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THE HIGH COURT

2008 2204 P

RYANAIR LIMITED

PLAINTIFF

AND

BRAVOFLY AND TRAVELFUSION LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered the 29th day of January, 2009

1. Introduction

1.1 These proceedings arise out of the objection of the plaintiff ("Ryanair") to the use of automated systems and software to extract real time flight information from Ryanair's website for the purposes of presenting it on websites facilitating flight search and booking services, which are run by the first named defendant ("Bravofly"). Ryanair claims that these activities, which Ryanair refers to as "screen scraping", breach Ryanair's online terms and conditions, infringe Ryanair's intellectual property rights, such as copyright, database rights and trade marks and amount to conversion and trespass to the goods of Ryanair comprised in its website.

1.2 Bravofly denies all of the claims and in addition asserts by way of defence and counterclaim that Ryanair is abusing a dominant position in contravention of European and Irish competition law.

1.3 As part of the case management of these proceedings I heard six separate applications over some three days. The first four applications, which related to discovery and further and better particulars, have already been ruled on, leaving two issues to be decided. The first remaining issue relates to an application by Ryanair in which it seeks the striking out of portions of Bravofly's defence and counterclaim. The second remaining issue relates to the question of jurisdiction in respect of the proceedings against the second named defendant ("Travelfusion").

2. Procedural history

2.1 Proceedings in relation to the relevant screen scraping activities were issued by Ryanair against Bravofly on 14 March 2008, and on application made by Ryanair on 7 July 2008, were admitted to the Commercial List of the High Court. On 10 June 2008, Bravofly's sister company, a Swiss company called Bravofly SA, issued declaratory proceedings against Ryanair in Switzerland seeking negative declarations that Bravofly SA was not breaching the terms of Ryanair's website or infringing Ryanair's database rights. On 28 July 2008, Ryanair issued a motion seeking an order to join Bravofly SA as co-defendant in the proceedings on the grounds that Bravofly SA may have been the operator of the website carrying out the impugned activities at the time of issuing of the proceedings. This application was heard on 22 October 2008 when judgment was reserved and is awaited. In accordance with the court's directions of 7 July 2008, Bravofly delivered an original defence and counterclaim on 1 September 2008. Particulars were also raised and responses furnished on both sides and letters seeking voluntary discovery were exchanged.

2.2 The original defence and counterclaim named Travelfusion as a provider of the technical facilities and services, necessary to permit the screen-scraping facilities, to Bravofly. On 22 October 2008, Ryanair applied to the court for an order to join Travelfusion as a co-defendant in the proceedings and consequential orders to allow the pleadings to be amended accordingly. The Court acceded to that request. On 18 November 2008, Bravofly delivered an amended defence and counterclaim.

3. Issues for Decision

3.1 This judgment, as I have noted, relates to two motions, one brought by Ryanair and the other by Travelfusion.

3.2 In the first application Ryanair seeks an order pursuant to O. 19, r.27 of the Rules of the Superior Courts ("RSC") and/or pursuant to the inherent jurisdiction of this court, striking out parts of Bravofly's defence and counterclaim, as identified in the notice of motion, which in summary refer to allegations that Ryanair was guilty of an abuse of a dominant position contrary to Article 82 of the EC Treaty and s. 5 of the Competition Act 2002.

3.3 In the second application Travelfusion has brought a motion which seeks to dismiss the proceedings as against it on the basis that the Irish courts have no jurisdiction to hear the matter by virtue of the provisions of Regulation (EC) no. 44/2001 of 22nd December 2002 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters ("the Brussels Regulation"). Travelfusion is a company incorporated under the laws of England, with its registered office in England and its principal place of operation in London, and with no place of business in Ireland. It is also Travelfusion's case that the terms of use of the Ryanair website confers exclusive jurisdiction in all disputes arising out of the use of the website on the English Courts.

3.4 I turn first to Ryanair's application to strike out part of Bravofly's defence and counterclaim.

4. The Application to Strike Out Portions of Bravofly's Defence and Counterclaim

4.1 Ryanair seeks to have portions of the amended defence and counterclaim struck out under O.19, r. 27 of the RSC. The portions of the amended defence and counterclaim objected to are as follows:-

> a. Paragraphs 66 (v), (w), (x), (y) and (bb) of the amended defence and counterclaim and the portion of the last paragraph of para. 66 which reads "which are partly the result of Ryanair's own aggressive actions in response to competition". In these paragraphs, it is said that Bravofly claims that Ryanair is engaging in abuse of a dominant position through the creation of barriers to entry to potential competitors by predatory pricing. These pleas are said by Ryanair to be irrelevant;
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> b. Paragraphs 67 (d) and 71(c) of the amended defence and counterclaim which sets out particulars of the flight information services provided by Ryanair. In these paragraphs Bravofly claims that Ryanair is engaging in cross subsidisation by using profits from its online services to subsidise low air fares in order, it is said, to maintain its alleged dominant position in the market for flight services in which Ryanair operates. These pleas are also said by Ryanair to be

irrelevant;

c. Paragraph 68 of the amended defence and counterclaim wherein Bravofly asserts that Ryanair has entered into agreements and concerted practices with third parties with the object or effect of restricting competition. These pleas are said by Ryanair to amount to a bald claim; and

d. Paragraph 67 (e) to (k) and (n) to (q) of the amended Defence and Counterclaim where Bravofly sets out matters which are said by Ryanair to comprise evidence as to the nature and size of the market for online travel agency service and/ or general argument as to the benefits of such services and thus, it is said, improperly included in pleadings.

