

THE HIGH COURT

COMMERCIAL

[2012 No. 1715 P]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

CLUB TRAVEL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 23rd day of March, 2012

1. This is an application for interlocutory injunctions set out in the following terms in a notice of motion dated 23rd February, 2012:

"1. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from offering for sale, and selling, the plaintiff's flight services separately and/or as part of a package holiday as sold on the defendant's website.

2. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from using Ryanair's website in breach of the terms of use thereto.

3. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from infringing the database rights of the plaintiff, including (but not limited to), by use of, or procuring the use of, software or other system to extract data including flight information from Ryanair's website for the use on the defendant's website for commercial purposes.

4. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from using data and/or information extracted from Ryanair's website or regarding services provided by the plaintiff, on any and all websites owned, controlled and/or operated by the defendant, its servants and/or agents.

5. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from infringing the database rights of the plaintiff, by establishing and operating unauthorised links to the plaintiff's website from the defendant's websites.

6. An order pursuant to section 127(2) of the Copyright and Related Rights Act 2000 or otherwise, by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents, from infringing the plaintiff's copyright in the database of flight information contained on its website.

7. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from passing off its search and booking services as being connected with the plaintiff's search and booking service by presenting the plaintiff's flight data on the defendant's websites and selling holiday packages that comprise, in part, of the plaintiff's flight services.

8. An order by way of interlocutory prohibitory injunction restraining the defendant, its servants and/or agents from adding unauthorised and concealed charges to the cost of the plaintiff's services in such a manner as to give the impression that such charges are imposed by the plaintiff thereby misleading consumers.

9. An order by way of interlocutory quia timet injunction restraining the defendant, its servants and/or agents from further breaching the Terms of Use of Ryanair's website.

10. An order by way of interlocutory quia timet injunction restraining the defendant, its servants and/or agents from further infringing the plaintiff's database rights."

2. The plaintiff is a company incorporated in Ireland and carries on an international business as a low fares airline. The plaintiff sells its own flights through its call centre and website. The defendant is a company incorporated in Ireland and carries on the business of an internet travel agent.

3. The plaintiff claims an exclusive distribution system in respect of its flights and maintains that no other person or entity is entitled to sell, or offer for sale, Ryanair flights but Ryanair. Approximately 99% of all Ryanair seats are sold through its website. When a consumer logs on to Ryanair's website, it goes to a homepage which, apart from providing a search for Ryanair flights, also contains advertisements for accommodation reservation services, car hire, insurance services and various other ancillary and related services. It also provides advertising space on its homepage to third party service providers. The plaintiff earns money from advertising on its website and also generates income from ancillary services which it advertises itself.

4. The defendant operates as a travel agent through its website and enables consumers to search for and book package holidays. When a consumer logs on to the defendant's website and enters in details in respect of a desired destination and dates of travel, the defendant displays a pre-selected flight to the consumer to the chosen destination together with a list of a number of hotels to choose from. The consumer is then provided with the option of booking the package holiday on the defendant's website.

5. The plaintiff complains that it has discovered that the defendant is selling Ryanair flights as part of its package holidays and that this is contrary to the plaintiff's exclusive distribution clause as contained in its Terms of Use in respect of the Ryanair website. The plaintiff complains that it is the defendant and not the consumer that uses the website. For its part, the defendant asserts that it is the consumer who deploys the internet search and booking engine and it is the consumer who enters into the contract with the plaintiff. At all times, the booking details are provided to the plaintiff and they identify who the passenger is.

6. The plaintiff alleges that the defendant is operating a practice which is called "screen scraping" and that it is taking information from a database created by the plaintiff and using it for the purposes of its business contrary to the plaintiff's Terms of Use of its website. The defendant denies the allegations made by the plaintiff.

7. The parties are in agreement on the legal principles to be applied in considering an application such as this. The principles enunciated by the Supreme Court in *Campus Oil v. Minister for Industry and Energy* (No. 2) [1983] 1 I.R. 88 apply. The test to be applied is as follows:-

- (i) Is there a fair *bona fide* question to be tried?
- (ii) Are damages an adequate remedy?
- (iii) Does the balance of convenience fall in favour of the granting of an injunction?

8. In *Kinsella v. McAleer* (High Court, 24th April, 2009), Clarke J. at para. 10 of his judgment referred to the observations of Griffin J. in the *Campus Oil* case when he said that at an interlocutory hearing, it is no part of the Court's function to resolve conflicts of evidence on affidavit. Clarke J. said:

"The reasons for this are clear. An interlocutory injunction involves a quick and early hearing designed to determine what is the proper way to leave the affairs of the parties until there has been a full trial. It is not practical, therefore, for the Courts to become involved in deciding contentious issues of fact or complicated legal questions as to the rights of the parties at this stage because the information and evidence is not available."

Is there a bona fide question to be tried?

