[2020] IEHC 399

THE HIGH COURT
COMMERCIAL

[2019 No. 9399 P]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND
SKYSCANNER LIMITED
SKYSCANNER HOLDINGS LIMITED
SKYSCANNER 2018 LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 30th day of July, 2020

SUMMARY

1. This case involves an application by the plaintiff ("Ryanair") for an interlocutory injunction against the defendants ("Skyscanner"). The application was heard over six days. In the substantive hearing, for which a date has yet to be fixed, Ryanair seeks an order restraining Skyscanner from facilitating the sale of Ryanair flights on the Skyscanner website by certain online travel agents ("OTAs"), such as lastminute.com and kiwi.com, that operate on that site.

2. However, in this interlocutory injunction application, Ryanair seeks to deal with those situations where a Ryanair flight is booked by an OTA for a passenger *via* the Skyscanner website between now and the hearing of the main action. Ryanair seeks an injunction obliging Skyscanner to require those OTAs, whose booking of a Ryanair flight has been facilitated by Skyscanner on its website, to provide Ryanair with the personal email address of the passenger (e.g. seancitizen@gmail.com), rather than an email address created by the OTA for the passenger in order to book the flight for that passenger (e.g. seancitizen123@ota.com).

3. In seeking this injunction to ensure that OTAs on the Skyscanner website do not provide what Ryanair calls *'fake'* email addresses for passengers, Ryanair wishes to ensure that it can directly contact the passenger flying on its flight, rather than having, as its passenger contact, an email address of the OTA. In support of its application, Ryanair relies primarily on the inconvenience caused to passengers, who discover that they cannot pass the security identification procedure on the Ryanair website/with the Ryanair call centre using their booking reference and their personal email address (e.g. seancitizen@gmail.com). This is because the passenger may not appreciate that his personal email address which he inputted on the Skyscanner website when making the booking was not used by the OTA in making the booking with Ryanair, but instead an OTA email address was used for this purpose (e.g. seancitizen123@ota.com).

4. In the course of making its application, Ryanair relied on several specific examples of frustration and inconvenience caused to passengers, which it claimed arose as a result of Ryanair not having access to the personal email address of the passenger. This inconvenience is caused by the passenger having to obtain from the OTA, if he/she does not already have it, the email address used for the booking. An example is the fact that a

passenger with mobility issues encountered a delay in receiving confirmation that she would have assistance when boarding and disembarking the aircraft. This delay was due to the passenger not being able to confirm her identity initially, because when she first contacted Ryanair she did not have the OTA email address for the booking.

5. In seeking this interlocutory injunction, Ryanair relies on its claim in the main action that Skyscanner is benefiting from what it says is unlawful 'screen scraping' of Ryanair's website in order to display Ryanair's flight information on the Skyscanner website. Screen-scraping is the practice of using software to interact with a website in order to extract and use for commercial gain information from that website (in this instance price, flight and timetables ("PFT")).

6. Ryanair also relies on its claim in the main action that Skyscanner is unlawfully facilitating on its website the sale of Ryanair flights by OTAs in direct contravention of the Terms of Use of the Ryanair website. These Terms of Use provide that the Ryanair website is the only website authorised to sell Ryanair flights. In addition, Ryanair claims in the main action that Skyscanner is in breach of a price comparison licence agreement dated 11th April, 2011 entered into by Ryanair and Skyscanner (the "Licence").

7. Against this background, Ryanair is seeking what it claims is the foregoing 'limited' interlocutory injunction pending the trial, in order to ensure that if its flights are going to be sold (unlawfully, in its view) *via* the Skyscanner website until the trial, that Ryanair should (at least, in Ryanair's view) receive the personal email addresses for passengers, rather than receiving OTA created email addresses for those passengers.

8. For its part, Skyscanner claims that the Licence has been terminated and that the term 'screen-scraping' is meant to demonise something which is lawful, namely the systematic obtaining, compilation and use of data which is voluntarily put into the public domain by Ryanair.

9. The legality or otherwise of 'screen-scraping', the alleged termination of the Licence and the alleged unlawful facilitation of sales of Ryanair flights on the Skyscanner website are matters for the trial judge and it is not necessary for the determination of the within application to consider the legality of same.

10. While Ryanair laid particular emphasis, in making this application, on the inconvenience and frustration to passengers, for its part Skyscanner emphasised the importance of personal email addresses to Ryanair in order for Ryanair to market ancillary services to passengers, such as car hire, hotels *etc.* Skyscanner claims that Ryanair does not wish to lose the significant revenue from ancillary services to OTAs (who will have those personal email addresses of passengers and thus will be in a position to market those ancillary services to them).

11. This Court rejects Ryanair's application for an injunction for the reasons set out below, including that the inconvenience to passengers, upon which Ryanair relies in seeking this injunction, can be alleviated by Ryanair itself (e.g. by Ryanair confirming the identity of

passengers by using a date of birth or other personal identification information for those who do not have the OTA email address for the booking). In addition, Ryanair could itself lessen the inconvenience which is caused to passengers by not using Chatbots (computer software that simulates human responses) to communicate with passengers. Accordingly, this Court finds that inconvenience (and the other prejudice relied upon by Ryanair) is not sufficient for this Court to conclude that the balance of justice favours the grant of the injunction.

The proceedings

12. In the substantive proceedings, Ryanair seeks, *inter alia*, an order restraining Skyscanner from breaching the Terms of Use of the Ryanair website, from breaching Ryanair's intellectual property rights and from using Ryanair's PFT for purposes other than the comparison of the price of Ryanair flights with those of other airlines. Ryanair also seeks an order restraining Skyscanner from facilitating the sale of Ryanair flights on the Skyscanner website.

13. In this interlocutory application, Ryanair seeks an injunction, until the hearing of the main action, prohibiting Skyscanner from facilitating on its website the sale by OTAs of Ryanair flights, without ensuring that the OTAs provide Ryanair with the personal email address of the passenger, as distinct from an email address created by the OTA, when booking on the Ryanair website. In the words of the Notice of Motion, Ryanair seeks:

> "[A]n interlocutory injunction prohibiting [Skyscanner] from selling [Ryanair's] flights on its website, whether on its own domain or *via* linked domains, without ensuring that [Skyscanner] and/or the selling party provides [Ryanair] with an email address and/or phone number which would enable it to directly contact its customer."

14. Ryanair claims that at present only 60 of the 300 or so OTAs that use the Skyscanner website are active on that website. It also claims that only four of those OTAs which use the Skyscanner site, namely lastminute.com, kiwi.com, trip.com and bravofly.com, provide an OTA email address, rather than the personal email address of the passenger to Ryanair.

15. The key issue in this interlocutory injunction therefore is that when Sean Citizen uses his personal email address, say seancitizen@gmail.com, to book a Ryanair flight on the Skyscanner website with say kiwi.com, Ryanair wants Skyscanner to oblige kiwi.com to provide Ryanair, not with the email 5226351@orbitdomainonline.com (an email address which was used by kiwi.com for the purposes of booking a Ryanair flight), but rather with seancitizen@gmail.com. In short, Ryanair wants to be able to directly contact passengers booked on their flights using the personal email addresses of those passengers, rather than only having a contact email address from the OTA that booked the flight on behalf of the passenger.

Relevance of revenue from Ancillary Services to this dispute

16. In these proceedings, Skyscanner laid particular emphasis, not on the inconvenience to passengers, which was highlighted by Ryanair (as well as Covid-19, regulatory and

goodwill issues), but rather on the financial motivation behind this application by Ryanair, i.e. that Ryanair wishes to market car hire, hotel booking, insurance, events and activities *etc* ("Ancillary Services") to its passengers using the personal email address of that passenger.

17. For its part, Ryanair emphasised the financial reasons why Skyscanner might want the current situation (of Ryanair not receiving personal email addresses of passengers) to continue, namely that the revenue earned by Skyscanner from commissions from OTAs who book Ryanair flights using the Skyscanner website, is likely to be greater if those OTAs, rather than Ryanair, will be in a position to sell Ancillary Services to those passengers. As noted below, this is because of the commissions earned by Skyscanner from OTAs that operate on its website.

General background regarding Ryanair and Skyscanner

18. Ryanair is a hugely successful airline with a turnover of €7.6 billion and profits of €885 million for the financial year ending 31 March 2019. In that year, Ryanair's revenue from sales of seats on its flights was in the sum of €5.3 billion compared to a sum of €2.4 billion in respect of ancillary revenue. The 2019 Annual Report indicates that the average price of a fare was €37 per passenger and the average value of sales of ancillary revenue was €17.15 per passenger. In this regard Mr. Thomas McNamara, Head of Legal at Ryanair, ("Mr. McNamara") avers on behalf of Ryanair that the *'sale of ancillary services is an essential and fundamental element of the low-cost model'* which it provides to passengers. Some of these ancillary services are sold by Ryanair *via* its website when a person is booking a flight on the Ryanair website and some, it seems, arise from emails sent directly from Ryanair to its passengers.

19. The value of Ancillary Services is therefore clear. For this reason, while Ryanair has no issue with its PFT being made available for price comparison purposes on the Skyscanner website, it does not want its flights sold directly or indirectly on that website. This is because Ryanair attaches huge importance to continuing to sell all Ryanair flights on the Ryanair website so as to continue to benefit from the sale of Ancillary Services to the purchasers of those flights. It is clear that this is a major reason for its decision to take the substantive proceedings, in which it seeks to prevent the sale of Ryanair flights on the Skyscanner website. While Ryanair emphasises the inconvenience to passengers of Ryanair not having their personal email address, it seems clear that as well as eliminating this inconvenience to passengers (if it has their personal email addresses), it is also the case that Ryanair will then be able to market Ancillary Services to those passengers. On the other hand, if Ryanair does not have the personal email address of these passengers, the OTAs will be able to market Ancillary Services to the exclusion of Ryanair.

20. For its part, Skyscanner is also a successful business. For the financial year ending 31 December 2018, it had a turnover of £261 million and profits after-tax of £35 million. It is a meta-search site which provides a search facility in respect of flights, hotels and travel-based services by providing a comprehensive search function covering as many providers and travel intermediaries as possible. Other meta-search sites include Google Flights,

Kayak and Momondo. Skyscanner has over a hundred million active users per month across the world.

21. The Skyscanner website offers a one-stop shop where a consumer can search over 600 airline websites and approximately 300 OTA websites to find flights from point to point, either by direct flights with one airline or multi-stop flights using one or more airlines. Skyscanner depends hugely on the OTAs that operate on its website, since Mr. Hugh Aitken ("Mr. Aitken"), Vice-President, Commercial, of Skyscanner Limited averred that 60-65% of its revenue comes from OTAs. While his affidavits did not clarify precisely how it earns this revenue, it seems likely that it is related to commission it receives from the sale by OTAs of flights and Ancillary Services arising from passengers who book *via* the Skyscanner website. This is because the Annual Report for Skyscanner Limited for the year ending 31 December 2018 states that it derives substantially all of its revenue from, *inter alia, 'commissions earned from facilitating the booking of flight, hotel car hire services'.*

Background to the application for this interlocutory injunction

22. Sworn evidence was provided on behalf of Skyscanner that it *does not sell* Ryanair flights on its website. Accordingly, this dispute seems to be concerned primarily with the sale of Ryanair flights by OTAs which are *facilitated* by Skyscanner on its website. This dispute arose on the 11th November, 2019. This is because prior to the 11th November, 2019, if a consumer chose a Ryanair flight from the results of a search for flights on the Skyscanner website, evidence was provided that he/she was re-directed to the Ryanair website to complete the booking in all instances and that it was not possible to book a Ryanair flight in any other manner *via* the Skyscanner website.

23. This was the case for all Ryanair flights booked by users of the Skyscanner website because the search results on Skyscanner did not, prior to 11th November, 2019, display flights on offer from OTAs where those flights were in fact Ryanair flights. Skyscanner explains that the reason for this approach by it at that time was because of the contractual restrictions in the Licence which was then in force, but which it claims was terminated on 11th November, 2019.

24. Since then the position is that a consumer can book the exact same Ryanair flight on the Skyscanner website in two different ways using what is known as the dBook process. Using this process, the passenger inputs his personal details on the Skyscanner website and if he chooses a Ryanair flight, which is for sale by Ryanair, his details are passed on by Skyscanner to Ryanair and the booking is completed on the Ryanair website. The other way is if the passenger chooses to book that same Ryanair flight which is offered for sale by an OTA, although the passenger may not know that it is a Ryanair flight he is booking with that OTA. In this instance, the passenger inputs his personal information on the Skyscanner website and it is accessed by the OTA which uses that information to book the flight on behalf of the passenger on the Ryanair website. However, as noted previously, in making that booking some OTAs do not input the personal email address of the passenger on the Ryanair website, but instead the email address of the OTA.

Booking Ryanair flights sold by Ryanair v. Ryanair flights sold by OTAs

25. The evidence which was provided to the Court, of the exact same flights sold by Ryanair and sold by an OTA, showed that Ryanair flights (and prices for seat reservations, luggage *etc*) sold by the OTAs were more expensive than if booked directly with Ryanair and this mark-up may be the equivalent of the profit made by a travel agent on the sale of a flight.