4.2 Ryanair further submits that the court has an inherent jurisdiction to strike out the above portions of the pleadings, particularly as the proceedings have been entered in the commercial list and are being case managed.

4.3 Ryanair seeks to have the relevant portions of the defence and counterclaim of Bravofly struck out pursuant to O.19 Rule 27 of the RSC on the grounds that the relevant parts comprise subject matter that is unnecessary and/ or scandalous and that, if maintained, would serve only to delay, embarrass or otherwise prejudice the fair hearing of the action. O. 19 r. 27 RSC states that:-

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

4.4 Order 19 r. 27 confers a broad discretion on a court to strike out any part of a pleading, which is unnecessary, scandalous or prejudicial. In *Morony v Guest* (1878) 1 LR I.R. 564 Chatterton VC, at page 571, described one of the predecessors to this rule in the following way:-

> "A party is not to be called upon to answer statements which are irrelevant to the case, or which are pleaded in an unfair, ambiguous, or prolix manner; but the Court should confine the rule to cases which come within it."

Chatteron VC, however, also cautioned that:-

> "The Rule is not to be abused, nor are pleadings to be scanned too finely, with regard to the power of the amendments conferred, nor can a party dictate to his opponent how he ought to plead."

4.5 The primary test used in judging whether a pleading contains unnecessary or scandalous matters is the relevancy of the matter pleaded to the proceedings between the parties; whether the pleadings concerned seek to introduce extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. Allegations are not scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the reliefs claimed. This test was formulated in *Christie v Christie* (1873) L.R. 8 Ch App 499, and approved in *Riordan v Hamilton* (Unreported, High Court, 26 June 2000, Smyth J) where Smyth J., at p. 5 of his judgment, stressed that:-

> "The purpose of pleadings is to convey what the nature of the action is. Pleadings should not be used as an opportunity of placing unnecessary or scandalous matters on the record of the court, or as an opportunity of disseminating such matters when they have nothing to do with any dispute between the parties"

4.6 In *Riordan v Hamilton*, the plaintiff sought certain reliefs against the defendants who were all members of the Supreme Court. In his pleadings, he had made a number of serious and intemperate allegations against the defendants, and Smyth J., having considered the pleadings, concluded that they should be struck out as scandalous. Smyth J. held that allegations are not to be considered scandalous where they would be admissible in evidence to show the truth of any allegation in the pleadings which is material to the relief claimed.

4.7 At the same time, not all facts which have relevance to the proceedings may be properly pleaded and matters set out in pleading must comprise facts that are relevant to the action between the parties and must not comprise the evidence by which it is hoped that such facts may be proved. In *Hanly v Newsgroup Newspapers Ltd* [2004] 1 IR 471, at page 475 , Smyth J stated that only material facts and not the evidence on which they are to be proved should be pleaded. This principle is also expressed in O. 19, r. 3 of the RSC, which states as follows:-

> "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to prove…"

4.8 A further type of problem to which O. 19 r. 27 is directed is where pleadings are found to be prejudicial. This may occur for a number of reasons. However the principal focus is again on materiality. *In Hanly* Smyth J. held, at p. 475, that the matters pleaded were scandalous, prejudicial and embarrassing in that they sough to "introduce immaterial matters which would lead to the introduction of irrelevant evidence at the trial of the action."

4.9 In the light of those general principles it is necessary to turn to the case made by Ryanair in relation to each of the categories of pleading sought to be struck out.

4.10 Paragraphs 66 (v), (w), (x), (y) and (bb) of the amended Defence and Counterclaim and the portion of the last paragraph of paragraph 66 which reads "which are partly the result of Ryanair's own aggressive actions in response to competition".

The relevant pleadings under this heading all appear in the section headed by reference to particulars of dominant position. In relation to this portion of the amended defence and counterclaim, Ryanair submits that the only matters relevant to the question of dominance are matters that go to show the extent to which the undertaking concerned can behave independent of its competitors, as defined by the European Court of Justice ("ECJ") in of *Michelin v Commission* [1983] ECR 3461. Ryanair submits that the relevant paragraphs do not comprise material relating to the market conditions affecting Ryanair in the markets in question and its economic strength or otherwise and that the relevant paragraphs constitute no more than allegations of competition law infractions *viz a viz* third parties in a different market. Ryanair further submits that these paragraphs come within the test for scandalous pleadings within O. 19 r. 27 in that they consist, it is said, of highly prejudicial and damaging slurs on Ryanair and are at the same time irrelevant to anything to be proved in the proceedings. Ryanair further argues that if maintained, the particular portions of the amended defence and counterclaim would occasion considerable delay and additional cost in the proceedings and significantly embarrass and prejudice

the fair hearing of the trial.

