

**THE HIGH COURT****2009 7499 P****BETWEEN****RYANAIR LIMITED****PLAINTIFF****AND****UNISTER GmbH****FIRST NAMED DEFENDANT****AND****AERUNI GmbH****SECOND NAMED DEFENDANT****JUDGMENT of Mr. Justice Paul Gilligan delivered the 22nd day of March, 2011**

1. The application before the court as brought by the plaintiff is for a direction that the first named defendant disclose the name, personal and/or business registered address and/or place of business, email address, telephone number, fax number and such other points of contact that this Honourable Court deems proper of the "third party provider" referred to throughout the affidavit of Mirko Richter, sworn on the 14th June, 2010, which affidavit is sworn in the wider context of these proceedings.
2. The plaintiff is an airline that carries on the vast majority of its business through its websites [www.ryanair.com](http://www.ryanair.com) and [www.bookryanair.com](http://www.bookryanair.com) by providing flight advertisement, search information, reservation and purchase services in respect of its own flights. The plaintiff also provides additional facilities whereby complementary and ancillary services such as accommodation reservation, car hire and insurance services may be accessed and booked by the plaintiff's customers.
3. The first defendant is a limited liability company organised and existing under the laws of Germany. It is domiciled in Germany and has its registered office in Leipzig. The first defendant does not have any place of business in Ireland. It carries on business as an online travel and Internet portal on its website [www.ab-in-den-urlaub.de](http://www.ab-in-den-urlaub.de). The main part of the software used is the 'Internet Booking Engine', which processes data received from several third party service providers via interface edited for display on the website.
4. In essence, what has occurred is that the plaintiff's website is being accessed and information is being taken therefrom which is then used for the purpose of selling the plaintiff's flights to customers. The first defendant claims that its system enables consumers to identify the availability and price of flights and to perform a comparative analysis of those available flights. It is argued that the information made available to the consumer mirrors the information on an airline's website and includes where appropriate the fare rules and terms and conditions of the airline. If the consumer decides to make a booking, the consumer would provide all of the relevant details and information needed to purchase the flight and these details would be sent onwards to the airline's website or online booking system. The first defendant claims that at all times it is the consumer that is the party transacting the business with the airline's website or online booking system and that the first defendant is simply acting as agent and technology provider for such consumer. The first defendant receives a commission from the consumer in respect of the service it provides.
5. The second defendant is a limited liability company organised and operating under the laws of Germany. The second defendant owns, operates and controls the website [www.fluege.de](http://www.fluege.de). The second defendant was joined as co-defendant in this action by order of Murphy J on the 12th April, 2010.
6. Despite a request from the plaintiff, the first named defendant refuses to disclose for the purpose of these proceedings the identity of the entity who actually accesses the Ryanair sites.
7. However, the first named defendant is also engaged in litigation with the plaintiff in Germany and a jurisdictional issue has arisen. This issue was before the German Courts on the 26th February, 2011, and judgment has been reserved with a further hearing scheduled for the 13th April, 2011.
8. In the German proceedings Unister GmbH has set out in court documentation similar to a statement of claim that it has a contractual relationship with Ytsilon.netAG. They say that this provides an electronic interface for numerous travel agencies that enables flight data to be queried and the flights offered by Ryanair and numerous other low cost airlines to be booked. They say that after the customer has entered the flight data he wants on the first named defendant's site, they then send the data, *inter alia*, to Ytsilon.netAG and they identify flights that match the customer's desired data, and they then return these flights to the first named defendant and they are then offered to the customer on the first named defendant's site as part of the booking transaction.
9. The plaintiff claims that the defendants, as users of the plaintiff's websites, are bound by the Terms of Use governing those websites, which prohibit any party other than the plaintiff from selling the plaintiff's flights and/or services. The plaintiff claims that this constitutes a breach of contract. The plaintiff further claims that the defendants have breached the rights, in particular database and copyright right, of the plaintiff under the Copyright and Related Acts, by virtue of the manner in which the defendants' websites interact with those of the plaintiff. The plaintiff further claims that the defendants have breached the trademark rights of the plaintiff through the unauthorised use of registered trademarks of the plaintiff on their websites. The plaintiff also submits that the defendants are passing off its search and booking services available through their websites as being connected with the plaintiff, thereby causing damage to the reputation and goodwill of the plaintiff, particularly having regard to the fact that the first defendant imposes an additional unauthorised charge on the consumer.
10. The plaintiff submits that the case being put forward by the first defendant is that it is not the entity that accesses and uses the

plaintiff's websites, but that a third party does so and the plaintiff contends that the first defendant cannot simply make such a bald averment without providing details of the said third party.