€86 v. €2,734 for same Ryanair flight sold on Ryanair website v. when sold by an OTA

26. However, care should be taken in reaching any conclusions regarding mark-ups on the flights, since only 20 or so flights were put in evidence. Nonetheless, excluding the €2,734 flight referenced below, all of these involved mark-ups averaging approximately 13% with half of them in the 6%-8% range. However, in one exceptional case, evidence was provided where Ryanair was offering a flight for €86 and the exact same flight was offered by trip.com for €2,734. Ryanair claims that, while the price comparison of Ryanair flights with other airlines on the Skyscanner website may be in the interests of the consumer, Skyscanner's facilitating of the sale of Ryanair flights by OTAs on its website is not in the consumer's interest, because it says of the inevitable mark-up of those flights.

27. Mr. McNamara of Ryanair has averred that Skyscanner fails to bring to the attention of its users that booking a Ryanair flight with an OTA will lead to the passenger paying more and it claims that this is because Skyscanner receives a commission when a flight is booked in this way and no commission if the flight is booked on Ryanair's website. Mr. McNamara further avers that Ryanair has championed the consumer *via* its focus on low-cost travel and that it does not believe that consumers are best served by Skyscanner facilitating OTAs to transact business on its website to *'mark-up its flights'*.

28. However, Skyscanner claims that this level of mark-up of over €2,500 is an anomaly and that there are reasons, other than price, why a consumer picks a flight. For example, OTAs facilitate the comparing and booking of flights from A to C via B with two different airlines more easily than having a consumer visit different airlines' websites. Skyscanner also claim that meta-search sites have a greater range of language options (e.g. Ryanair does not offer a Turkish language option, but on the Skyscanner platform a number of OTAs do), new and alternative Ancillary Services may be provided by an OTA and some OTAs guarantee to book a passenger on the next available flight from any air carrier if a flight is missed in a 'chain' of flights booked with the OTA.

Using the dBook system on the Skyscanner website to book a flight

29. It is apparent from the evidence before the Court of the booking process and indeed evidence of a notice on the Skyscanner website itself (to which Mr. McNamara refers in his affidavit), that a customer who books a flight with an OTA such as kiwi.com or lastminute.com on Skyscanner might not appreciate that this flight is in fact a Ryanair flight.

30. However, in neither situation is Skyscanner the merchant of sale for the flight. Rather, it provides the environment in which the booking is made with either Ryanair or with the OTA. It does this by requiring the consumer to fill in his/her details on the Skyscanner

website (rather than re-directing the consumer to the Ryanair website or indeed the OTA website).

31. The Skyscanner website makes clear that either Ryanair or the OTA remains the merchant of sale throughout the booking process by, for example, presenting a consumer, after he clicks *'Book on Skyscanner'*, with (in the case of kiwi.com) a page that states that the consumer is *'Booking with Kiwi.com on Skyscanner' and with a statement that the total price is 'debited by Kiwi.com'*, followed by a confirmation email from kiwi.com which thanks the consumer *'for booking with Kiwi.com.'*

32. Sworn evidence was provided on behalf of Skyscanner that it is not technically possible for Skyscanner to interpose itself in the transaction between the user and the OTA, so as to provide the passenger's personal email address to Ryanair, notwithstanding that the transaction is facilitated on the Skyscanner website.

33. Evidence was also provided to the Court of a similar process in the case of a booking with Ryanair of a Ryanair flight using the dBook process on the Skyscanner website, i.e. the phrases used are *'Booking with Ryanair.com on Skyscanner' and the price is stated as being 'debited by Ryanair.com'.*

34. A careful examination of the web pages provided in evidence reveals therefore that a consumer who makes a dBook booking on the Skyscanner website would seem to be contracting with Ryanair or the OTA, as the case may be. Perhaps most significantly of all, in the context of the injunction being sought, it seems clear that Skyscanner passes on the email address inputted on its website as part of the dBook process to Ryanair or the OTA, as relevant (or they are accessed by Ryanair/the OTA form the Skyscanner website). So, in the case of a Ryanair flight booked by an OTA for a passenger, while Skyscanner clearly facilitates that booking on its website, it does not itself provide an email address for the passenger to Ryanair as part of the booking process, rather it is the OTA which does so.

35. Thus, the passenger's details (including his personal email address) are accessed by or passed to Ryanair or the OTA via the Skyscanner website and the booking is then completed by Ryanair on its website, or by the OTA by it interacting with the Ryanair website for this purpose. The payment is made by the passenger directly to Ryanair or the OTA, as relevant. While it seems clear to this Court that Skyscanner may not be selling the Ryanair flights to passengers, based on the evidence before this Court, it seems to be facilitating the sale on its website of Ryanair flights by OTAs to those passengers.

36. As previously noted, four of the 300 OTAs that use the Skyscanner website input in the Ryanair website an email address created for that passenger by the OTA, rather than the personal email address of the passenger.

Licence Agreement to access Ryanair flight information for price comparison website

37. For a period of eight and a half years up 11th November, 2019, Ryanair and Skyscanner both accept that they operated the Licence and that pursuant to its terms, Skyscanner had access to the Ryanair website to enable it use Ryanair's PFT information for price comparison purposes only. This access was achieved by Ryanair granting Skyscanner access to the Ryanair website through what is known as an application program interface (an "API"). The Licence provided, *inter alia*, that:

> "[Skyscanner] shall in the operation and running of its price comparison website, re-direct all sales and passenger enquiries prospective or otherwise to the homepage of [Ryanair's] website www.ryanair.com. [Clause 4.4]
>
> [Skyscanner] is prohibited from targeting consumers by displaying any marketing content or any other communications, including through pop-ups at any time during or after the consumer is redirected to www.ryanair.com and subsequently www.bookryanair.com or after the booking process has been completed on www.bookryanair.com. [Clause 4.5]"

38. The Licence was capable of termination by either party by giving the other party seven days' notice after the material breach of its terms or by 30 days' notice without cause. There is a dispute between the parties as to whether the Licence was terminated at all or by Ryanair or by Skyscanner's acceptance of Ryanair's alleged material breach of the Licence. Skyscanner claims the Licence terminated on the 11th November, 2019, while Ryanair in its Plenary Summons seeks a declaration that:

> 'the Licence Agreement dated 11 April 2011 (the "Licence Agreement") and/or Ryanair's website Terms of Use ("Ryanair's TOUs") are binding on Skyscanner'.

39. While there is clearly a dispute between the parties as to whether the Licence was terminated, and if so by whom, it seems clear that insofar as Skyscanner accessed the Ryanair website after 11th November, 2019, it was not done using the licenced API in accordance with the terms of that Licence, since Ryanair is able to confirm that this has not occurred. Therefore, however Skyscanner accessed Ryanair's PFT after the 11th November, 2019, it seems it did not do so using the API.

40. Furthermore, Skyscanner would have been in no doubt from as far back as 2011 when the Licence was first executed by Skyscanner, that Ryanair did not want Skyscanner to access its PFT information to sell Ryanair flights itself or indeed to enable third parties sell those flights. This is also clear from the terms of the Licence, since thereunder, Skyscanner's sole entitlement was to use the PFT information for price comparison purposes and any sales of Ryanair flights were to be redirected to Ryanair.

41. Ryanair claims not only that the Licence is still subsisting but that it is understood between Ryanair and Skyscanner that, pursuant to its terms, Skyscanner is not permitted to hamper the direct delivery by Ryanair of its low-cost fares. Ryanair also claims that there is an implied term in the Licence that Skyscanner will not hamper in anyway Ryanair's ability to communicate with its customers.

KEY ISSUE: PROVISION OF PERSONAL EMAIL ADDRESS TO RYANAIR?

42. The key issue, for the purposes of these interlocutory proceedings, is that when the consumer buys the Ryanair flight directly from Ryanair, the consumer inputs his personal information, including his personal email address, which then is directly provided by Skyscanner to Ryanair.

43. In contrast, when the consumer books the exact same Ryanair flight using say kiwi.com on the Skyscanner platform, his booking information is accessed by kiwi.com on the Skyscanner website, which then inputs that information on the Ryanair website, but crucially kiwi.com replaces the personal email address of the consumer with a kiwi.com email address. For example, in one instance the email address provided by kiwi.com to Ryanair was the unusually titled bulletfromagunskepta@gmail.com.

44. The significance of the provision of OTA email addresses from a commercial perspective is that Ryanair loses the opportunity to market Ancillary Services to the passenger, since marketing emails sent by Ryanair to bulletfromagunskepta@gmail.com will be received by the OTA. Instead, kiwi.com, as the business with the personal email address of the passenger is in a position to market Ancillary Services to that passenger.

45. Because of the very considerable value of the Ancillary Services to Ryanair and the OTAs, it seems clear that a key driver for this application for an interlocutory injunction (and a key driver for its resistance by Skyscanner) is the amount of revenue at stake if OTAs are allowed to continue to book Ryanair flights for its customers in this way, i.e. without providing the personal email address of the passenger to Ryanair.

Only four out of 300 OTAs provide OTA email addresses to Ryanair

46. It is relevant to note that although approximately 300 OTAs operate on the Skyscanner website (60 of them actively), according to Ryanair, only four of those 300 OTAs do not provide the personal email address of passengers to Ryanair, i.e. trip.com, kiwi.com, lastminute.com and bravofly.com

The OTAs, rather than Skyscanner, are the main culprits

47. It is also relevant that, although these proceedings are against Skyscanner, Skyscanner is not selling Ryanair flights on its website (*albeit* it seems to be facilitating the sale of Ryanair flights by OTAs), and Skyscanner is not providing the OTA email addresses to Ryanair (since this is being done by the OTAs).

48. In this regard, it is clear that Ryanair regards the OTAs as the main culprits regarding the failure of Ryanair to receive the passenger's personal email address. In its submissions to this Court, counsel for Ryanair stated:

> "So some OTAs, and as best we can identify it's been the ones we have identified are the culprits we are aware of in relation to the false information" (Transcript, Day 2, p. 15)

In a similar vein, Ryanair sent two letters to the UK Civil Aviation Authority ("CAA"), the first dated 16th January, 2020 and the second dated 13th March, 2020, in relation to

what Ryanair describes in those letters as *'OTAs' anti-consumer behaviour'* including their *'practice of providing fake email addresses to airlines'*. In both of these letters, Ryanair details examples of issues which it claims were caused by the provision of false passenger email addresses by OTAs. It is clear from both of these letters that the focus of Ryanair's complaint is on the OTAs that Ryanair has identified as providing false passenger email addresses.

49. Nonetheless, in these proceedings, Ryanair's complaint against Skyscanner is that it provides the environment in which the sale of the Ryanair flight happens and that it likely receives considerable revenue from the OTAs who are engaging in the sale of Ryanair flights.

50. On this basis, Ryanair does not dispute that it could sue the OTAs to oblige them to provide Ryanair with each passenger's personal email address, but it claims that Skyscanner is in a position to oblige OTAs, which are allowed operate on the Skyscanner website, to provide the personal email address to Ryanair.

51. It is clear that it is not within Skyscanner's power to compel the OTAs, which are independent third parties, to change their business model such that they book Ryanair flights using the personal email address of its clients, rather than an OTA email address.

52. This means that granting an injunction against Skyscanner in the format sought by Ryanair is a serious matter because if the injunction is granted and a passenger books a flight with an OTA *via* the Skyscanner website, which turns out to be a Ryanair flight, without that OTA providing the passenger's personal email address to Ryanair, Skyscanner would be in breach of a court order. This could lead to an application for an order of attachment against the directors or other officers of the Skyscanner.

53. Furthermore, if the OTAs fail, or refuse, to change their business model, then the only way for Skyscanner to ensure that it is not in contempt of court, as a result of the actions of OTAs using its website, would be for Skyscanner itself to change its business model by filtering out results for Ryanair flights from the OTAs' search results on the Skyscanner website, which Mr. Aitken has averred can be done. Mr. Aitken has however averred that this would cause *'enormous damage'* to Skyscanner's business because it would weaken its position in the market compared to its competitors, who Mr. Aitken averred would *'exploit'* this change in Skyscanner's business model. Mr. Aitken further averred that the exclusion of OTAs from the Skyscanner platform *'threatens Skyscanner's financial survival'*.

APPLICABLE LAW FOR THE GRANT OF INTERLOCUTORY INJUNCTIONS

54. The law regarding the grant of interlocutory injunctions is well settled and does not need to be restated in any detail. It is clear from the judgement of O'Donnell J. in the Supreme Court case of *Merck Sharp & Dohme v. Clonmel Healthcare Ltd* [2019] IESC 65 at para. 64, that the following is the approach to be taken:

"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the *American Cyanimid* and *Campus Oil* approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it *may* be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

55. The first question therefore is whether, if Ryanair was successful at the trial, a permanent injunction would be granted. If Ryanair is successful at the trial in its claim that

Skyscanner is breaching the Licence and Terms of Use, then it seems clear that it will get a permanent injunction. Hence the answer to this question is yes.