4.11 Paragraphs 67 (d) and 71(c) of the amended Defence and Counterclaim

Ryanair argues that these paragraphs come within O. 19 r. 27 because, it is said, the relevant paragraphs expressly or by implication put forward a further claim that Ryanair is abusing its dominant position and where, it is said, that allegation is irrelevant to the case being made by Bravofly.

4.12 Paragraph 68 of the amended Defence and Counterclaim

Ryanair argues that these pleas should be struck out firstly on the basis of their speculative nature and secondly under O.19 r. 27 on the basis of the lack of relevancy of the claims to Bravofly's case of any alleged agreements between Ryanair and third parties and that this lack of relevancy causes the claims to be scandalous.

4.13 Paragraph 67 (e) to (k) and (n) to (q) of the amended Defence and Counterclaim

In these paragraphs Bravofly sets out the nature and size of the market for online travel agency services and the benefits of such services. Ryanair submits that these paragraphs should be either clarified or stuck out on the basis that it is not clear whether they represent evidence which is intended to be given or fact. In this respect Ryanair seeks to rely on the comments to Smyth J at p. 477 of *Hanly*, where the court struck out matters that might or might not be relevant to the question of damages in the case indicating:-

> "In my judgment, it is not permissible for a plaintiff in a statement of claim in an action such as this to seek to set forth in the pleadings in a narrative form intended factual evidence in anticipation of, or pre-emptive of, possible evidence in mitigation of damages that may be tendered at trial arising from matters in a defence yet to be formulated. The material in the paragraphs of the statement of claim is scandalous, prejudicial and embarrassing in the legal sense of those terms."

It is submitted by Ryanair that these impugned parts of the amended Defence and Counterclaim of Bravofly may ultimately have the consequence of unnecessarily increasing the length of the trial in respect of matters which go beyond the real nature of the dispute between the parties.

4.14 At para. 60 of its original defence and counterclaim Bravofly pleaded:-

> "The plaintiff is in a dominant position in trade for low cost online booked air travel and also in related services, both in the State and within the common market or in a substantial part of it"

By notice for particulars, Ryanair sought full and detailed particulars for Bravofly's basis for making this claim. In reply to Ryanair's application Bravofly now argues that these particulars were incorporated into the amended pleadings and form part of the portions of such pleadings which Ryanair are seeking to have struck out in this application.

4.15 In specific reply to the case made by Ryanair concerning the first category of pleading sought to be struck out, Bravofly submits that the portions impugned in this motion were necessary additions to their pleadings in order to prove their claim that Ryanair are engaging in anti-competitive behaviour under EU and Irish competition law. To this end, Bravofly referred to the jurisprudence of the ECJ in relation to establishing dominance of an undertaking under Article 82 of the EC Treaty. Bravofly submitted that part of the test of dominance of an undertaking is as to whether the undertaking could prevent competitors from entering the market. Bravofly also referred to the decision of the European Commission in Ryanair/Aer Lingus, Case No. COMP/M 4439, where, at par. 625, the commission stated:-

> "The Commission's investigation showed that Ryanair has a reputation of engaging in aggressive competition in case of new entry to Ireland, notably by temporarily lowering prices and expanding its capacity in order to drive out the new entrant on routes to or from Ireland."

Bravofly argued that the details of the response of Ryanair to entry to its market is a factor in determining its dominance and as such are proper particulars for its basis for claiming that Ryanair is in a dominant position in the relevant market (i.e. the flight market) and do not fall under the types of pleadings envisaged by O.19, r. 27.

4.16 In relation to the pleading as to cross subsidisation, Bravofly submits that such pleadings are not irrelevant as, Bravofly claims that Ryanair is not permitted to use its proprietary rights to prevent online travel agents activities and any exclusionary conduct by Ryanair is said to amount to an adverse effect on competition. As such the pleading concerned is said to be a relevant and proper matter to include in the context of such a claim.

4.17 As to the alleged Anti-Competitive Agreements, Bravofly argues that Ryanair's assertions in relation to this plea are unsustainable as Ryanair has referred in its pleadings to an agreement with a third party in relation to the use of Ryanair's website. In that context Bravofly specifically draws attention to para. 30 of Ryanair's amended statement of claim, which pleads:-

> "..loss of directed traffic to the plaintiff's website and the likely consequent impact on sale of complementary service from the plaintiff's website by the contract partners of the plaintiff additionally exposes the plaintiff to potential liability under an agreement that it has concluded with a third party in respect of advertising and sales right on the plaintiff's website."

Bravofly argues that the reference to this agreement in Ryanair's statement of claim precludes Ryanair from asserting that reliance on the same agreement in Bravofly's counterclaim is impermissible under O. 19, r. 27 of the RSC.

4.18 In relation to particulars of the nature of services other than the operation of low- fares flights, Bravofly submits that the matters pleaded in these paragraphs are relevant to the principal plea that both parties are engaged in the provision of services other than the operation of low fares flights, and as to the nature of those online services, which involves the nature of the market in which they are provided.

5. Conclusions on Strike out of Parts of Counterclaim

5.1 As will have been seen, the first set of issues under this heading concern those parts of the pleadings contained in the counterclaim under the general heading of "Particulars of Dominant Position" which contain allegations of aggressive or abusive activity by Ryanair in the flight services market. In order to assess the argument under this heading it is necessary to consider the

sort of matters that could, arguably, be relevant to the counterclaim which Bravofly brings against Ryanair in these proceedings.