11. The plaintiff in these proceedings further submits that the Jurisdictional issue is clear cut having regard to Clause 7 of the Terms of Use of the plaintiff's website, which had to be agreed to before any information is imparted to a would be consumer of its product.

12. Clause 7 of the Terms of Use provides as follows:-

**"Applicable law and jurisdiction.** *It is a condition precedent to the use of the Ryanair website, including access to information relating to flight detail, costs etc., that any party submits to the sole and exclusive jurisdiction of the Courts of the Republic of Ireland and to the application of the law of that jurisdiction, including any party accessing information or facilities on their own behalf or on behalf of others."*

13. In essence, Ryanair is seeking disclosure of the identity business details of the third party provider referred to throughout the affidavit of Mirko Richter, sworn on the 14th June, 2010, and as identified in the German proceedings wherein it is set out that the plaintiff company sends the relevant data, *inter alia*, to Ytsilon.netAG.

14. In essence the plaintiff, Ryanair, seeks disclosure of the relevant details of Ytsilon.netAG to enable it to join the "third party provider" to these proceedings. It is contended that Ryanair is clearly suffering a wrong and that the issue to be determined will relate to the entities committing the wrongful act. It is alleged that Ryanair's terms and conditions of use prohibit any other person from selling Ryanair flights, and yet Ryanair flights are being sold through the first named defendant's websites and whether this is caused by the first named defendant and/or a third party provider is a matter yet to be determined. The plaintiff maintains that there is a clear breach of its terms and conditions of use. In order to enable the court to consider the issue as to jurisdiction and to completely adjudicate upon and settle all the questions involved in the cause, the relevant third party providers should be joined as party to these proceedings.

15. Further, it is contended on the plaintiff's behalf that even if the first named defendant is not engaged in any wrongful conduct and is thus an innocent party, pursuant to *EMI Records v. Eircom* [2005] 4 I.R. at p. 148, this Court has the power to make an order against the first named defendant if the court is satisfied that a wrong is being committed.

16. The first named defendant accepts that the parties have agreed to ask this Court to decide as a preliminary issue whether the court has jurisdiction to direct such disclosure in circumstances where there is as yet an undecided pending challenge to jurisdiction under the Brussels Regulation.

17. The first named defendant relies on the fact that in its plenary summons, as issued on the 14th August, 2009, Ryanair claims a Norwich Pharmacal-type substantive relief, in that it prays for:

"An order directing the defendant, its servants and/or agents to make full disclosure to the plaintiff of all information in its possession or procurement which identifies or assists in identifying all individuals, companies and/or other persons who are or were involved in any activities which may infringe or have infringed the plaintiff's rights including but not limited to the plaintiff's trademarks and the plaintiff's database rights."

18. The first named defendant's claim that the Irish Courts do not have jurisdiction and in relation to the jurisdiction of this Court it is submitted that as regards Article 5(1) of the Brussels I Regulation the substantive contractual obligations that the plaintiff is attempting to rely on in this action are negative obligations and that, in those circumstances, no special jurisdiction for contractual matters can be given and the plaintiff must bring its contractual claim in Germany, being the place of domicile of the first defendant. The first defendant further submits that, insofar as their activities could be said to be "harmful events" within the meaning of Article 5(3) of the Brussels I Regulation, it is clear that those events take place in Germany, the location of the first defendant's technical and business operations.

19. At para. 17 of the plenary summons it is further claimed:

"An order for any appropriate reliefs under the European Communities (Enforcement of Intellectual Property Rights) Regulations 2006 (S.I. No. 360 of 2006)."

20. It is contended on behalf of the first named defendant that the order sought by the plaintiff in these proceedings in its interlocutory motion is the directing of disclosure, which is the same relief it seeks from the court in the substantive action as part of its final relief.

21. The first named defendant relies on the Brussels Regulation and, in particular, Article 2(1) of the Council Regulation EC No. 44/2001 of the 22nd December, 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters where in it is stated:

"Subject to this Regulation persons domiciled in a member state shall whatever their nationality be sued in the courts of that member state."

22. In these proceedings the first named defendant has entered a conditional appearance and by notice of motion dated the 4th February, 2010, has challenged jurisdiction and this application is still pending.

23. As the first named defendant is domiciled in Germany and as the guiding principle of the Brussels Regulation is that persons are to be sued in the courts of the member state in which they are domiciled, in essence, the first named defendant contends that the issue as to jurisdiction is open to significant argument.