56. The next issue is whether there is a fair issue to be tried, which per O'Donnell J. at para. 29 *'means no more than the case not being frivolous or vexatious'*. However, it is relevant to note that while most injunctions will be prohibitive in nature (i.e. prohibiting a person from doing something), if an injunction is mandatory in nature (i.e. requiring a person to do something), then it is not enough for the plaintiff to show that there is a fair issue to be tried, in order for him to be granted an interlocutory mandatory injunction. Instead, to be entitled to such an injunction, the plaintiff must show *'that he has a strong case that he is likely to succeed at the hearing of the action' per* Clarke C.J. in *Charleton v. Scriven* [2019] IESC 28 at para. 4.4, wherein he quoted with approval from the judgment of Fennelly J. in *Maha Lingham v. Health Service Executive* [2005] IESC 89. As explained by Clarke C.J. at para. 4.8:

> "The reason why a higher standard is applied is not because of some technicality but because of the greater risk of injustice which I have sought to identify. But that greater risk is a function of the substance of the order sought and the consequences which it might have for an individual who became bound to obey the interlocutory injunction but ultimately succeeded. It is clear that, at least in general terms, requiring someone to do something which, it may ultimately transpire, they were not required to do may give rise to a greater risk of injustice than simply requiring someone to refrain from doing something which they may ultimately be found to be entitled to do. But that question is dependent on an analysis of the substance of the effect of the injunction if granted, rather than the language used in its terms."

57. If there is a fair issue to be tried (in the case of a prohibitive injunction) or if there is a strong case that is likely to succeed (in the case of a mandatory injunction), the next issue is whether the balance of justice favours the grant of an injunction (to oblige Skyscanner to require the OTAs that use its website to provide the personal email addresses of its passengers to Ryanair). An important, but not necessarily determinative element of the balance of justice is the adequacy of damages, which emphasises the essential flexibility of the discretionary equitable remedy of an injunction whose aim should be to minimise injustice.

THE TYPE OF INJUNCTION BEING SOUGHT IN THESE PROCEEDINGS

58. Although the interlocutory injunction being sought (obliging Skyscanner to require OTAs using its website to provide 'personal' email addresses of its customers to Ryanair) is different from the injunction being sought at the trial (i.e. to prevent the sale of Ryanair flights on the Skyscanner website to the OTAs in the first place), nothing turns on this. This is because if Ryanair was to be successful at the trial and get orders prohibiting the sale of Ryanair flights by OTAs *via* the Skyscanner website, this would obviously also prevent OTAs providing OTA email addresses to Ryanair (since they would not be providing *any* email addresses to Ryanair, as they would not be able to book any Ryanair flights *via* the Skyscanner website).

If the injunction sought is a prohibitive injunction

59. The injunction sought by Ryanair in this case is framed as a prohibitive injunction, since it seeks an injunction *'prohibiting'* Skyscanner from allowing the sale of Ryanair flights on its website *'without ensuring'* that the OTA provides the passenger's personal email address to Ryanair.

60. It is clear from the judgment of Clarke C.J. in *Charleton v. Scriven* [2019] IESC 28 at para. 4.6. that:

> "the assessment of whether an injunction can properly be said to be mandatory […] is a matter of substance rather than one of form".

61. Thus, if this injunction being sought is in substance a prohibitive injunction, this means Ryanair must satisfy this Court that an order, prohibiting Skyscanner from facilitating the sale of Ryanair flights on its website (which will have the same effect as prohibiting Skyscanner from facilitating OTAs providing OTA email addresses), is a fair issue to be tried, i.e. that it is not frivolous or vexatious. Ryanair claims in the substantive proceedings that Skyscanner's actions in using Ryanair's PFT and facilitating the sale of Ryanair's flights on its websites amounts to, *inter alia*, a breach of the Terms of Use, breach of contract, breach of duty, misrepresentation, passing off, trespass to goods, infringement of trade mark and/or breach of Ryanair's constitutional rights.

Breach of Terms of Use of Ryanair website as a 'fair issue to be tried'?

62. Ryanair placed particular emphasis on the alleged breach of the Terms of Use. It seems clear to this Court that Ryanair's claim that Skyscanner is itself breaching, or is facilitating the breach of, Ryanair's Terms of Use of its website, by permitting details of Ryanair's flights to be displayed on the Skyscanner website for sale, is not a frivolous or vexatious claim. This is because evidence has been provided of the Terms of Use on the Ryanair website which make it clear that the use of the Ryanair website by price-comparison websites is for the purpose of price comparison and not for the purpose of the sale of flights or the facilitation of the sale of flights. Clause 2 of the Terms of Use states:

> "[The Ryanair website] is the only website authorised to sell Ryanair Group flights […], whether on their own or together with any other services. Price comparison websites may apply to enter into a written Licence Agreement with Ryanair, which permits such websites to access Ryanair Group airlines' price, flight and timetable information for the sole purpose of price comparison."

It also seems clear that Skyscanner should be familiar with these Terms of Use, since in order to conduct a search for flights on the Ryanair website, evidence was provided that Skyscanner would have to engage in a process referred to as 'click-wrapping', which involves clicking on a tick box which is emphasised on the website as leading to the acceptance of the Terms of Use.

63. Yet, there is no doubt that Ryanair's PFT information is appearing on Skyscanner's website and Ryanair flights are being sold via that website, albeit that Skyscanner does not appear to be selling them, since they are being sold by OTAs. It also seems that

Skyscanner benefits financially from the sale of Ryanair flights by OTAs on the Skyscanner website. It seems therefore to this Court that, it is not frivolous or vexatious of Ryanair to claim that Skyscanner is involved in some way in permitting conduct that may be in breach of Ryanair's Terms of Use and/or indeed Ryanair's rights as the owner/creator of the PFT. On this basis therefore, if the injunction is held to be a prohibitive injunction, there is a fair issue to be tried as to whether Skyscanner is using Ryanair's website in breach of Ryanair's Terms of Use. One then considers whether the injunction should be granted on the balance of justice.

64. However, first this Court will consider whether, despite this injunction being framed in a prohibitive manner, it is in substance a mandatory injunction.

Is the injunction in substance a mandatory injunction?

65. If the injunction in this case was regarded as in substance a mandatory injunction, then Ryanair has to show that it has a strong case that is likely to succeed at trial that Skyscanner is engaged in unlawful conduct such that it should be prohibited from facilitating the sale of Ryanair flights on its website (and thereby prevented from providing OTA email addresses to Ryanair).

66. In this regard, Skyscanner claims that while the injunction is framed as a prohibitive injunction, *'prohibiting'* Skyscanner from allowing the sale of Ryanair flights *'without ensuring'* that the OTA provides the personal email address, in substance it is a mandatory injunction.

67. This is because Skyscanner claims that the injunction would require positive action on the part of Skyscanner, namely it requires Skyscanner to monitor what the OTAs are doing on its website, and it also requires Skyscanner to engage with the OTAs regarding their business model (of providing an OTA email address to Ryanair). Furthermore, it potentially requires Skyscanner to persuade the OTAs to change their business model. In addition, if the OTAs do not change their business model, it would require Skyscanner to change its business model by blocking the OTAs from selling Ryanair flights on the Skyscanner website (to avoid Skyscanner being in contempt of court).

68. For its part, Ryanair claims that prior to 11th November, 2019 Skyscanner did not permit the sale of Ryanair flights by OTAs and so this application for an injunction, seeking to prevent their sale by OTAs now, without providing a personal email address of the passenger, amounts to no more than preserving the *status quo*.

69. In support of its claim that this injunction requires extensive monitoring, Skyscanner refers to a letter to Skyscanner's solicitors dated 3rd June, 2020 from Ryanair's solicitors regarding an undertaking in similar terms to the injunction sought, namely an undertaking which would ensure that OTAs provide the passengers' personal email addresses to Ryanair. In that letter, Ryanair offers to do the monitoring of the OTAs to see if they comply with the undertaking. This letter states, *inter alia*, that:

"Ryanair is willing to monitor the situation itself and will notify Skyscanner of any incidents of any new online travel agents who are not providing the correct email or phone numbers, on the basis that Skyscanner would, in turn, undertake to delist such online travel agents until such time that they provide the correct email addresses to Ryanair."

70. By letter dated 3rd June, 2020 Skyscanner's solicitors rejected the offer that Ryanair would have, what they saw as, a role in monitoring Skyscanner's business, since they replied, *inter alia*, that:

> "Furthermore, Ryanair's suggestion that it would tell [Skyscanner] what parties [Skyscanner] can or cannot allow to be displayed on its meta-search site is an unprecedented and unjustified interference with [Skyscanner's] business and would cause the very damage which [Skyscanner] has repeatedly outlined on affidavit would arise and for which [Ryanair] clearly has no regard.
>
> […]
>
> Ryanair cannot seriously believe that [Skyscanner] would agree to a proposal that Ryanair would have a role in managing how [Skyscanner's] business would operate in light of the steps which Ryanair have to date taken to try and damage [Skyscanner's] business. We make reference in particular to the press release which Ryanair issued (and posted on its website) urging consumers to boycott [Skyscanner's] business and in respect of which (as outlined in paragraph 12 of Mr Aitken's second affidavit) [Skyscanner] had to obtain an ex-parte injunctive order against [Ryanair] from the German Court to have that press release removed and to prevent [Ryanair] from continuing to issue such calls to boycott.
>
> We are also concerned about the legal implications of your suggestion that Ryanair would monitor the situation itself, notify Skyscanner of any incidents, and that Skyscanner would undertake to delist such OTAs. Ryanair and Skyscanner are distinct undertakings for the purposes of EU and Irish competition law, and the suggestion that [Skyscanner] would agree with [Ryanair] effectively to boycott a third-party undertaking raises obviously serious concerns as a restrictive agreement."

71. This Court would note as follows:

- First, the form of this injunction effectively requires Skyscanner to control the behaviour of a third party. If this injunction was solely directed at Skyscanner, namely prohibiting Skyscanner itself from providing Skyscanner email addresses, then it is arguable that it would constitute a prohibitive injunction.

- Secondly, this injunction not only involves third parties, but in truth its primary target is third party OTAs, which are being targeted *via* Skyscanner, where Skyscanner is a proxy for those OTAs, since it is clear that the main culprits, for the

mischief of which Ryanair complains (i.e. failing to provide personal email addresses of passengers), are the OTAs.

- Thirdly, not only is the injunction directed at third parties, but the form of injunction requires a lot more than requiring the real subject of the injunction (the OTAs) simply not to do something (which is the essence of a prohibitive injunction). Rather, this injunction requires a third party, the OTA, to change its current business model, even though that business model is based on the OTA providing OTA email addresses to Ryanair for obvious commercial reasons (namely the sale by the OTA, rather than Ryanair, of Ancillary Services to the passenger).

- Fourthly, the injunction would require Skyscanner to engage in the constant monitoring of a third party over whom Skyscanner has no control, since this injunction would require monitoring of OTAs, perhaps day by day, hour by hour or even minute by minute. It is not an answer to this level of monitoring of a third party which is required to be done by the party the subject of the proposed injunction, that the party seeking the injunction could do the monitoring and notify Skyscanner of breaches (as Ryanair has offered). This is because a court order to that effect would involve a third party, Ryanair, monitoring the business of Skyscanner (a company that is arguably its competitor, in the sense that Ryanair (directly) and Skyscanner (indirectly) benefit from the sale of Ancillary Services to passengers on flights, which, although perhaps not unprecedented, would be unusual. In any case, the key issue regarding whether the injunction is in substance a mandatory or prohibitive injunction, is the degree of positive action required and, in this regard, the key question is the extent of the positive actions required, not whether those positive actions are to be done by Skyscanner or by a third party, in this instance Ryanair, on behalf of Skyscanner.

- Fifthly, the injunction would also involve Skyscanner itself in a completely new business model whereby it would be involved in a high degree of monitoring (whether directly by Skyscanner or indirectly by Ryanair) of the OTAs and then requiring the 'wrongdoer' OTAs to change their business model. If the OTA failed to do so, Skyscanner would have to take further positive action by altering its business model by excluding that OTA from the Skyscanner website in respect of Ryanair flights.

This is the extent of the positive action involved in Skyscanner having to obey the injunction, if granted.

72. Ryanair's claim that it is only seeking to protect the *status quo*, is not without merit, since it alleges, and it is not denied by Skyscanner, that no Ryanair flights were sold on the Skyscanner website by OTAs before the 11th November, 2019. However, because of the involvement of third parties and the extent of the monitoring and changes in business models required, this injunction involves, in this Court's view, a lot more than simply not doing something and so is in substance mandatory.

73. Accordingly, in order to be entitled to the interlocutory relief, Ryanair must establish that there is a strong case that it will succeed at the full hearing of the action.

Has Ryanair a strong case?

