they can also generally be called up in Germany. This suffices for the Court to be awarded jurisdiction. Any undertaking that is actively involved in the internet will be aware that its on-line content can be called up throughout the world and must therefore expect to be sued in foreign courts in accordance with Art. 5(3) of the Convention. However, it is immaterial whether the offence of infringement actually takes place in Germany as a result of an internet domain conflicting with a German trademark or distinguishing mark. The extent to which extraterritorial effect is to be given to national discontinuance claims under trademark and competition law is similarly irrelevant. The question of legal assessment and the consequences of the same relate to the substance of a claim and not to the jurisdiction of the court."

As regards the facts of the *Maritim* case, the claimant held German and EU trademarks in relation to the name "Maritim", which it used for a chain of hotels in Germany. The defendant ran a bed and breakfast hotel in Copenhagen under the name "Hotel Maritime" which it had registered as a trademark in Denmark. It held the internet domain name hotel-maritime.dk and its website included information in German about the hotel. The claimant was seeking an order that the defendant discontinue use of the name "Hotel Maritime" in advertising on the internet in German. Although the Landgericht Hamburg found that the action was admissible, it held that it was unfounded in German law.

55. The plaintiff has not attempted to relate the passage from the *Maritim* case quoted above to the factual underlay of that case, nor has it attempted to demonstrate how it could apply to the factual underlay of this case. Presumably, the basis of the plaintiff's claim in tort for, *inter alia*, infringement of intellectual property rights, as distinct from its claim in contract, is based on the use by the defendant of its own website. If that assumption is correct, it is for the plaintiff to demonstrate that Ireland is the "place where the harmful event occurred", as explained by the Court of Justice in *Dumez France SA v. Hessische Landesbank* [1990] ECR 1 – 49 (at para. 20) –

> ". . . the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event".

The plaintiff has not done so and, in my view, has not discharged the onus imposed by Article 5(3).

56. Having quoted the definition of "Internet" on Wikipedia, the defendant submitted that it would be entirely artificial to proceed on the basis that access via the internet produces a palpable physical "event" within this jurisdiction as opposed to any other, simply because the plaintiff happens to direct its operations from this jurisdiction. The defendant cautioned against ignoring what was referred to as the note of caution sounded by the Court of Justice in the *Dumez* case. In its judgment in that case (at para. 17) the Court, having stated that it is only by way of exception to the general rule whereby jurisdiction is attributed to the courts of the defendant's domicile that special jurisdiction arises in certain cases, such as under Article 5(3), stated that the cases of special jurisdiction, the choice of which is a matter for the plaintiff, are based on –

> " . . . the existence of a particularly close connecting factor between the dispute and courts other than those of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings."

The note of caution is to be found later in paragraph 19 where the Court stated:

> ". . . that objective militates against any interpretation of the Convention which, otherwise than in the cases expressly provided for, might lead to recognition of the jurisdiction of the courts of the plaintiff's domicile and would enable a plaintiff to determine the competent court by his choice of domicile."

57. It was in the context of Article 5(3) that the defendant produced evidence of the three locations, Dublin, London and Frankfurt, at which the plaintiff "hosts" data. Having regard to the conclusion I have reached that the plaintiff has not discharged the onus of proof which it bears under Article 5(3), it is not necessary to address the significance of that evidence and, in any event, given the state of the evidence, it would be wholly inappropriate to come to any conclusion on the basis of it. However, once again, it does seem to me that the parties have not identified the factual basis of the plaintiff's allegations in tort and, in particular, have not addressed whether, if there is tortious activity on the part of the defendant, it flows from the use of its own website or the plaintiff's website.

Order
58. Being satisfied that the plaintiff has established compliance with Article 23(1)(C) and that the Court has jurisdiction to hear the plaintiff's claim, there will be an order dismissing the defendant's application.