9. The plaintiff has described in affidavits and its written submissions the interaction between the plaintiff and the defendant. It claims that the defendant is engaged in what is commonly described as "screen scraping". This is an interaction of automated software with a website in a manner designed to mimic the actions of a human user so as to selectively extract data from the targeted website, in this case, the Ryanair website, thereby enabling the screen scraper to reutilise and present the data on its own website for its own purposes. The plaintiff's Terms of Use govern the use of its website and the plaintiff maintains that the defendant is using its website contrary to its Terms and Conditions. This is denied by the defendant which claims that it is the consumer who deploys the internet search and booking engine and who enters into the contract with the plaintiff. The plaintiff relies on the decision of Hanna J. in *Ryanair Ltd. v. Billigfluege GmbH* [2010] IEHC 47 as authority for the proposition that by its actions, the defendant is bound by the plaintiff's website Terms of Use. I do not accept that argument because it is clear that Hanna J. was only dealing with a jurisdiction issue in that judgment. He says at p. 2 of his judgment:

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

He says that one of the issues which may ultimately fall to be determined by the Court if the plaintiff overcomes the initial hurdle of defeating the defendant's jurisdiction application is whether or not the plaintiff's website Terms of Use constitutes a valid and legally binding contract which was entered into by the defendant through its use of the website. This clearly suggests that he was postponing any decision on that issue. At p. 6 of his judgment, he holds that the jurisdiction clause is severable and distinct from the agreement in terms of validity and capable of surviving independently of it. On that basis he went on to consider the jurisdiction clause in the plaintiff's website's Terms of Use, notwithstanding the fact that the defendant in those proceedings disputed that document's validity.

10. The plaintiff raises a number of issues on its claim that there was a breach of contract and these are argued around some technical points such as "click wrapping" and "browse wrapping". It also makes claims in respect of the plaintiff's database rights which it claims have been infringed and claims trespass to goods/chattels, conversion, passing off and unlawful interference with economic and/or contractual interests. The defendant deals with each of these matters in its submissions and argues that the plaintiff has not even met the threshold of an arguable case or serious issue to be tried in the light of various judgments of EU Courts in cases in which Ryanair was involved. It is not necessary for me to rehearse those decisions here. Suffice it to say that I am quite satisfied that the plaintiff has established that there is a *bona fide* question to be tried on many of the points which it has raised, although I do not accept that it has established that threshold in relation to a passing off claim.

Are damages an adequate remedy?

11. The plaintiff asserts that there are two serious matters which arise from the manner in which the defendant operates and that these give rise to the plaintiff being exposed to either sanction from the Data Protection Commissioner and/or litigation from consumers whose right to privacy has been breached. The plaintiff also claims that it could be subject to claims resulting from cancelled flights, obligations to pay compensation unless it notifies a passenger in advance in accordance with timelines set out in Article 5 of EU Council Regulation 261/2004, establishing common rules on compensation and assistance to passengers in the event of being denied boarding and of cancellation or long delay of flights. The plaintiff complains that it may not have the details of the passenger that it requires owing to the manner in which the passengers are booked on to the Ryanair flights through the assistance of the defendant. The plaintiff also claims that its relationship with advertisers will be affected by virtue of the fact that people availing of the defendant's services may get access to Ryanair flights without being exposed to the advertising which is an integral part of the plaintiff's website, and the plaintiff may lose benefits either directly or indirectly through this. The plaintiff asserts that it is difficult if not impossible to quantify such damages and that damages would not be an adequate remedy as it would suffer a loss of goodwill and be exposed to claims in a manner which would not arise if the consumers were booked on their flights in the normal way.

12. I am dealing with this application as a claim for interlocutory relief and I take into account the fact that the plaintiff has not been able to give any specific examples of claims being made against it or actual losses sustained as a result of the defendant's activity. From such information as was available to the Court, it is clear that the plaintiff's business is growing year on year, and while the plaintiff may well be able to establish some of the damage that it asserts, when the case gets on for a full hearing, it seems to me that a number of the plaintiff's apprehensions are somewhat unreal and fanciful and there is no evidence, to date, it has suffered any

loss which can not be dealt with by way of damages at the end of the day. In my view, damages are an adequate remedy in this case. To a significant extent, the issue of damages is tied up with the balance of convenience because there is credible evidence that the defendant could suffer loss and damage which would not be compensatable in damages if an interlocutory injunction were to be granted.

Balance of convenience

13. There is no evidence that the defendant acted speedily in order to consolidate its position before the hearing of the interlocutory motion. The defendant has been carrying on business in the manner complained of since 2010 without interference. The defendant has produced credible evidence to suggest that it would suffer significant loss and damage if it were restrained by way of injunction from continuing to carry on business as it has been doing. On the other hand, the plaintiff has claimed that it has suffered and is continuing to suffer losses which are of a somewhat intangible nature but, nevertheless, real. But the plaintiff has been unable to establish any actual loss which is, to some extent, due to the nature of the damage which it alleges. In the absence of evidence that the defendant has sought to consolidate its position prior to the application by the plaintiff, it seems to me that the status quo is the position that obtained since 2010, when the defendant first started offering to its clients packages which included a flight operated by the plaintiff. There are many conflicts of fact in this dispute which are not capable of resolution on affidavit and which it would be inappropriate to try to resolve at this stage of the proceedings. The defendant's modus operandi is now an established enterprise. If it was required to cease that activity pending the trial of the action, it would cause great hardship and inconvenience to the defendant should it be successful at the trial because it would then have to start up all over again.

14. A very substantial number of documents were produced to the Court at the hearing of the interlocutory application, which set out in considerable detail the position of the plaintiff and defendant, and it seems likely that both parties would be in a position to deal with an early trial date with a view to resolving the issues between them at a full hearing. In my view, the balance of convenience favours making no interlocutory order in this case.

15. Accordingly, I refuse the plaintiff's application.