74. The various causes of action relied upon by Ryanair in these proceedings are as follows:

- Breach of Terms of Use/Breach of contract:

  Ryanair claims that Skyscanner is in breach of the Terms of Use of its website. Reference has already been made to this cause of action. This is the cause of action upon which particular emphasis appears to have been placed by Ryanair as the one which gave it a strong case that it would succeed at the hearing of the action. This Court has concluded that Ryanair has raised at least an arguable case regarding this issue. The extent to which it gives rise to a valid contract is clearly a question for the trial judge. Ryanair claims that it has a strong case to be tried and in this regard it relies on the decision in *Ryanair v. S.C. Vola.ro S.R.L.* [2019] IEHC 239 where Ní Raifeartaigh J. considered it significant that the express agreement to accept the Terms of Use of the Ryanair website appears beside the 'Let's go' button that a user of the Ryanair website must click – thereby expressly consenting to the Terms of Use. Furthermore, she notes in her judgment that the Terms of Use appear as a hyperlink at all times on the Ryanair website and that therefore any user of the website can access the Terms of Use at all times while using the website. The precise format of the Terms of Use is not necessarily the same for Skyscanner as it was for S.C. Vola.ro. In addition, of course, Skyscanner has denied screen-scraping. Furthermore, Skyscanner claims that the Licence, which permits the use of Ryanair's PFT for price-comparison purposes only, was terminated on 11th November 2019. For these reasons, this Court concludes that, while Ryanair might well succeed at the hearing of the action that Skyscanner has breached its Terms of Use of its website, it is not possible for this Court to conclude that Ryanair does has a strong case, such as to entitle it to a mandatory injunction at the interlocutory stage.

While this Court did not understand Ryanair to be claiming that it had a strong case that it will succeed at the full hearing of the action in relation to the other causes of action, these will nonetheless be referenced briefly.

- Restitution – Unjust enrichment:

  Reliance was placed by Ryanair on the decision of McDonald J. in *HKR Middle East Architects Engineering LC v. English* [2019] IEHC 306. This claim is based on the idea that Ryanair's website is its property and that therefore the alleged screen scraping activities engaged in by Skyscanner leads to Skyscanner being unjustly enriched at the expense of Ryanair. While this does seem to be an arguable point, there was insufficient basis for this Court to conclude that Ryanair had a strong case in this regard that it will succeed at the full hearing of the action.

- Breach of duty/negligence:

  Ryanair claims in its written submissions that it is *'arguable'* that Skyscanner owes Ryanair a duty of care based on its status as a licensed partner of Ryanair, a position which it has held for over eight years. Ryanair claims that a reasonable foreseeability exists that damage would be caused by the activities allegedly engaged in by Skyscanner (screen-scraping *etc.*), in particular the potential damage that could be caused to Ryanair if it were to be held criminally liable under, *inter alia*, consumer protection legislation such as Regulation 261/2004 on Compensation and Assistance to Passengers in the event of Cancellation or Delay of Flights ("Regulation 261/2004"). Ryanair argues that if such a duty of care exists, then that duty has been breached by Skyscanner and that Ryanair has suffered monetary and reputational loss because of this breach. However, as noted by Ryanair, this appears to be an arguable cause of action, but it does not amount to a strong case that it will succeed at the full hearing of the action.

- Breach of copyright/database rights:

  Ryanair appears to accept in its submissions that technical evidence will be required at the trial of the action in relation to this claim, that Skyscanner is guilty of breach of copyright and of Ryanair's database rights. However, it submits that notwithstanding this, it has an arguable case. This does not however amount to a strong case that will succeed at the full hearing of the action.

- Breach of trademark:

  Ryanair claims that its trademark is actively 'used' by Skyscanner in the course of its business and that this is done without the consent of Ryanair. In its submissions, Ryanair details the different stages at which the word 'Ryanair' appears on the Skyscanner website and claims that this is done with a view to economic advantage on the part of Skyscanner. Ryanair claims that the use of its name on the Skyscanner website is interpreted by consumers as linking Skyscanner's products with those of Ryanair and that this affects the use of the trademark by Ryanair, and in particular breaches the rights afforded to Ryanair under Article 9 of Regulation 2017/1001 (Regulations on the European Union trade mark) and s. 14 of the Trademarks Act 1996. For its part, Skyscanner submits that Article 14(1)(c) of Regulation 2017/1001 allows for the use of an EU trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark. It seems therefore that Skyscanner has an arguable defence to Ryanair's claim and so Ryanair does not have a strong case in this regard that it will succeed at the full hearing of the action.

- Conversion, trespass to goods/property/services:

  The essence of this claim is that Ryanair alleges that Skyscanner is taking the 'key element' of Ryanair's website (i.e. the data needed to induce the consumer to book

a flight, described by Ryanair as the 'hook' for a sale) and using it to further Skyscanner's business. However, Ryanair acknowledges in its submissions that at common law trespass and conversion only apply to corporeal property and so it is arguing that *'in principle'* data should also be capable of protection by these torts. It is clear therefore that Ryanair does not have a strong case in this regard that it will succeed at the full hearing of the action.

- Misrepresentation, passing off:

  The thrust of this particular claim made by Ryanair is that the way in which PFT information is presented on the Skyscanner website is *'likely to lead the public to believe that the goods and/or services offered by Skyscanner are the goods and/or services of Ryanair'* and/or that services on the Skyscanner platform are endorsed by Ryanair and that this has the potential to cause damage to Ryanair's business. In relation to the claim of passing off, Ryanair claims that this has the potential to cause damage to Ryanair's reputation, e.g. where Ryanair flights sold *via* the Skyscanner website are more expensive than flights sold via the Ryanair website. However, in the course of the hearing of the within application for an injunction, Ryanair did not produce any evidence of any of their passengers having been confused by the Ryanair name appearing on the Skyscanner website. Nor did it provide any evidence of any significance that the display of its PFT information or the word 'Ryanair' on the Skyscanner website has caused damage to its reputation. Accordingly, at this stage of the proceedings, Ryanair does not have a strong case in this regard that it will succeed at the full hearing of the action.

- Economic torts:

  Ryanair submits that Skyscanner is liable for 'general' economic torts that it has carried out against Ryanair. This claim appears to be grounded in the claim that Skyscanner is 'hijacking' Ryanair's multi-billion capital investment in aircraft for its own benefit. Whatever about this being an arguable point, insufficient authority or evidence was provided to this Court to enable it to conclude that Ryanair has a strong case that it will succeed in this regard at the full hearing of the action.

- Breach of constitutional/ECHR/EU rights:

  Ryanair claims a breach of its property rights under Articles 40.3 and 43 of the Constitution. It also claims breaches of its rights under Articles 1, 6, 10, 13, and 14 (and breaches of the connected rights) of the EU Charter on Fundamental Rights. However, these claims are made in a very general way and specific breaches do not appear to have been articulated or evidenced at this stage of the proceedings and so this Court could not conclude that Ryanair has a strong case that it will succeed in this regard at the full hearing of the action.

75. For the foregoing reasons, this Court concludes that, while it has been established that Ryanair has an arguable claim that Skyscanner's conduct is unlawful, it has not been

established that it has a strong case that is likely to succeed at trial. Accordingly, since the injunction sought is mandatory in substance, there is no basis for granting an interlocutory injunction as this stage of the proceedings.

Would an injunction be granted if it was a prohibitive injunction?

76. However, if this Court is wrong in this regard and the injunction were to be held to be prohibitive in nature, then Ryanair has only to establish that there is a fair issue to be tried (which there is in relation to the alleged breach of Ryanair's Terms of Use on its website by Skyscanner). In such a scenario, for this Court to grant an injunction to Ryanair, it is necessary to consider whether the balance of justice favours the grant of an injunction. Accordingly, this Court will next consider this issue.

Findings at an interlocutory stage

77. Before doing so it should be emphasised that this judgment is given at an interlocutory stage and so any conclusions which are reached are done so, without the full facts and without any opportunity to test the limited facts which are relied upon for the purposes of the interlocutory hearing. In addition, since it is Ryanair that has the onus of proving that the injunction is justified, there is some focus on its behaviour in this judgment, but this should not be taken as suggesting that Skyscanner might not also have questions to answer e.g. regarding how it accesses Ryanair's PFT information such that it then appears on Skyscanner's website as a flight being sold by an OTA (without, it seems, in for example the case of lastminute.com, any reference on the Skyscanner website to the fact that it is actually a Ryanair flight), even though the terms of use of the Ryanair website make clear that any access to the information on the Ryanair website is permitted on the basis that that information is used solely for price comparison purposes.

Ryanair flight information appearing on the Skyscanner website

78. In particular, Ryanair has averred that there are only two ways to access its PFT information, either using Ryanair's licensed API or by interacting with its website. Due to the alleged termination of the Licence on the 11th November 2019, Skyscanner stopped using the API to access the Ryanair flight information. Yet this flight information is continuing to appear on the Skyscanner website and it is clear, under the Terms of Use of the Ryanair website, that Ryanair puts its flight data on its website on strict terms that any third party that accesses same is prohibited from passing it on to third parties, and this would, it seems, include Skyscanner.

79. Despite this apparent anomaly being put on affidavit by Ryanair and bearing in mind that Skyscanner would or should be aware of the Terms of Use of the Ryanair website, nowhere did Skyscanner provide any clarification to this Court of how it manages to provide Ryanair flight information on its site (e.g. if it uses a third party to screen-scrape the information from the Ryanair website).

80. All that Skyscanner stated was its bald averment that *'none of the three defendants are engaged'* in screen-scraping. This averment raises more questions than it answers, since Skyscanner does not seem to dispute that it interacts with the Ryanair website regarding its flight data. In response to Ryanair's allegation that Skyscanner, is obtaining Ryanair data other than in accordance with the Licence, Skyscanner's response is not to deny that

it is obtaining data from the Ryanair website, rather it simply reasserts its claim that the Licence Agreement was terminated. At no point does Skyscanner explain how it currently gathers the data necessary for it to facilitate the display and subsequent sale of Ryanair flights on its website.

81. For its part, Skyscanner claims that the term 'screen-scraping' is meant to demonise something which is lawful, namely the systematic obtaining, compilation and use of data which is voluntarily put into the public domain by Ryanair, a process which it says is recognised as standard in many industries where the use of comparison websites is essential (in its view) for ensuring transparency to consumers.

82. However, irrespective of whether the obtaining and use of Ryanair's PFT information is lawful or not (which is a matter for the trial judge), Skyscanner obviously knows how Ryanair's data appears on its website, but it has not provided any information on affidavit regarding how this occurs. While this is a matter for the trial judge, nonetheless, as observed by Ní Raifeartaigh J. in *Ryanair v. S.C. Vola.ro S.R.L.* at paras. 11 and 58, a deliberately non-forthcoming approach by a defendant can be criticised. In that case, she criticised the defendant OTA for the absence of detail regarding how it managed to display Ryanair's PFT and its failure, for example, to produce copies of agreements with third parties from whom it obtained this information.

83. In defending this application, Skyscanner was clearly very well informed of the amount and nature of litigation by Ryanair against websites and against OTAs in Ireland and abroad (which it provided in considerable detail to this Court). Accordingly, it seems likely that it was well aware of these criticisms by Ní Raifeartaigh J. of an OTA which was displaying Ryanair's PFT on its website.

84. It is worth remarking therefore that despite this, Skyscanner provided little detail in these proceedings regarding how it accesses the PFT since Skyscanner does not accept in any of its affidavits that it interacts, with the Ryanair website, so as to determine, *inter alia,* whether it might be bound by the Terms of Use on the Ryanair website (that it would not sell Ryanair flights). However, as this is an interlocutory hearing, these and other issues (e.g. the legal status of screen-scraping) regarding not just Ryanair's behaviour but also Skyscanner's behaviour, are to be addressed at a later date.

DOES BALANCE OF JUSTICE FAVOUR THE GRANT OF INJUNCTION?

85. As previously noted, it is clear from the caselaw that the key criteria to be satisfied for the grant of an interlocutory injunction is that it is justified on the balance of justice.

86. In seeking to persuade this Court that the balance of justice favours the grant of the interlocutory injunction, Ryanair emphasised the frustration and inconvenience of its passengers when they cannot satisfy the security/identification check set by Ryanair, using their personal email address.

87. While much emphasis was put by Ryanair on this frustration and inconvenience to the passenger (as well as the Covid-19 issue, the regulatory issue and the goodwill issue

referenced below), it seems likely that a factor in the application for the injunction is the loss to Ryanair of revenue from the sale of Ancillary Services to passengers, in light of the significance of this revenue. Indeed, Ryanair did not disguise its concern about this loss of revenue from passengers

88. This is not to suggest that finance is not an equally significant factor for Skyscanner in resisting the injunction, since it seems likely that Skyscanner's commission from OTAs is dependent on the income derived by OTAs from, not just the booking of flights, but also the sale by them of Ancillary Services. However, in this interlocutory injunction application, it is Ryanair that is looking for court intervention and so it is Ryanair which has the onus of satisfying the Court that such intervention is justified. Accordingly, careful consideration has to be given to the reasons given by Ryanair as to why the injunction is needed to see if they satisfy the balance of justice test.