5.2 It is, of course, the case that Bravofly is not involved in the market for the provision of flight services itself. Rather it is involved in the market for the provision of online booking of flight services (or more particularly, on its case, a sub-set of that market being that which is involved with online booking of low cost flights). The precise market may, of course, be the subject of some debate at the hearing, but at this stage it does not appear to be me to be appropriate or possible to reach any conclusion as to what the proper market to consider is. A court should not lightly exclude matters from pleadings where there is at least some reasonable possibility that the material pleaded could be relevant. Matters should only be excluded where it is clear that such pleading is irrelevant. On that basis it is at least possible that the proper market, by reference to which the court will need to assess the allegations made by Bravofly against Ryanair, is as Bravofly alleges.

5.3 It is next necessary to note that Bravofly contends that the market for online booking of low costs flights is a connected or ancillary market to the market for low cost airline flights themselves. On that basis it is contended that, if it should transpire that the court is satisfied that Ryanair holds a dominant position in the market for low cost airline flights (or at least does so within certain defined geographical regions), then it follows that it is arguable that dominance in the flight market might give rise to abuses in the subsidiary on line flight booking market. Again, it is neither possible nor appropriate to reach any conclusions on this question at this stage. Suffice it to say that the propositions which I have set out are sufficiently arguable to render it inappropriate to strike out any pleadings which are designed to allow those arguments to be progressed at trial.

5.4 Therefore, at the level principle, it is, in my view, permissible for Bravofly to seek at trial to establish Ryanair's dominance in the flight market with a view to seeking to persuade the court that a knock on effect of that dominance is a proper factor to be taken into account when assessing whether there has been any abuse of Ryanair's position in the online booking market.

5.5 The next step in the argument relies on the jurisprudence of the ECJ in cases such as *Michelin* which make clear that a court can, in assessing whether an enterprise has a dominant position, consider the factual matters which are put forward as amounting to abuse. The logic behind this position is clear. The test for dominance is well established. In *Michelin* the ECJ defined it as follows:-

> "A position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant markets by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers."

5.6 The basis for dominance is, therefore, a sufficient level of economic power within the market so as to be able to operate without significant regard for other players. It is obvious that the fact (if it be so) that the alleged dominant enterprise was able to achieve certain ends by exercising its economic muscle within the market, can be properly taken into account in assessing whether it is dominant. If it be dominant, then the means by which it has achieved those ends (amongst other things) needs to be assessed to determine whether those means amount to an abuse of its dominant position. It follows that the same factual information can be relevant to both questions. The exercise of a significant degree of market power can be evidence of dominance. If dominance is established the manner of the exercise of that power can be evidence of abuse.

5.7 However, it is important to emphasise that in assessing whether the enterprise concerned is dominant, a court is not concerned with whether the activity alleged is, in fact, abusive. The court is solely concerned with whether the enterprise is capable of exercising a degree of economic power in the relevant marketplace such that it meets the test for dominance.

5.8 Against that background it seems to me that much of the contested pleading under this heading is inappropriately drafted. The pleading makes allegations of "abuse" and "aggressive behaviour". It is not relevant to these proceedings to determine whether Ryanair was or was not guilty of abuse of any dominant position which it might arguably have in the low cost flight market. It is, of course, possible that some of the underlying facts which might, arguably, be said to amount to an abuse of such a position in the flight market can be relevant in determining dominance in that market.

5.9 However, it is important to emphasise that in these proceedings the only matter that is relevant in relation to the flight market, is the alleged dominance of Ryanair in that market. Whether Ryanair has (if it be so dominant) abused that position in the flight market is not relevant because Bravofly does not operate in the flight market. While some of the underlying facts on which it might be contended that Ryanair has abused its alleged dominant position in the flight market can, in accordance with the established jurisprudence, be relied on as part of the assessment of whether it is in fact dominant in that market, it is only those underlying facts which might, arguably, go to show a sufficient level of market power to establish dominance that are relevant, and not whether those facts might also amount to an abuse.

5.10 It seems to me to follow that those aspects of the pleading which assert abuse, aggressive behaviour and the like are, therefore, inappropriate. It is not relevant to these proceedings to consider or determine whether Ryanair has been guilty of abuse of a dominant position in the flight market. The only facts under this heading that are, arguably, relevant in these proceedings are underlying facts which demonstrate Ryanair's economic power in the flight market. These latter underlying facts will be relevant to the court's assessment of whether it has been established that Ryanair has a dominant position in the flight market which, for the reasons which I have sought to analyse earlier, is arguably relevant to the issues which arise in this case.

5.11 It would be wrong for me to be prescriptive as to the precise way in which Bravofly should plead the underlying facts. However, I am satisfied that the pleadings as currently drafted under this heading are not permissible. I propose to afford Bravofly an opportunity to redraft the pleadings in such a way as confines the allegations in respect of the flight market to underlying facts which might, arguably, be relevant to the assessment of whether Ryanair is dominant in that market. There should be no reference in such pleading to any material which contains a suggestion of abuse by Ryanair of its alleged dominant position in the flight market, for such matters are wholly irrelevant to this case.