24. The first named defendant relies on the necessity for the plaintiff to demonstrate the requisite consensus between it and the first named defendant herein, and that this consensus must be clearly and precisely demonstrated. It is further contended that in this regard this Court when dealing with the jurisdiction aspect would have to be able to readily decide whether it has jurisdiction on the basis of the Rules of the Convention without having to consider the substance of the case.

25. Counsel for the first named defendant has referred to the judgment of Clarke J., in *Ryanair Ltd v. Bravofly Ltd and Travel Fusion Ltd* [2009] IEHC 41 at paras. 7.11 and 7.12.

26. As Clarke J. stated in the course of his judgment, it would be most unsatisfactory if a court was 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. He did accept that there could, however, be cases where the unsatisfactory situation as identified could not be avoided.
27. It is contended on the first named defendant's behalf that what the plaintiff is seeking in this application is an order the would require a response other than the normal interrogatory situation pursuant to the Rules of the Superior Courts and is, in effect, a Norwich Pharmacal Order for the identification of an alleged wrongdoer. This, in fact, is the substantive relief as sought by the plaintiff herein. It is contended on the first named defendant's behalf that it is not permissible for Ryanair to circumvent the effect of the Brussels Regulation by seeking Norwich Pharmacal relief in an interlocutory application where a jurisdictional challenge by a German domiciled defendant is pending. Further, if such a process were to occur in the framework of a jurisdictional challenge, it can hardly be stated that the jurisdiction had been readily decidable.
28. It is contended on the first named defendant's behalf that the real purpose of Ryanair's application for disclosure is to advance its substantive case and to join a third party to these proceedings.
29. In these circumstances it is contended that there is no power for the Court to direct the disclosure sought and in this matter would effectively grant Ryanair a relief which it seeks in the prayer of its plenary summons as final relief, especially where this Court has yet to decide whether it has jurisdiction under the Brussels Regulations to hear the substantive action.
30. As matters presently stand the jurisdictional issue remains open to be determined both in these proceedings and in the proceedings between the same parties as taken in Germany. It is clear that in the German proceedings the first named defendant in these proceedings maintains that it does not directly access or use the plaintiff's websites, but rather it interacts with a partner/third party. The unusual feature is that in the German proceedings, in a document entered on behalf of the first named defendant, the case is clearly made out that the first named defendant in these proceedings has a contractual relationship with Ytsilon.netAG, and that this entity provides an electronic interface for numerous travel agencies that enables flight data to be queried and the flights offered by the plaintiff company and numerous other low cost airlines to be booked. After the customer has entered the flight data he wants onto the Ytsilon.netAG site, the first named defendant herein sends these details on to, *inter alia*, Ytsilon.netAG and they identify the flights that match the customer's desired data and they then return these flights to the first named defendant company herein, and they are then offered to the customer on the first named defendant's internet site as part of the booking transaction along with offers from other flight data providers.
31. As has been pointed out to the court the entity accessing the Ryanair website has to agree to the terms and conditions before proceeding to obtain the relevant information.
32. In essence, the first named defendant is maintaining a case that it does nothing wrong because, in fact, it is not accessing the plaintiff's websites and that such accessing that is carried out is committed by a third party service provider. However, on its own admission the first named defendant accepts that that service provider provides it with the information that was obtained from the Ryanair website.
33. The first named defendant advances a strong contention in respect of jurisdiction, and further that, if this application were to succeed it effectively grants one of the primary reliefs as sought in the plenary summons.
34. The rights and entitlements of the respective parties have to be balanced and, in my view, the overriding feature of this case is that there is a *prima facie* demonstration of a wrongful activity in the use of the plaintiff's websites. The first named defendant is attempting to hide behind the activities of a service provider who actually accesses the plaintiff's website and delivers the information back to the first named defendant. The very fact of the first named defendant's claim that it does not actually access the plaintiff's website is also a feature in respect of the jurisdictional issue.
35. I am satisfied that the plaintiff makes out a case for the making of the order which is sought. The reality of the situation is that the first named defendant for its own purpose was prepared to disclose the factual background identifying the particular service provider in the German proceedings as set out in court documentation. Accordingly, it is apparent that the first named defendant was prepared to reveal the identity of the service provider website for its own purpose in the German proceedings but not prepared to reveal the identity of that entity for the purpose of these proceedings and, in my view, that situation has the potential to create an injustice.
36. Accordingly, I grant the application as brought by the plaintiff for a direction that the first named defendant discloses the name, personal and/or business registered address and/or place of business, email address, telephone number, fax number and such other points of contact of the third party provider referred to throughout the affidavit of Mirko Richter, sworn on the 14th June, 2010.