Issues of 'inconvenience and frustration' for passengers

89. To illustrate the issues which Ryanair claims arise when Ryanair does not have the personal email address of a passenger, evidence was provided of a copy of a letter dated 16th January, 2020 which Ryanair sent to the CAA in the UK complaining about the provision of what it calls *'fake'* email addresses by OTAs. This letter states, *inter alia*:

> "I am following up on the issue of screenscraper OTAs anti – consumer behaviour, including the practice of providing fake passenger email addresses to airlines. As referred to in our letter of 9 January, consumers do not expect at booking that OTAs will place this obstacle, which causes inconvenience and frustration to customers, between them and the airline. Please find attached and outlined below recent examples of vulnerable passengers prejudiced as a result of OTAs providing fake email addresses to Ryanair:
>
> i. Chat Transcript 1 – passenger needed assistance getting to and from the seat. As the OTA had not provided us with the passenger's email, the customer was unable to pass the security check and for data protection and information security reasons our agent could not immediately book PRM assistance for this passenger. The chat lasted 17 minutes. […]"

90. As is clear from the various transcripts with passengers before this Court, the 'inconvenience' arose because the passengers did not have the email address which was used by the OTA to make the booking. This meant that the passenger was not able to initially satisfy Ryanair that he/she was the person who had booked the Ryanair flight in question. This is because it is the practice of Ryanair to use two unique pieces of information, which are attributable to the passenger, to confirm that the booking in question is that passenger's booking. For this purpose, Ryanair uses a unique six digit booking reference for the booking e.g. XYZ123 along with the email address used on the Ryanair website to complete the booking. Thus, when the passenger disclosed to Ryanair his personal email address (on the mistaken assumption by him that this had been used to complete the booking by the OTA on the Ryanair website), this obviously did not

correspond with the email address Ryanair had received (the OTA email address) when the booking was completed.

91. It is clear from the various transcripts produced by Ryanair that all of this led to each of those passengers, initially at least, not being able to satisfy Ryanair for security purposes that he/she was the person booked on that particular flight.

92. It also seems clear from these transcripts that, if and when the passenger had the OTA email address, he/she would then be able to satisfy Ryanair that he/she is the person who booked the relevant flight.

93. In seeking this injunction, Ryanair lays particular emphasis, not on the loss of income from its sale of Ancillary Services to its passengers, but rather on the inconvenience and frustration to passengers of the current situation whereby OTAs do not provide the personal email address of the passenger to Ryanair when making the booking. Ryanair claims that this is a cause of considerable inconvenience to customers and could lead to missed flights and other consequences e.g. delays in getting specialised equipment for disabled persons, and so it should be considered by this Court in deciding whether the balance of justice favours the grant of the injunction.

Did this inconvenience and frustration even result from a Skyscanner booking?

94. While it is not proposed to set out all the chat transcripts relied upon by Ryanair in its application for this injunction, it is to be noted that it is not clear from the 30 or so transcripts put into evidence in this case, exhibited on affidavit and in this letter to the CAA, how many of those consumers booked their flights on the Skyscanner website.

95. This is a relevant factor in determining the balance of justice, since it is important to remember that the injunction which Ryanair seeks is against Skyscanner, not against the OTAs. Also, Ryanair is claiming that this problem for passengers is caused (indirectly at least) by Skyscanner and hence it claims that an injunction against Skyscanner (and not against the OTAs or other meta-search sites) is justified.

96. Yet, it is impossible to tell whether the 30 or so incidences of alleged prejudice, for persons who booked Ryanair flights, originated from the Skyscanner website in the first place. (This point is equally valid in relation to the passengers who Ryanair claim suffered prejudice arising from Covid-19, Regulatory issues and Goodwill issues, referenced below).

97. Mr. Aitken on behalf of Skyscanner has averred that certainly some of the 30 or so bookings put into evidence could not have originated on the Skyscanner website i.e. Travel Republic, Click & Go and Villaplus, since it seems these companies do not operate on the Skyscanner website.

98. Indeed, even in relation to those OTAs that do operate on the Skyscanner website, it is possible that the flights exhibited by Ryanair were not booked *via* the Skyscanner website, since they could have been booked via another meta search site or indeed on the OTAs own website.

99. Skyscanner has submitted, and it was not controverted by Ryanair, that in all the thousands of pages of documentary evidence handed into the Court showing passengers with frustration, Covid-19, Regulatory or Goodwill issues, for just one of those passengers is there evidence that he booked his Ryanair flight via the Skyscanner website (see p. 2802 of 2936 of the Motion Papers).

100. On the one hand therefore, Ryanair relies on Skyscanner being the indirect cause of the foregoing inconvenience to passengers (and prejudice under the Covid-19, Regulatory and Goodwill headings), thereby justifying on the balance of justice, an injunction against Skyscanner (as distinct from one against the OTAs or some other meta-search site). On the other hand, however, it seems that of the 30 or so instances of prejudice to Ryanair and/or its passengers, which allegedly justify the remedy of an injunction against Skyscanner, just one instance of prejudice can be said to definitely have resulted from Skyscanner's involvement.

101. In determining whether the foregoing inconvenience (and indeed the Covid-19, Regulatory and Goodwill issues) justify on the balance of justice an injunction, this is a factor which weighs against such a finding.

An injunction is an equitable remedy

102. More generally, in considering the effect, on the application for an injunction, of the inconvenience which is being caused to passengers by the provision of the OTAs email address rather than the passenger's email address, it is to be noted that an injunction is an equitable remedy. For this reason, the extent and cause of that inconvenience and in particular the degree to which it could be relieved by Ryanair, are relevant factors in this Court's conclusion as to whether, on the balance of justice, an injunction is warranted. This is because if a person claims that an injunction is justified because of some inconvenience caused to a third party and the person seeking the injunction could, by other means, alleviate that inconvenience, this fact must be relevant, in this Court's view, in determining whether on the balance of justice, the inconvenience is such as to justify the granting of an equitable remedy such as an injunction.

Factors in the balance of justice

103. With this in mind, the following factors are relevant to the Court's decision regarding the balance of justice:

(i) Pro-forma response by Ryanair to passengers' inconvenience

104. First, it is relevant to note that in the transcripts of conversations with passengers exhibited by Ryanair to support its application, the Ryanair staff dealing with the passengers seeking to manage their bookings are given the personal email address by the passenger. When this does not match the one used by the OTA, the Ryanair staff appear to use a *pro forma* response in many of these exhibited transcripts, as follows:

> "Unfortunately there is another email address on the booking. When you make a booking through a travel agency, one of the travel agents made the reservation on www.ryanair.com. It means that she/he used the travel agency's card to purchase the ticket and also created a new email address. If you do not have these details,

you will not have access to your Ryanair booking. Since you do not have that information may I suggest you contact them directly to get the information and come back to us?"

105. Since Ryanair is relying on the inconvenience caused to passengers by Skyscanner not obliging the OTAs to provide the personal email address of passengers, it is relevant to note that in seeking to alleviate this inconvenience for the passengers as quickly as possible (which one must assume is Ryanair's intention in these telephone/web interactions with customers), there appears to be a *pro forma* response, rather than an individualised attempt by Ryanair to confirm the passengers identity by some other means e.g. date of birth, passport number, mobile number etc.

106. It is not being suggested that Ryanair is deliberately making it difficult for passengers (so as to ensure that they book on the Ryanair website next time they book a flight). Similarly, it is not being suggested that the use of *pro forma* responses (which can have the advantage in some cases of ensuring consistency and accuracy in a call centre/web chat) is in any way determinative in this application. Nonetheless it is arguable that a more nuanced, rather than a *pro-forma*, response might lessen any delay in confirming a passenger's identity, particularly when one takes account of what is stated below regarding the use of some other identification information, other than an email address.

(ii) Use of Chatbots by Ryanair to respond to passengers' inconvenience

107. It is also relevant to note that in responding to the inconvenience which Ryanair claims Skyscanner is causing to customers, the chat transcripts indicate that Ryanair uses Chatbots to deal with some of the issues arising from the use of OTA email addresses. This is because the transcripts indicate that some of the replies are from a 'bot', rather than a real person, and they appear to be machine-created replies in which the machine is seeking to improve its ability to deal with complaints, rather than having a person speedily resolving the inconvenience to the passenger. See for example the following responses sent by Chatbots to passengers:

"I want to learn and improve, please let me know if I was able to resolve your query today?

[…]

I'm keen to learn and improve, did the answer I provided answer your query today?"

108. It is also clear from some of the responses provided by the Ryanair website Chatbot that it is not necessarily the most efficient and effective way for passengers to resolve any issues they may have with their flight. For example, it is clear that certain Chatbots are not developed fully and are not able to communicate effectively with the passenger:

"Hmmm. Sorry, I didn't understand that. I'm a new ChatBot and still learning. I'm better with simple, short questions. […]"

109. Again, although not a determinative factor in the balance of justice (since the use of Chatbots is a common feature in modern customer care), it is nonetheless relevant because Ryanair is seeking an equitable remedy and in its application for an injunction is seeking to rely on the inconvenience Skyscanner is allegedly causing its passengers. However, it lessens the force of that argument if Ryanair itself is not doing everything it can to reduce that inconvenience. In this regard, the use of a Chatbot, rather than a human with a quick and tailored solution, may increase *the 'inconvenience and frustration'* of a passenger, rather than alleviate it.

(iii) Passengers' inconvenience appears to have been resolved without issue

110. In assessing the extent of the inconvenience (and therefore whether it justifies an injunction on the balance of justice) there was no evidence to suggest, in the numerous examples of customer inconvenience relied upon by Ryanair in these transcripts, that the passengers did not have their issue resolved, *albeit* after a delay while they obtained from the OTA, the email address used for the booking.

111. Despite what is said regarding bots and pro-forma responses therefore, this is to the credit of Ryanair, since it does seem to have helped the passengers resolve the identification issues, without incident, by explaining how he/she could get hold of the OTA email address. This means that, while clearly inconvenient for the passengers due to the delay in resolving their issue by having to contact their OTA to get the email address used for the booking, there is no evidence that the passengers suffered any great detriment, other than frustration and inconvenience, since it appears they were able to check in or otherwise manage/change their booking once they realised that a different email address had been used for their booking.

112. Thankfully therefore, in considering the balance of justice, the extent of the harm in this regard at least, which is relied upon by Ryanair to justify an injunction, is not significant. Ryanair does however claim that this delay/inconvenience caused by the use of OTA email addresses *could*, in the future lead to missed flights and to disabled passengers not being able to access services in time.

(iv) Ryanair could alleviate the inconvenience of which it complains

113. Perhaps most significantly, sworn evidence was provided on behalf of Skyscanner that numerous other reputable and well-known airlines (e.g. Aer Lingus, Air France, British Airways, Delta, Easyjet, SAS Group, Swiss International Airlines *etc*.) do not require the email address of passengers to confirm their identity in order to check in or manage their booking. In its letter of 9th April, 2020 to the CAA in the UK, Skyscanner claimed that there is no regulatory requirement on Ryanair to require passengers to provide an email address as a form of identity verification and this has not been disputed by Ryanair. Against this background, one might consider an example of one of the transcripts exhibited by Ryanair:

> "Passenger: I am trying to access my Ryanair booking online, and seem to have difficulties. I then would need to book a 10kg checked bag, with my reservation.
>
> Ryanair: What are the difficulties?

Passenger: The booking is not being found.

[…]

Ryanair: Let me ask you, have you booked through an agency?

Passenger: I have, Kiwi. I was given a ticket [number] by them, and another 6 digit reference [number] which is what I've sent now.

Ryanair: I see, so in that case let me advise you to kindly contact them to give you the email address they have used in the booking, so that you can use it, and the reservation number, to be able to enter your booking

May I assist you any further?"

114. Not surprisingly, the passenger asked the Ryanair customer service agent if he/she could simply not help the passenger to confirm the booking (presumably with other personal identification information), rather than the passenger having to contact the OTA:

"Passenger: Will you not be able to help me locate this booking? Without their assistance..

Ryanair: Unfortunately not, as you will need to get that email."

115. While there are good commercial reasons why Ryanair would prefer to have the personal email address of passengers, it seems to this Court that there is no reason why Ryanair, when dealing with a passenger whose personal email address was not used in the booking, could not use other information, which is unique to that passenger (or for all intents and purposes unique e.g. such as a date of birth in combination with a name), in order to confirm his identity/his booking. In this regard, Skyscanner claimed in its letter of 9th April, 2020 to the CAA that Ryanair was seeking to penalise customers who booked with OTAs:

"Ryanair's choice not to verify identity by other means (such as surname, booking reference, address and passport number, or a combination thereof) and to instead insist on the provision of email addresses as the means of identity verification has clearly been to the detriment of many vulnerable passengers and in particular seeks to penalise those customers who have chosen to purchase their flights from an OTA." (Emphasis added)

116. In this regard, a document was exhibited by Ryanair which showed that there were several pieces of information held by Ryanair relating to each passenger that books a flight e.g. name, expiry date of passport/id card, passport/id number, nationality, address, phone number, date of birth, booking reference.