5.12 The second set of contested pleadings concern allegations of so called cross subsidisation whereby it is contended that Ryanair is in a position to cross subsidise its flight business by profits made in the online booking business. If such facts could be established then same might well be relevant in an action brought by a competitor of Ryanair in the flight business, who might maintain that it was an abuse of Ryanair's allegedly dominant position in that market (or at least the low cost end of it) to keep flight prices artificially low by such cross subsidisation. However, it is difficult to see how such an allegation could have any relevance in this case. It is hard to see how it could be relevant in establishing dominance. It might, arguably, be a means by which dominance in the flight market might be maintained or achieved. Such cross subsidisation might, for example, provide for an opportunity for a company such as Ryanair to operate below cost on certain flights for the purposes of making it very difficult for competitors to enter the market or, having so entered, to stay in the market. But it is the ability of a company such as Ryanair (if it be established) to exclude such competitors that goes to establish its dominance. The fact that it may have access to sufficient funds to achieve that dominance by

cross subsidisation (or from any other source), does not seem to me to be particularly material to the question of whether it is dominant in the first place. Likewise the methods adopted might well be relevant, as I have pointed out, in an action in which it was alleged that there was an abuse of a dominant position in the flight market. It is hard to see how such facts could be relevant in an action in which it is sought to suggest that there is abuse in the subsidiary or ancillary market for online booking in the low cost sector.

5.13 Counsel on behalf of Bravofly argued that if cross subsidisation happens in one direction, then it is also possible that it might happen in the other direction if the commercial interests of the enterprise concerned were to require it. That is undoubtedly true. However, it is not currently asserted that it has, in fact, happened. If Ryanair is found to be in a dominant position in the flight market such that that finding could justify a further finding of abuse in the subsidiary flight booking market, then cross subsidisation which allowed the booking market to operate in an unfair way against competitors, might well amount to an abuse. But that is not an abuse which is currently alleged.

5.14 I am not, therefore, satisfied that the cross subsidisation issue could have any relevance to these proceedings, and it seems to me that the relevant paragraphs under this heading should be struck out.

5.15 The third disputed area of Bravofly's counterclaim concerns particulars of what is said to be anti-competitive activity on the part of Ryanair by reason of having entered into exclusive agreements with third parties. It is important to note that the genesis of this issue stems from a contention in Ryanair's statement of claim where, as a particular of the damage which has or may be caused to Ryanair by what is said to be Bravofly's wrongful activity, it is said that that activity may cause difficulties for Ryanair by exposing it to potential liability under an agreement which it has entered into with a third party. There is, therefore, a clear basis for the assertion that Ryanair has entered into some form of exclusive agreement with a third party concerning the exploitation of aspects of its online booking website.

5.16 The question which I have to address is as to whether the allegation deriving from that fact, in the manner in which it is particularised in para. 68 of the amended defence and counterclaim, is sufficient to properly bring such a claim. The issue seems to me to be analogous to that which I had to consider in *National Education Board v. Ryan & Ors* [2007] IEHC 428, concerning the proper pleading of a claim in fraud. While the analogy between a fraud claim and an anti-competitive activity claim is far from complete, there are not insignificant analogies. Both involve allegations which, if true, involve activity which is likely to be at least in part clandestine. A person bringing a valid claim in respect of such matters will be unlikely to be able to plead such a claim with a great degree of particularity in advance of having had the opportunity to exercise procedural measures such as discovery. On the other hand there is clear competing requirement that a party should not be able to make a bald and general accusation of wrongful activity and thus gain access to its opponent's private papers, for the purposes of seeing if it can make out a case. A balance between those two competing requirements needs to be struck.

5.17 As I pointed out in *National Education Board* it seems to me that the court is entitled to require something more than a bald claim before permitting the pleadings to close, and the plaintiff to seek discovery. However, a court should not go so far as to require an overly detailed particularisation of the claim, which would have the effect of potentially limiting the claim in a way such as would exclude from discovery material that might well be relevant to true wrongdoing. I am satisfied that an analogous position applies in an anti-competitive activity claim such as this. A party should not be permitted to make a bald accusation of anti competitive behaviour and hope to be able to particularize it as a result of documents obtained on discovery or by reason of the results of other procedural measures. On the other hand a party should not be required to particularize such a claim in such great detail (prior to discovery), such as might well exclude it from the reasonable opportunity of obtaining material information on discovery.

5.18 While it is fair to say that it would not be proper to characterize the claim made by Bravofly in para. 68 of the amended counterclaim as being merely a "bald" claim, given that there is a reference to the relevant third party, and given that there is clearly a factual basis for the assertion that there is a contract between Ryanair and that third party (the existence of the contract is relied on by Ryanair), which gives exclusive rights to that third party in relation to the exploitation of aspects of Ryanair's website, nonetheless I am satisfied that the claim as currently formulated falls on the wrong side, from Bravofly's perspective, of the line between what it is reasonable to require of a plaintiff in terms of detail prior to discovery. In those circumstances, as noted in respect of the first category, it is not for me to be prescriptive as to the precise way in which Bravofly should formulate its claim under this heading. I will, therefore, afford Bravofly an opportunity to reformulate this aspect of the claim to include a significant amount of additional detail as to the manner in which it asserts that such a contract is anti-competitive, and what relief is said to flow from that assertion.

5.19 As to the fourth disputed category it is fair to say that counsel for Ryanair indicated that this category gave rise to the least level of concern on Ryanair's side, although counsel did persist with the application to have what were said to be the offending aspects of the counterclaim struck out. On balance I have come to the view that I should not make that order. There is obviously, in many cases, a very fine line between facts and the evidence by reference to which those facts might be proved. In cases where it is obvious that the relevant pleading concerns evidence rather than facts, then it may well be appropriate for the court to strike out the pleading concerned. On the other hand where the relevant pleading lies in what might be reasonably be described as a grey area between fact and evidence, it seems to me that a court should err on the side of allowing the pleading to stand. I, therefore, make no order in respect of that aspect of the claim.

5.20 In summary, under this heading, I, therefore, propose affording Bravofly an opportunity to provide a revised pleading in relation to categories 1 and 3 of those under contest, to strike out the pleadings set out in the second category, and to decline to make an order striking out the fourth category.

6. <u>Travelfusion's Claim Under The Brussels Regulation in relation to Jurisdiction</u>

6.1 As noted earlier Travelfusion has brought an application to dismiss the proceedings against it for want of jurisdiction under the Brussels Regulation. The guiding principle of jurisdiction, as set out in the Brussels Regulation at Article 2, is, of course, that persons are to be sued in the Courts of the Member State in which they are domiciled. It is not disputed but that Travelfusion is domiciled in England.

6.2 In its application to the court Travelfusion relied on a number of different grounds for asserting that the Irish courts have no jurisdiction to entertain the claim made as against it in these proceedings. However, while not conceding that the remaining grounds lacked merit, counsel for Travelfusion confined his argument at the hearing before me to a claim based on what is said to be an exclusive jurisdiction clause governing the situation.

6.3 Travelfusion contends that Ryanair's proceeding against it are subject to the exclusive jurisdiction of the English Courts having

regard to the provision in the Terms of Use of the Ryanair Website, which purport to governs applicable law and jurisdiction. The clause in question is Clause 7 of the Terms of Use, which provides as follows:-

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

6.4 In the context of that clause it should be noted that counsel for Ryanair did not dispute but that, if the clause were applicable, it would govern each of the causes of action asserted by Ryanair in these proceedings. In other words it was accepted that each of the relevant causes of action constituted a dispute "arising from the use of this website". As will be seen, Ryanair does not accept that, for the purposes of determining jurisdiction, the clause is applicable in the circumstances which have arisen. The concession to which I have referred is, therefore, predicated on Ryanair failing to satisfy me of that fact and, consequentially, the clause governing jurisdiction in this case. In that eventuality it is not contended by Ryanair that I can properly draw any distinction between the various causes of action. Travelfusion also agree with this interpretation of the clause. Furthermore, Ryanair accepts that if the jurisdiction clause is operative in accordance with the requirements of the Regulation, there is no legitimate basis for invoking the jurisdiction of the Irish courts. The sole issue is, therefore, as to whether the clause does in fact govern jurisdiction in this case.

6.5 It is Travelfusion's case that this court has no jurisdiction to hear these proceedings as against it by virtue of the Article 23 of the Brussels Regulation which states:-

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

6.6 Travelfusion submits that it is clear under Ryanair's own Terms of Use that any disputes relating to the Terms of Use or the use of the Ryanair website are subject to the exclusive jurisdiction of the English courts.

6.7 Travelfusion further argues that the Court should follow the "common sense" approach to the interpretation of jurisdiction clauses as set out by Steyn LJ in *Continental Bank NA v Aeokos Cia Naviera SA* [1994] 1 WLR 588 and approved by the Supreme Court in *Leo Laboratories v Crompton BV* [2005] 2 ILRM 43. It was argued by Travelfusion that the choice of jurisdiction clause must be upheld and give effect even though one party is challenging the validity of the entire contract including the clause concerned.

6.8 On the other hand Ryanair submits that Travelfusion, as the party asserting the applicability of Article 23 to oust the jurisdiction of the Irish court, has the burden of demonstrating its applicability and further asserts that an essential precondition to the operation of Article 23 is not satisfied. Ryanair relies on case law from the ECJ which has held that the requirements of Article 23 have to be strictly construed, in particular with regard to whether there was a consensus between the parties in relation to the clause. At paragraph 7 of the ECJ's decision in *Estas Salotti v Rua* [1976] ECR 1831, the ECJ states that Article 23:-

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

6.9 Also the ECJ in *Benincasa v. Dentalkit* [1997] ECR 1 6767, at paras. 28 and 29, explained that this Article should be interpreted strictly, since the purpose of the Article is to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus between the parties. Ryanair argues that there is no consensus as to the jurisdiction clause as Travelfusion itself is disputing the existence of a contract between the parties in relation to the use of Ryanair's website.