117. It is against this background that Ryanair wants to use only the personal email addresses of passengers, in order to complete its security/identification check, and so wants an

interlocutory injunction pending the trial of the action to get that information from OTAs. In response to the suggestion that Ryanair could use some other information, such as the foregoing items, to identify a passenger, Mr. McNamara avers that:

> "[Skyscanner's Mr. Aitken's] argument appears to be that Ryanair should adapt its tried and trusted systems, to cater for the problems created by unlawful scraping of its data and sale of its flights.
>
> Quite apart from the fact that this does not solve the problem that Ryanair has been given a "false" email, I understand that and am informed by Ryanair's IT department that the security of Ryanair system is enhanced by virtue of the use of a unique identifier (e.g. an email) and a password (e.g. Passenger Name Record [PNR] or booking reference), rather than just the use of the name and password. This is because, at any one time, there may be many "Smiths" booked to travel with Ryanair and, if the system did not require a unique identifier in combination with the PNR or booking reference, this leaves the system more vulnerable to random number generator attacks."

118. It is clear from this averment first that the email address is just *an example* of a unique identifier (*'e.g. an email'*), and that there are other unique identifiers (e.g. a passport number or a mobile phone number). Secondly, it is clear that there is no technical bar to the use of some other identifier and so it is possible for Ryanair, like other airlines, to use some identifier other than an email address, but it chooses not to do so.

119. This is a factor in the balance of justice, since Ryanair itself has a possible role to play in alleviating the very inconvenience, which it relies upon to seek this injunction. In particular, it seems to this Court that in the time between now and the trial of the action, Ryanair could use some other unique identifier in order to alleviate the inconvenience to passengers of the four OTAs who operate on the Skyscanner website and of which Ryanair complains. This is a factor which weighs, in the balance of justice, against the granting of an injunction which is Ryanair say is designed to relieve that very same inconvenience.

(v) Injunction will not prevent OTAs providing OTA email addresses on other platforms

120. A fifth factor, in assessing whether the balance of justice favours the grant of an injunction, is the fact that there was evidence provided to this Court to the effect that the four OTAs, who provide Ryanair with OTA email addresses *via* the Skyscanner website, operate the same business model (i.e. of providing OTA email addresses when booking Ryanair flights) on their own website and on other meta search websites such as Google, Kayak or Momondo.

121. Although not in any way a determinative factor, it is however relevant to note therefore that even if Ryanair is granted this interlocutory injunction, which will impact upon the business of Skyscanner until the hearing of the action, it will not stop the four OTAs from continuing to provide OTA email addresses to Ryanair when they book Ryanair flights on other meta search sites and on their own websites.

(vi) Injunction will put Skyscanner in a weak position vis-à-vis its competitors

122. In considering the balance of justice, it is also relevant to note that other meta-search websites that compete with Skyscanner, such as Google, Kayak and Momondo, will not be affected by this injunction. If the injunction is granted they would be able to exploit the position of Skyscanner, particularly if Skyscanner had to exclude certain OTAs from its website in respect of Ryanair flights. Those other meta-search sites would not be so restricted and in light of the enormous number of flights offered by Ryanair, this could be a significant factor in relation to the decision of OTAs to use Skyscanner or other meta-search sites. In this regard, Mr. Aitken has averred on behalf of Skyscanner that Ryanair itineraries are absolutely essential to Skyscanner (and presumably to many of the OTAs using the Skyscanner website) and that Skyscanner would not have a viable business without them and that he does not believe that any other meta-search sites are subject to the requirement that they oblige OTAs to provide the personal email addresses of passengers to Ryanair. Accordingly, the injunction if granted is likely to put Skyscanner in a weak position vis-à-vis its competitors, which, although not determinative, is nonetheless a factor in the balance of justice.

(vii) Significance of this injunction - just one battle in a world-wide war by Ryanair on OTAs

123. If Ryanair is granted the injunction, it will, in the time between this judgment and the main hearing, have had the benefit of getting the personal email addresses of passengers from four out of the 300 OTAs that use the Skyscanner website to book Ryanair flights (to ease passengers' inconvenience and to enable it market Ancillary Services to them).

124. Alternatively (if the OTAs refuse to provide personal email addresses of passengers), Ryanair will have forced Skyscanner not to permit those four OTAs to sell Ryanair flights on the Skyscanner website, pending the main hearing (and thereby increased the chance of those passengers buying their flights on the Ryanair website and thereby being subject to marketing by Ryanair of the Ancillary Services).

125. While this is obviously of some financial significance from the perspective of Ancillary Services' income, it is worth noting that one is only talking about four out of 300 OTAs (just over 1% of all OTAs that use the Skyscanner website).

126. Furthermore, as noted previously, those same OTAs would not be prevented by the injunction (which applies only to Skyscanner) from continuing to provide OTA email addresses to Ryanair, in cases where the OTAs' own website or other meta-search sites are used by those OTAs to book Ryanair flights.

127. Mr. McNamara has averred that *'Ryanair does not wish for its […] products or services to be sold by anyone other than Ryanair'*. In the context therefore of this 'war' by Ryanair in seeking to stop all OTAs selling Ryanair flights on all meta-search sites or on their own websites, this injunction is clearly a very small step in that 'war' which is being waged world-wide against all OTAs. This is because this step achieves the lesser aim of receiving personal email addresses from all OTAs, but the injunction is not even against an OTA – the direct 'culprits' - but against a meta-search site, Skyscanner. The OTAs will be free to

provide OTA email addresses for Ryanair flights booked on other meta-search sites and on the OTAs' own websites.

128. To illustrate the nature of the interlocutory injunction being sought in this case, one might consider a typical interlocutory injunction before the Irish courts. This might be where a plaintiff issues plenary proceedings against a defendant seeking to prevent him say knocking down a wall and seeks an interlocutory injunction in similar terms before the main hearing.

129. In contrast, this is a battle engaged in by Ryanair against Skyscanner (*albeit* as a proxy in its battle against the main culprits, four OTAs), which is but part of a world-wide war between Ryanair and OTAs, in which Ryanair seeks to ensure that OTAs do not sell Ryanair flights on their websites or on any meta-search sites. In this regard, evidence was provided of numerous actions by Ryanair against OTAs not just in Ireland but throughout Europe in pursuit of Ryanair's stated aim to ensure that Ryanair flights can only be purchased on the Ryanair website.

130. The current injunction is therefore different from the typical injunction sought in the Irish courts, since, first it is against Skyscanner as proxy for the OTAs and secondly it is part of a world-wide campaign by Ryanair against OTAs in which it seeks to prevent them selling Ryanair flights on any platform. The fact that this injunction is part of a world-wide campaign by Ryanair and is not against the primary culprits are factors that weigh against the grant of an injunction at an interlocutory stage on the balance of justice. This is clear from the case of *R. Griggs Group Ltd & ors. v. Dunnes Stores Ireland Co.* (Unreported, High Court, McCracken J., 4th October 1996).

131. In that case, the world-wide nature of the campaign (seeking to establish a monopoly in the manufacture of Dr. Marten's boots) and the fact that the interlocutory injunction was sought against a *'secondary target'* were factors in the refusal of the injunction by McCracken J. He stated at pp. 7 and 8 of that judgment that:

> "What influences me more is that this is part of world-wide campaign by the Plaintiffs to establish a monopoly in a certain design of footwear. While the outcome of the action eventually will depend only on the reputation of the Plaintiffs in this jurisdiction, nevertheless I am entitled to take into account the fact that this is a small battlefield in a world war, and that the attack in this battle is against what I might call a secondary target – namely a retailer – while no real attack is mounted against the primary target, namely, the manufacturers.
>
> The granting of an Injunction is an equitable remedy, and the concept of balance of convenience is an equitable concept. It seems to me inherently inequitable in this case that the proceedings should be brought against a retailer which, on the evidence before me, bona fide purchased these goods from two manufacturers […] while no action is taken against the manufactures . […]"

132. On this basis, while not determinative, it is nonetheless a factor, in this Court's conclusion as to whether the balance of justice favours the grant of the injunction at an interlocutory stage, that this is just one part of a world-wide war (or Europe-wide at least) by Ryanair against OTAs seeking to sell Ryanair flights.

133. In this context, Mr. Aitken of Skyscanner has averred that, as the Skyscanner website has over 100 million users, if the injunction is granted, it will have a very considerable extra-territorial affect, since it could affect a person based in the US, Australia or Japan booking a flight or connecting flights in Europe.

134. It is also relevant that Mr. Aitken averred that kiwi.com was on the Skyscanner website for almost a year prior to the alleged termination of the Licence on the 11th November, 2019, yet Ryanair did not issue proceedings against kiwi.com, even though it seems that kiwi.com during that time provided OTA email addresses to Ryanair. Yet it has instituted these proceedings against Skyscanner as a proxy for kiwi.com.

135. While not a determinative factor therefore, the world-wide element to the dispute against OTAs, is nonetheless relevant to a grant of an injunction at the interlocutory stage, particularly since it is likely, as happened in the past (see below regarding the German Court order) that an order from an Irish Court might be immediately relied upon by Ryanair in other jurisdictions, where Skyscanner's services (which would be subject to the proposed injunction) are accessed by over 100 million users all over the world.

(viii) Conduct of parties to date and likely future conduct if injunction granted

136. As one is dealing with an equitable remedy, this Court is entitled to take account of the actions of the parties to date and, arising therefrom, the likely actions of the parties in the event of the injunction being granted.

137. In this regard, evidence was provided to this Court that, when Ryanair obtained an *ex parte* injunction in January 2020 from a court in Hamburg, Ryanair issued a press release which referred to it having obtained an *'interim injunction'* without specifying the hugely significant fact that it was obtained *ex parte*, and so the fact that it was obtained in reliance only on evidence provided by Ryanair and without any involvement by Skyscanner in those proceedings.

138. Skyscanner claims that the injunction from the German court was obtained because of misleading and inaccurate information provided by Ryanair, which information implied that the injunction was required urgently. For this reason, Skyscanner has objected in the German courts to the grant of the injunction and is currently seeking its withdrawal.

139. The failure by Ryanair to mention in the press release that the injunction was *ex parte* means that an arguably misleading impression was given that a court had considered all the evidence, including Skyscanner's defence, and had found that Ryanair was in the right and Skyscanner was in the wrong.

140. Secondly, and more significantly, even though the injunction was granted based solely on Ryanair's claims made in court, in that press release Ryanair relied on the fact that an

injunction had been granted by a German court to call for the boycotting of Skyscanner. The press release states, *inter alia*, that:

> "We welcome the Hamburg Court injunctions which will help protect our customers from misleading hidden mark-ups on Skyscanner.de, ensuring our customers get the lowest fares, which can only be found in Ryanair.com.
>
> […]
>
> We again urge consumers to avoid screenscrapers such as Skyscanner and book directly on the Ryanair website, the only place to find the lowest Ryanair fares and fully transparent pricing on ancillary products like baggage." (Emphasis added)

141. It would have been possible for Ryanair to issue an accurate press release, namely referencing the fact that it was an *ex parte* injunction and without calling for a boycott of a competitor's business, but it chose not to do so. This is not an insignificant issue, since the European Commission has made it clear that it takes boycotting very seriously under competition law. See for example the Commission Decision 74/431/EEC of 23rd July, 1974 relating to a proceeding under Article 85 of the EEC Treaty (IV/426 – Papiers peints de Belgique). This concerned the decision of an association of undertakings to cease to supply another undertaking in the wallpaper market, Pex and International Decor. Part IV, para. 3 of the Commission's decision is of particular relevance:

> "In fixing the amount of the fine, the Commission has to have regard both to the gravity and the duration of the infringement. The collective boycott is traditionally considered one of the most serious infringements of the rules of competition, since it is aimed at eliminating a troublesome competitor. Such a boycott constitutes an intentional infringement of Article 85 (1)."

142. Significantly, Skyscanner sought and obtained on the 30th March, 2020 an *ex parte* injunction against Ryanair in the German courts following this press release on the grounds that it amounted to an illegal boycott under German law.

143. It is also relevant to note that Ryanair used this German court order, even though it was obtained *ex parte*, to complain about Skyscanner to the CAA in the UK in its letter of 16th January, 2020. Once again, Ryanair gave an arguably misleading impression to the CAA by complaining about Skyscanner and referring to an *'interim injunction'* without referencing the most significant fact about this order namely that it was obtained *ex parte*. The letter states, *inter alia*, that:

> "In this regard, you will be pleased to learn that last Friday we obtained an interim injunction in Germany against Skyscanner.de (copy and translation attached). Skyscanner.de was making bookings on Ryanair.com but did not provide us with the correct email. Unfortunately, such speedy remedies are unique to the German legal system, which is why swift intervention by the CAA is necessary to protect vulnerable customers in the UK market.

We trust you will now initiate an investigation or at a minimum issue guidelines to OTAs, and we look forward to assisting the CAA." (Emphasis added)

So, although not a determinative factor (and particular caution must be taken with evidence presented which has not been subject to cross examination), it is nonetheless of some relevance that were Ryanair to be granted an interlocutory injunction in the proceedings before this Court, based on this very recent incident after the German court order, there is a risk that Ryanair might use that court order to damage Skyscanner's business, since this appears to have been the intention of the press release calling for the boycotting of Skyscanner after the German court order, which is *prima-facie* anti-competitive behaviour.

144. While not determinative, the foregoing evidence regarding Ryanair's actions regarding a similar court order, to the one sought in this case, weighs against the grant of an injunction on the balance of justice.

(ix) Injunction is against a secondary target

145. Brief reference has already been made to what is a significant stand-alone factor in assessing whether the balance of justice favours the grant of an injunction. That is the fact that Ryanair is seeking an injunction against a secondary target. This is because the injunction would oblige Skyscanner to force a third party OTA to provide the personal email addresses of its customers to Ryanair, when it is clear that the primary culprit for this alleged wrongdoing (of providing OTA email addresses) is the OTA and not Skyscanner.

146. This is so because Skyscanner has provided evidence to this Court that a customer provides Skyscanner with his email address and this personal email address is provided by Skyscanner to the OTA/accessed by the OTA on the Skyscanner website. Accordingly, there appears to be no question of Skyscanner being the party that provides the OTA email address to Ryanair. It seems clear from the evidence provided to this Court that it is the OTA, when booking on the Ryanair website on the passenger's behalf, which provides the OTA email address to Ryanair.

147. In deciding whether to grant an injunction against Skyscanner, it is clearly relevant that the injunction in question is not one simply requiring Skyscanner to do something or not do something, but rather it requires Skyscanner to force four third party OTAs to do something. In this sense therefore, Skyscanner is a proxy or secondary target, just as in the *Griggs* case, the retailers were secondary targets to the primary targets (the manufacturers of the offending shoes). Based on the evidence before this Court, *albeit* at an interlocutory stage, it seems that Skyscanner facilitates the sale of Ryanair flights, but the flights are sold by the OTAs and it seems it is the OTAs that provide the OTA email addresses to Ryanair.

148. In this regard, there is nothing to stop Ryanair issuing proceedings against OTAs that it says sell Ryanair flights unlawfully and in particular to force them to provide Ryanair with the personal email addresses of passengers. Yet it has chosen to use Skyscanner as a

'proxy' in its dispute against the OTAs. In this regard, Ryanair has put on the record many years ago its willingness to sue OTAs that sell Ryanair flights. For example, by letter dated 18th August, 2016, Ryanair wrote to Skyscanner regarding the Licence in the following terms:

> "We confirm that all licensees are held to the same conditions as Skyscanner and that we will issue proceedings (including for damages) as appropriate against all OTAs that act, aid or are complicit in a breach of the Terms of Use of the Ryanair website."

149. However, in these proceedings it is not an OTA which is being sued, but a meta-search site, Skyscanner. Ryanair is of course perfectly entitled to sue Skyscanner in these proceedings and it may well be successful at the trial of the action in establishing that Skyscanner should not be facilitating the alleged wrongful use of Ryanair's PFT on its website and the alleged wrongful sale of Ryanair flights on its website.

150. However, when a court is being asked to grant an interlocutory injunction (based on limited evidence and no testing of that evidence), it is a factor in determining where the balance of justice lies, that the plaintiff has other means, and indeed arguably more direct means, of achieving its aim.

(x) Injunction may require ongoing Court supervision

151. It is clear from the judgment of Geoghegan J. in the Supreme Court decision in *Ó Murchú T/A Talknology v. Eircell Ltd* [2001] IESC 15 at pp. 9 and 10 that it is a:

> "well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court, therefore, is very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess, at any given time thereafter, as to whether such injunctions are being obeyed or not."

152. In this case, while it is not a trading or service contract, nonetheless if an injunction is granted, it is clear that Skyscanner will be required to monitor on a constant basis the business practices of all 300 OTAs which operate on its website, so as to ensure that they provide the personal email addresses of passengers to Ryanair, rather than an OTA email address. This is because the injunction sought applies not just to the four OTAs highlighted by Ryanair in these proceedings, but it requires all OTAs to provide personal email addresses to Ryanair. This daily monitoring in order to ensure compliance is necessary because if any of the 300 OTAs provide a personal email addresses to Ryanair, then Skyscanner could be found to be in contempt of court. In such a case, its directors or other officers could be subject to an order for attachment.

153. As previously noted in the context of prohibitive/mandatory injunctions, it is not an answer to this level of monitoring to say that Ryanair has offered (which it has done) to monitor whether the OTAs operating on the Skyscanner website forward the personal email addresses of passengers to Ryanair. This is because the key issue is whether the

injunction sought requires ongoing supervision and in this case it does, regardless of whether this ongoing supervision/daily monitoring is done solely by Skyscanner or with the assistance of a third party, in this instance, Ryanair.

154. In this context, the injunction sought would involve Skyscanner (directly or indirectly) in the daily monitoring of the business practices of 300 third parties over whom it has no control, with the threat of Skyscanner's directors and officers being subject to contempt of court proceedings if, for any reason, any of those OTAs, intentionally or unintentionally, book a Ryanair flight without using the personal email address of the passenger.

155. While not a determinative issue in this case, this level of ongoing supervision is nonetheless of some relevance and weighs on the balance of justice against the granting of the injunction.

(xi) Use of OTA email address may in some cases be preferable for operational reasons

156. Finally, in this context, it is relevant to note that there may in some cases be good operational reasons, and not just commercial reasons, why an OTA would use an OTA-created email address, rather than the personal email address of a passenger when making a booking.

157. For example, where a passenger books a multi-airline itinerary, i.e. a trip with one or more stops and two or more airlines, it may be appropriate for the OTA to take control of customer service, rather than several airlines sending communications to the passenger, which communications do not take account of the other legs of the journey. In such a case it might be preferable for the passenger to receive communication from the OTA, rather than several separate airlines (with details relating to each leg of their journey). Furthermore, this could arguably save time and effort making the passenger's experience more convenient.

158. In this instance, one can see therefore why, not only might it not be inconvenient for the OTA email address to be used, but in fact it might lead to less 'frustration and inconvenience' for the passenger if the OTA email address is used on the booking. While not a determinative factor in the balance of justice, this is nonetheless of some relevance in determining whether the inconvenience alleged by Ryanair is such as to justify the grant of an injunction.

Covid-19 issues

159. In further support of its application, Ryanair claims that the fact that it has the email address of the OTA that made the booking, means that its ability to comply with contact-tracing requirements for Covid-19 reasons may not be as good, as it would be if Ryanair had the personal email address of the passenger. Ryanair exhibited a letter, already referenced, dated 13th March, 2020 to the CAA in the UK in which it referred to a request from the German health authorities requiring contact information for passengers in seats 32C and 32D of a Ryanair flight. These seats had been purchased via an OTA called VTours. In its letter, Ryanair stated, *inter alia*, that:

"Due to the involvement of VTours we cannot say with certainty whether the German Health Authority was able to contact these at-risk passengers, but at the very least we expect VTour's involvement caused an unnecessary and unacceptable delay during this time of crisis."

160. As noted in greater detail earlier in this judgment, much of the evidence upon which Ryanair relies for its injunction against Skyscanner relates to flights which may not have been booked on Skyscanner. This is a case in point, since VTours does not operate on the Skyscanner website. While the general point is valid, namely that the involvement of an intermediary such as an OTA in a booking introduces a time-lag in communications between Ryanair and the passenger, this evidence upon which Ryanair seeks to rely for its injunction *against* Skyscanner has no application *to* Skyscanner since VTours does not operate on the Skyscanner website. It follows that the grant of an injunction against Skyscanner would not prevent this incident occurring again with a passenger booked on a Ryanair flight by VTours.

161. Ryanair also provided evidence of a similar request having been made by the HSE in March 2020 in respect of a passenger using an email address which was created by kiwi.com, which is an OTA operating on the Skyscanner website. However, there was no evidence that this booking was made on the Skyscanner website, as distinct from another meta-search website or indeed on kiwi.com itself.

162. It is also relevant to note that while there might have been some delay in contacting the passengers in these instances, there was no evidence that the health authorities were not able to contact the passengers in question and so the significance of this issue (like the issue of inconvenience caused to passengers) is not as significant as might otherwise be the case, which is a factor in the balance of justice.

Risk of Ryanair email not being forwarded to a passenger by OTA

163. Furthermore, Skyscanner submitted that it is not uncommon for group bookings to be made where just one email address, *albeit* the personal email address of one of the passengers, is given for the entire group of passengers and so an 'intermediary' email address is used in these situations, without apparent incident. This is despite the fact that the same issue arises as in the VTours case in the event of contact tracing being necessary, namely that there may be some time lag between the contact point in the group receiving the health information and the relevant passenger receiving that health information from the group contact.

164. In this Court's view, the fact that there may be a time lag in contacting passengers (whether that arises from a group booking directly through Ryanair or an individual booking through an OTA) is not sufficient reason to grant a significant injunction against Skyscanner which would require it to change its business model pending the trial of the action.

165. This is particularly so in circumstances where, not only is there no evidence of VTours or indeed kiwi.com not passing on the email from the airline/health authorities to the

passenger, but also logic would dictate that it is in the business interests of an OTA to pass on communications received from an airline to the passenger, since otherwise the passenger is less likely to re-book with that OTA.

166. For these reasons, this Court concludes that the prejudice suffered by Ryanair from it not having the personal email addresses of passengers, arising from Covid-19 and other health issues, is not sufficient to justify the grant of an injunction on the balance of justice.

Regulatory issues

167. Ryanair also relies on certain regulatory difficulties which it says arises from the provision of personal email addresses. In particular, it says in the Statement of Claim that:

> "the provision of fake email addresses causes significant issues for Ryanair in complying with its various obligations under the Montreal Convention and Regulation 261".

168. In this regard, and in support of its application for an injunction, Ryanair exhibits evidence of two separate complaints by consumers in Germany seeking compensation for cancelled Ryanair flights, where they were not informed about the cancellation of the flight until less than 7 days prior to its departure.

169. Ryanair claims that if it does not have the personal email address for each passenger, then it would be in breach of its regulatory obligations to notify each passenger in time of a delayed/cancelled flight, if it notifies the OTA email address and this notification is not passed on to the passenger.

170. Ryanair, in exhibiting these two complaints (which appear to have been booked with OTA email addresses), explains that it made the notification to the OTA email address, which was provided when the booking was made, and within time, yet Ryanair points out that it is nonetheless liable under the terms of Regulation 261/2004. In this regard, Ryanair references the apparent strict liability of an airline where a passenger has not been notified of the delay to a flight. This, it says, is clear from the decision of the CJEU in *Krijgsman v. Surinaamse* (Case C-302/16). The Court states at para. 29 *et seq*.:

> "Nonetheless, it should be noted that the discharge of obligations by the operating air carrier pursuant to Regulation No 261/2004 is without prejudice to its rights to seek compensation, under the applicable national law, from any person who caused the air carrier to fail to fulfil its obligations, including third parties, as Article 13 of that regulation provides (see, to that effect, judgment on 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraph 46 and the case-law cited.
>
> […]
>
> In the light of the foregoing, the answer to the question referred is that Article 5(1)(c) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that the operating air carrier is required to pay the compensation specified in those

provisions in the case where a flight was cancelled and that information was not communicated to the passenger at least two weeks before the scheduled time of departure, including in the case where that air carrier, at least two weeks before that time, communicated that information to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and the passenger had not been informed of that cancellation by that agent within that period." (Emphasis added)

171. In considering this reliance by Ryanair on these regulatory issues, it is relevant to note when this evidence of prejudice in the two German cases, upon which Ryanair relies to support its application for an injunction against Skyscanner, arose.

Certain evidence relied upon by Ryanair pre-dates November 2019

172. It is relevant to note that these two complaints from passengers in Germany, seeking compensation for breach of the regulatory provisions regarding notification to passengers of delays/cancellation of flights, relate to flights that were due to depart on 8th November 2018 and on 6th April, 2019 respectively.

173. Although not a determinative factor, this is relevant because this evidence upon which Ryanair relies, arose prior to November 2019.

174. This is despite the fact that Ryanair makes clear that the activities of which it complains, in these interlocutory proceedings and in the substantive proceedings, only occurred after 11th November, 2019. In this regard, consistent reference was made in the legal submissions by Ryanair to it seeking to maintain the *status quo* which existed prior to 11th November, 2019. It is clear that, as Ryanair contend, the issues between the parties at play in these proceedings only arose on 11th November, 2019. As counsel for Ryanair put it:

> "The breach took place on the 11th November …" (Transcript, Day 1, p. 23)
>
> "From the 11th, however, that changes, and the false e-mails become a feature of the exercise." (Transcript, Day 1, p. 113)
>
> "It's as if the world turned on its head on 11th November; it's now all over." (Transcript, Day 2, p. 42)
>
> "There is no real issue until the 11th November." (Transcript, Day 2, p. 133)

175. Since most, if not all, of this evidence of alleged prejudice relates to incidents which occurred prior to 11th November, 2019, it follows that much of the evidence upon which Ryanair relies to support this injunction cannot be evidence of prejudice to Ryanair or Ryanair's passengers that arose *as a result* of Skyscanner's allegedly unlawful decision in November 2019 (to allegedly engage in/or benefit from screen-scrapping and to facilitate the allegedly unlawful sale of Ryanair flights by OTAs on the Skyscanner website).