6.10 It was argued by Travelfusion that the choice of jurisdiction clause must be upheld and given effect even though one party is challenging the validity of the entire contract including the clause concerned. In that context Travelfusion also relies on *Benincasa*, where the ECJ considered whether the court of a Member State, specified in a jurisdiction clause in a franchising agreement, has exclusive jurisdiction pursuant to Article 17 where there was a dispute as to the validity of the franchising agreement. The ECJ found that a distinction must be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated and that a validly concluded jurisdiction clause remains valid despite either party seeking a declaration that the contract which contains the clause is void. The ECJ also stated that it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope. The principle was reaffirmed by the ECJ in *Soc.Trasporti Castelletti Spedizioni Internazionali SA v. Hugo Trumpy SpA* [1999] ECR 1/597, where at paras. 48 to 51, the ECJ started:-

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

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

7. <u>Conclusions on Jurisdiction</u>

7.1 As has been pointed out the only issue which I now have to decide is whether the choice of jurisdiction clause contained in Ryanair's standard form is applicable, so as to bind the parties and thus exclude any jurisdiction other than that of England. Obviously given that Travelfusion is, by common agreement, English domiciled it follows that the alternative jurisdiction available under the clause referable to the domicile of the proposed defendant does not alter the situation. On the facts of this case, if the clause applies, it chooses England and only England as the forum for any proceedings.

7.2 It was accepted by the parties that the circumstances giving rise to the issue in this case are highly unusual. The party who has produced the standard form containing a choice of jurisdiction clause is the one saying it does not apply. Equally the party denying that there is any contract at all is the one who is placing reliance on a clause which arises out of a contract alleged by its opponent but denied by it.

7.3 Likewise it seems to me that, doubtless because the situation is unusual, there is little decided case law which is directly on point. It would appear possible to identify two important principles concerning the proper construction of the Brussels Convention (and afterwards the Brussels Regulation), in areas such as this.

7.4 Firstly, the ECJ has been concerned to ensure that issues relating to the applicability of jurisdiction clauses are determined as a matter or European law under the terms of the Convention or Regulation, and without reference to the many different laws of the member states concerning the substantive issues which might arise in proceedings before the courts of such member states. The ECJ has, therefore, been at pains to point out that the question of whether the requirements set out in the Convention or Regulation for a choice of jurisdiction clause to apply are met (and whether they are met is to be determined on the basis of an autonomous application of community law) is wholly separate from any questions concerning the validity or enforceability of the contract in which the clause might be found. The validity or enforceability of such contract in the substantive proceedings will, of course, fall to be determined in accordance with the law of the member state concerned, or such other law as the private international law of the member state concerned may deem applicable. The fact, therefore, that it might be argued that the contract as a whole is either invalid or unenforceable does not, of itself, mean that the choice of jurisdiction clause may nonetheless be applicable, provided that the conditions set out in the Convention, or now the Regulation, are met.

7.5 The second major principle appears to be that decisions as to whether a choice of jurisdiction clause applies should be made in a relatively straightforward way. In *Hugo Trumpy* the ECJ speaks of a court being able to "readily decide" the issue. It also seems to follow that that decision will, in practice, have to be made at a very early stage in the process. In many jurisdictions (and Ireland is one such) procedural law and private international law requires that an objection to the jurisdiction of a court must be made at the beginning of proceedings for the obvious reason that it would be wholly unsatisfactory to require parties to embark on the substantive proceedings themselves without knowing whether those proceedings are going to ultimately determine the issues between the parties.

7.6 In most cases there is unlikely to be any significant tension between those two principles. A court is required to decide, at the beginning, and solely by an application of the principles to be found in the Regulation, whether a choice of jurisdiction clause applies. On the basis of that decision, then the question of whether the courts of the member state whose jurisdiction has been invoked has jurisdiction, can be determined. Questions such as the validity of the underlying contract as a matter of the proper law of the member state concerned, will then fall to be dealt with as part of the substantive proceedings themselves.

7.7 The potential tension between those two principles that can arise in unusual cases has come into stark relief on the facts of this case. True it is to say that the question of the validity of a contract as a matter of the law of the member state concerned (or other applicable law) will never be exactly the same as the question of the applicability of a choice of jurisdiction clause (which, as I have pointed out, falls to be determined as a matter of community law). However, in certain unusual cases the two questions may be very similar indeed. This case seems to me to be one such.

7.8 The issue between the parties so far as the choice of jurisdiction clause is concerned is whether there was a consensus as to that clause. A key issue in the substantive proceedings is as to whether the set of standard clauses contained in Ryanair's standard form terms, (including the choice of jurisdiction clause) govern the legal relations between the parties, both as to contract and so far as the intellectual property claims made by Ryanair are concerned. While by no means the only issue in the substantive case, a very significant issue will, therefore, be as to whether Bravofly are bound by those terms. That issue, as a matter of Irish law (or perhaps, on one view, of English law as the applicable law) will largely turn on whether Bravofly must be taken to have agreed to the relevant terms and conditions.

7.9 Both questions will, therefore, fall to be decided by reference to whether it can properly be said that there was an agreement or consensus between the parties. It is true to say that the question of the applicability of the choice of jurisdiction clause, so far as the Regulation is concerned, will fall to be determined by reference to whether it can properly be said that there was a consensus between the parties, in the sense in which that term is used in the jurisprudence of the ECJ and referable only to the jurisdiction clause, while the question of whether there was an agreement, so far as the substantive issues in the proceedings are concerned, will fall to be determined, for example, by reference to whether it can properly be said that Bravofly entered into a contract at all with Ryanair incorporating the relevant terms. Nonetheless the two questions are very similar.