176. This lessens the significance of this evidence in the balance of justice. However, it does not mean that the evidence is of no value, since it is nonetheless evidence of a general nature, i.e. evidence of the sort of issues that *might* arise if Ryanair does not have the personal email address of a passenger who books in the future on Skyscanner, namely that there *might* be a delay in that passenger receiving notification of a delay/cancellation of the flight leading to a claim for compensation by that passenger against Ryanair, even though Ryanair notifies the OTA in time.

177. It is not however evidence before this Court of prejudice to Ryanair which would not have occurred but for the alleged unlawful actions of Skyscanner, such as to justify an injunction against Skyscanner. To put the matter another way, since these two regulatory breaches happened through no fault of Skyscanner, how does this evidence justify the grant of an injunction against Skyscanner, since these incidents would have happened, even if Skyscanner had not allegedly acted unlawfully in November 2019.

Failure of OTAs to pass on information to passengers is a matter for OTAs not Skyscanner

178. Secondly, when considering the relevance in the balance of justice of this issue of regulatory breaches by Ryanair (caused, it says, by OTAs), it is relevant to note that this is primarily an issue between Ryanair and the OTAs, as Skyscanner has no responsibility for an OTA not passing on immediately to the passenger any details it receives from Ryanair regarding the delay or cancellation of the flight.

Ryanair is not liable under the Montreal Convention where it took reasonable measures

179. Thirdly, Article 19 of the Montreal Convention provides that:

> "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." (Emphasis added)

180. Thus, under the Montreal Convention, Ryanair is not liable to passengers, where it took all measures that could be reasonably required. It certainly seems arguable that notifying a passenger at the email address that was provided on a booking by that passenger's agent is all that could be reasonably required of an airline. Accordingly, when considering the balance of justice, this lessens the significance of Ryanair's claim that it is *strictly liable* for regulatory breaches where it uses an OTA email address to notify passengers of a delay/cancellation of a flight.

Ryanair can seek indemnification from OTAs for any regulatory breaches or fines

181. Fourthly, Article 13 of Regulation 261, states:

> "In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person,

including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws." (Emphasis added)

182. Based on Article 13 of Regulation 261/2004, it seems clear that if an OTA failed to pass on the notification of a delay, which it received from Ryanair, to a passenger, Ryanair would be entitled to pursue that OTA for compensation. Accordingly, this further lessens the significance of the prejudice likely to be suffered by Ryanair as a result of regulatory breaches, which Ryanair relies upon in seeking this injunction.

183. For all these reasons, this 'regulatory' prejudice, upon which Ryanair relies to support its injunction application, is not such as to justify the granting of an injunction on the balance of justice.

Goodwill – criticism of Ryanair over its response to a racist incident

184. In support of its application for an injunction, Ryanair also claims that its inability to contact a passenger using his/her personal email address can have a negative impact on Ryanair's goodwill in the marketplace. Ryanair evidences this claim by reference to an incident on a Ryanair flight in October 2018 in which a lady was racially abused by a man sitting beside her. The incident received a lot of publicity in the media because it was captured on camera. Despite the fact that Ryanair sent her an email to apologise for the upset caused, using it seems the OTA email address that had been supplied on booking the flight, the racially abused passenger does not appear to have received this email. Ryanair complains that its goodwill suffered as a result of references by that lady in a media interview to not have received a response from Ryanair, which was publicly condemned by the interviewer, when in fact Ryanair had sent an apology to the contact email address supplied with the lady's booking.

185. While Ryanair might be understandably frustrated that an email does not appear to have been passed on by an OTA to its passenger, and that Ryanair suffered some bad publicity as a result, it is this Court's view that this one incident of prejudice/damage to its goodwill suffered by Ryanair does not justify the grant of an injunction on the balance of justice against Skyscanner, particularly where, first, the incident happened prior to 11th November, 2019 (when the issues herein first arose) and secondly, there is no evidence that the lady booked her Ryanair flight on the Skyscanner website or even with an OTA that operates on the Skyscanner website. Thus, there is no evidence that the granting of an injunction against Skyscanner would prevent this incident re-occurring.

DAMAGES AS AN ADEQUATE REMEDY

186. It is clear from O'Donnell J.'s judgment in the *Merck Sharp & Dohme* case that the question of whether damages are an adequate remedy has to be considered as part of the

balance of justice. In this regard, Ryanair has claimed that if it was successful in getting the permanent injunction at the main hearing but was to be refused this interlocutory injunction between now and the main hearing, damages would not adequately compensate it. Hence it claims that the interlocutory injunction should be granted.

187. In this regard, Mr. Aitken on behalf of Skyscanner has averred that certain OTAs have for several years not provided personal email addresses to Ryanair when booking flights, yet during that period Ryanair has continued to be successful, with profit levels of close to €1 billion for the year ending 31 March 2019.

188. For this reason, Skyscanner claims that any suggestion, that the refusal by this Court to grant an interlocutory injunction for the time period before the main hearing, would create irreparable harm to Ryanair, should be treated with caution.

189. It is also relevant that evidence was provided to this Court of numerous sets of proceedings by Ryanair against OTAs in various jurisdictions, but it seems that Ryanair did not believe that it was necessary or sufficiently urgent to seek interlocutory injunctions against those OTAs to directly force the provision of passengers' personal email addresses to Ryanair. It seems that this may be the first occasion on which Ryanair has sought an interlocutory injunction in any jurisdiction requiring the provision of personal email addresses of passengers, whether directly against an OTA or indirectly by injuncting a meta-search site to ensure that the OTAs provide same. Yet Ryanair nonetheless suggests that the harm is irreparable and that the harm cannot be remedied by damages in these proceedings against Skyscanner, in which it requires Skyscanner to oblige OTAs to provide personal email addresses for passengers.

190. Furthermore, it seems to this Court that Ryanair is in a position to quantify how many passengers use OTA email addresses when booking Ryanair flights, since as previously noted it has offered to notify Skyscanner any time an OTA email address is provided on booking a Ryanair flight *via* the Skyscanner website. Ryanair has also confirmed that it earns €17.15 on average in Ancillary Services from each passenger. For this reason, it should be a relatively straight-forward task to calculate how much Ryanair will lose in monetary terms from its failure to get an interlocutory injunction for the period of time up until the main hearing (if it ends up getting a permanent injunction at that hearing).

191. As this is a *'commercial case'*, this Court must adopt, per O'Donnell J., a *'robustly sceptical'* attitude to the claim from Ryanair that damages are not an adequate remedy. Adopting this approach and based on the foregoing, it is this Court's view that damages are an adequate remedy for Ryanair, and hence this is not a reason for the injunction to be granted.

192. As regards the calculation of damages for Skyscanner, if an injunction was granted for the time period up until the main hearing, but was not granted at the main hearing, it seems to this Court that it would also be possible to calculate the amount of money lost by Skyscanner as a result of the grant of the injunction, *albeit* that it might be a somewhat

more involved exercise and perhaps less precise than calculating the foregoing damages for Ryanair.

193. This is because if, after the injunction is granted, an OTA refused to provide the passenger's personal email address to Ryanair, Skyscanner would then have to stop listing Ryanair flights in its search results for that OTA on the Skyscanner website. In such a scenario, Skyscanner should be able to provide a comparison of its commission revenue from that OTA before and after this change in Skyscanner's business model, to enable an estimate to be made of the monetary damage caused by the interlocutory injunction.

194. Equally, if after the injunction is granted, an OTA changed its business model by providing the personal email address to Ryanair, Skyscanner should be able to provide a comparison of its revenue from that OTA before and after this change in the OTA's business model. Adopting a similarly robustly sceptical attitude to Skyscanner's claim regarding the adequacy of damages, this Court concludes that for the foregoing reasons, damages are also an adequate remedy for it, if an injunction were to be granted and at the trial it was to be found to have not been justified.

195. Since damages are an adequate remedy for both parties, the critical factor in this case is not the adequacy of damages but rather other factors (as outlined above) regarding whether the balance of justice favours the granting of an injunction.

Reliance by Ryanair on Cartier and Dramatico cases

196. Ryanair sought to rely on the English High Court case of *Cartier International AG & ors. v. British Sky Broadcasting Ltd & ors.* [2014] EWHC 3354 (Ch), [2015] All ER 949 in which an injunction was granted requiring certain internet service providers ("ISPs") to block the access by six targeted websites, which advertised and sold counterfeit *Cartier* goods in breach of trademark, to the subscribers of those ISPs.

197. Ryanair argues that just as an ISP such as Sky was required to block websites, in the *Cartier* case, from selling counterfeit goods, so too Skyscanner should be required to force the OTAs to deliver personal email addresses to Ryanair, failing which they should not be allowed to sell Ryanair flights on the Skyscanner website.

198. However, this Court has concluded that the appropriate test to apply is that set out for the grant of interlocutory injunctions in this jurisdiction as set out in the *Merck Sharp & Dohme* case. Accordingly, the *Cartier* case, which dealt with a permanent injunction in the context of a breach of trademarks, is of limited assistance. Furthermore, it is to be noted that as a precondition to the granting of the injunction in the *Cartier* case, there were findings of fact, of unlawful activity (i.e. the sale of counterfeit goods). At para. 139 of his judgment, Arnold J. states:

> "Where an injunction is against an intermediary on the basis that its services have been used to infringe copyright or related rights, Parliament has laid down a number of threshold conditions for the exercise of the High Court's jurisdiction to grant an injunction. In the context of website blocking orders, it can be seen from

the cases cited in paragraph 3 above that that there are four conditions which must be satisfied. First, that the defendant is a service provider. Secondly, that users and/or the operator of the website in question infringe the claimant's copyrights. Thirdly, that users and/or the operator of the website use the defendant's services to do that. Fourthly, that the defendant has actual knowledge of this." (Emphasis added)

199. In contrast, in the present case, this is an application for an interlocutory injunction, and so there are only allegations that the OTAs are involved in screen scraping, which is claimed to be unlawful and similarly there are only allegations that Skyscanner is involved in facilitating the alleged unlawful sale of Ryanair flights.

200. Ryanair also sought to rely on the case of *Dramatico Entertainment Ltd & ors. v. British Sky Broadcasting Ltd & ors*. [2012] EWHC 268 (Ch). That was a case in which the claimant record companies sought injunctions against the defendant ISPs requiring them to take measures to block or at least impede the access of their customers to a file-sharing website called The Pirate Bay. In his judgment, Arnold J. found that both users and the operators of The Pirate Bay had infringed the copyright of the claimants. On the basis of these findings of fact, the defendants agreed to orders requiring them to carry out IP address blocking. In that case therefore, Arnold J. granted the injunctions sought by the claimants (see [2012] EWHC 1152 (Ch)). However, for similar reasons, this case is not of particular relevance to the current case since it did not involve an interlocutory injunction but final orders which the High Court made based on findings of fact in order to justify the blocking orders, i.e. that there was an infringement of copyright.

CONCLUSION

201. This Court concludes that:

- The substance of the injunction sought by Ryanair *('prohibiting'* Skyscanner from allowing the sale of Ryanair flights on its website *'without ensuring'* that the OTA provides the passenger's personal email address to Ryanair), although expressed in prohibitive terms, is in substance a mandatory injunction,

- Ryanair has failed to establish that it has a strong case that it is likely to succeed at the hearing of the action for a permanent injunction against Skyscanner prohibiting it from facilitating the sale of Ryanair flights on its website (with the consequence that no email addresses, whether personal or OTA, would be provided for Ryanair flights),

- There are therefore no grounds for the grant of an interlocutory injunction, since the injunction sought is mandatory in substance, and,

- Even if the injunction is regarded in substance as a prohibitive injunction, this Court concludes that on the balance of justice an injunction requiring Skyscanner to oblige OTAs to provide personal email addresses is not justified, for the reasons set out above, including that:

- ☐ Ryanair is in a position to alleviate the prejudice it claims is being caused by the provision of OTA email addresses (i.e. by Ryanair using personal information other than a passenger's personal email address to identify a passenger), and,
- ☐ the injunction is sought against Skyscanner, even though the primary target of the alleged prejudice to Ryanair are the OTAs who are providing the OTA email addresses to Ryanair, not Skyscanner, and,
- ☐ much of the alleged prejudice relied upon by Ryanair relates to OTAs who do not use the Skyscanner website or relates to incidents which occurred prior to 11th November, 2019, the date upon which the alleged unlawful facilitation of the sale of flights on the Skyscanner website began.

202. This Court therefore refuses to grant the interlocutory injunction sought by Ryanair and will hear counsel in relation to the form of the final order.