7.10 As I understand it, the questions which arise largely stem from the proper characterisation of the manner in which the Bravofly website interacts with the Ryanair website. Can it be said that a proper characterisation of that interaction leads to a view that there was an agreement by Bravofly to be bound by Ryanair's terms and conditions? If it can (as a matter of Irish – or English – contract law), then all of the relevant Ryanair clauses will, *prima facie*, be applicable. Equally it is difficult to see how a similar question, i.e. the proper characterisation of the interaction between the two websites concerned in the context of whether it can be said to give rise to an agreement between the parties, would not be highly relevant, although not, perhaps, determinative, of the issues which arise in relation to the existence of a consensus as to the choice of jurisdiction clause as required by the Regulation.

7.11 This case, therefore, brings four square into contention a position where the question of whether there is a choice of jurisdiction clause which ought be recognised under the provisions of the Regulation and the questions of whether, in the substantive proceedings, there are binding legal arrangements between the parties, largely turn on the same or a very similar question. I say largely because, for the reasons which I have sought to analyse, the precise test is, of course, different. The question which I have to decide is as to the proper approach of a court faced with such a situation.

7.12 Firstly, it appears to me that it would be most unsatisfactory if a court were required to enter into a detailed inquiry in relation to the underlying facts giving rise to the proceedings, similar to that which would need to be conducted to determine the central issues in the substantive proceedings, in order for the court to determine jurisdiction. In such a circumstance the court could hardly be said to be able to "readily decide" the jurisdiction issue. Obviously such a situation will not arise where the parties had in fact reached some form of agreement (from which a consensus on the jurisdiction issue can be inferred) but where the questions which govern the validity and enforceability of a contract in the substantive proceedings (in cases where they arise) do not, therefore, involve the absence of any agreement or consensus in the first place. There may, however, be cases where the unsatisfactory situation which I have just identified cannot be avoided.

7.13 On the other hand it seems to me that the situation here is different. It is not open to Ryanair to suggest that it does not want its legal relations with those who use its website to be governed by the terms of use which it has specified. Much of the case which Ryanair seeks to bring involves urging on the court that those terms of reference are applicable to its legal relations with Travelfusion. While Travelfusion does deny the applicability of the terms, it seems to me that it would do significantly less damage to the jurisdiction regime specified in the Brussels Regulation to permit, for the purposes of an action, a party to accept, for jurisdictional purposes only, the applicability of a jurisdiction clause sought to be imposed by the other side (while denying in the substantive proceedings the existence of any agreement) rather than creating a situation where it would be necessary to embark on a level of

inquiry into the facts which would very closely parallel the inquiry that would be necessitated by a hearing of the substantive proceedings themselves.

7.14 The United Kingdom Court of Appeal in *Continental Bank* had to consider a somewhat analogous situation under the Brussels Regulation. It is true to say that the issue under consideration in that case involved the contractual jurisdiction provisions contained in Article 5(1) of the Brussels Regulation rather than a choice of jurisdiction clause. There are limits, therefore, to the extent to which one can draw an analogy from such a situation. However, the other facts of the case in question were very similar to those with which I am faced. The party's seeking to assert jurisdiction under Article 5(1) denied that there was any contract at all. On that basis, on its case, there were no contractual obligations of any sort between the parties and therefore, for example, there could, again on that party's case, have been no place for the performance of any contractual obligations. Nonetheless, the Court of Appeal was happy to accept that a sufficient case for the application of Article 5(1) had been made out by virtue of the assertion of the opposing party of contractual relations which, if they existed, would undoubtedly have conferred jurisdiction on the courts of the United Kingdom to determine issues arising out of same.

7.15 It seems to me that, by a parity of reasoning, a defendant is entitled, while denying the existence of any contract, to rely on a choice of jurisdiction clause which will necessarily be contained in any contract should same be found to exist.

7.16 It seems to me that such an approach is also consistent with the overall approach of the ECJ. True it is that, in *Estas Salotti*, the court noted that there must be an examination by the relevant court of the member state concerned to ensure that the jurisdiction clause "was in fact the subject of a consensus between the parties which must be clearly and precisely demonstrated". It is important, however, to note that the court was in that case concerned with the situation where the party who might be said to have inserted the jurisdiction clause in dispute was the one that was seeking to rely on it. In this case the party who might be said to have inserted the jurisdiction clause is the one seeking to deny it. It would create no unfairness or injustice to permit a party in a position such as Travelfusion to accept, for the purposes of jurisdiction, the existence of the relevant choice of jurisdiction clause. Travelfusion is, in this case, happy to accept the jurisdiction clause. The clause itself was inserted into any contractual relations that might be said to exist by Ryanair. That, in my view, is a sufficient consensus to meet the requirements of the Regulation even though Travelfusion asserts the absence of any contractual relationship.

7.17 For those reasons I am satisfied that the choice of jurisdiction clause is operative on the facts of this case. It follows that the courts of Ireland have no jurisdiction to deal with the issues raised as and between Ryanair and Travelfusion and the claim as against Travelfusion must, therefore, be struck out for want of jurisdiction.