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Case No: CP-2021-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 13 April 2022

Before :

LORD JUSTICE NUGEE

Between :

ON THE BEACH LTD

Claimant

- and -

(1) RYANAIR UK LTD

(2) RYANAIR DAC

Defendants

Brian Kennelly QC and Emma Mockford (instructed by Stephenson Harwood LLP)
for the Defendants

Robert O'Donoghue QC and Max Schaefer (instructed by Hogan Lovells International LLP) for the Claimant

Hearing date: 10 March 2022

Approved Judgment

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LORD JUSTICE NUGEE

Remote hand-down: This judgment was handed down remotely at 10.30am on 13 April 2022 by circulation to the parties or their representatives by e-mail and by release to BAILII and the National Archives.

Lord Justice Nugee:

Introduction

1. The Claimant, On The Beach Ltd (“**OTB**”), a UK company, is an online travel agent that allows members of the public to book package beach holidays via its websites and apps.
2. The Defendants operate Ryanair flights, including flights to and from the UK. Those to EU destinations are operated by the 2nd Defendant Ryanair DAC, an Irish company; those to non-EU destinations are operated by the 1st Defendant Ryanair UK Ltd, a UK company which is its subsidiary. It is not generally necessary to distinguish between them and I will refer to them together as “**Ryanair**”.
3. This action was brought by OTB against Ryanair for damages and injunctive relief for what is claimed to be a concerted campaign by Ryanair aimed at preventing competition from online travel agents, including OTB. This is said to be unlawful (i) as a breach of s. 18 of the Competition Act 1998 (which prohibits conduct which amounts to the abuse of a dominant position in a market if it may affect trade within the UK) and (ii) as constituting the tort of causing loss by unlawful means.
4. By the present application Ryanair applies for a stay of these proceedings pursuant to Art 30 of EU Regulation 1215/2012 (“**Brussels Recast**”) on the ground that there are related proceedings ongoing in Ireland. It is common ground that Art 30 continues to apply to the present application despite the UK having ceased to be a Member State of the EU. It is also common ground that the application gives rise to two questions: (1) whether the proceedings in Ireland, or any of them, are “related proceedings”; and (2) if so, whether the Court should exercise its discretion to order a stay.
5. Ryanair applies in the alternative for a stay under the Court’s general case management powers, but in practice this adds little, if anything, to the application under Art 30 and it was scarcely argued.

Background in more detail

6. The facts have of course not yet been found and are in some respects highly contentious, but I can summarise the parties’ respective positions quite shortly.
7. OTB’s case, as set out in the Particulars of Claim in this action, can be summarised as follows:
 - (1) OTB offers services via the web and apps for mobile devices. These enable consumers to book short-haul package holidays online. Although it has an international segment which offers holidays from websites in Sweden, Norway and Denmark, the vast majority (99.7%) of holidays are booked via its UK-facing website and app, and almost all of these depart from the UK. Its claim in this action is concerned exclusively with holidays that are booked through the UK-facing website and app and depart from the UK, and the vast majority of relevant consumers are thus resident in the UK.
 - (2) OTB operates as a “one-stop shop” where customers can select various

components of their holiday, such as flights and hotels, from different providers, and buy them in a single transaction. That includes Ryanair flights. For most flights, including Ryanair flights, OTB makes the booking (or attempts to do so) as agent on the customer's behalf. In providing its services it is directly competing with Ryanair both in providing flight booking services to customers and in offering to arrange ancillary travel services such as hotel accommodation and car hire. Ryanair does not welcome such competition but wants to own the customer relationship itself, monopolise the market for booking its flights, and reduce competition and choice for ancillary services.

- (3) In pursuit of this end Ryanair has not only engaged in multiple litigation against online travel agents and their service providers, but adopted a multi-faceted course of conduct aimed at preventing such competition. This is said to include making false and disparaging claims about online travel agents, including OTB; attempting to prevent OTB from completing bookings on behalf of its customers; refusing to allow OTB customers to check in online, or requiring them to undergo a verification process which makes it difficult for OTB to perform its services for them; and withholding refunds from OTB customers. That conduct is pleaded as both an abuse of a dominant position, and as the tort of causing loss by unlawful means, and OTB claims damages and injunctive relief accordingly.
8. Ryanair has not yet pleaded a Defence in this action, but I can take its case from evidence given by Mr Paul Phillips, a partner in Stephenson Harwood LLP, Ryanair's solicitors, in support of the present application. It can be summarised as follows:
- (1) Ryanair is a low-fares airline. Its business model is based on being able to sell its flights directly to customers, thereby maximising its opportunities to sell ancillary products to them. It therefore predominantly advertises, markets and sells its flights to customers via its own website and not through travel agents or other online platforms.
 - (2) Online travel agents such as OTB obtain data regarding Ryanair flights by "screen-scraping" Ryanair's website in order to display Ryanair's flight information on their own websites. Screen-scraping is the practice of using software to interact with a website to extract information from it such as price, flight and timetable information. OTB is one of a number of online travel agents which do this, and has been doing it for 10 years.
 - (3) This practice has caused wide-ranging difficulties for Ryanair, due in large part to the fact that agents such as OTB do not provide Ryanair with the personal e-mail address of the customer but instead with an e-mail address generated by the agent. That has led to customers not being informed of cancellations, or Ryanair being unable to assist with customer service queries, or in one case (not I think involving OTB) Ryanair suffering adverse publicity when a letter of apology did not reach a customer.
 - (4) Second, screen-scraping interferes with Ryanair's business model. Ryanair bears the significant costs involved in hosting and operating its website and regards the actions of the online travel agents as the unauthorised taking and use of its property at its expense, depriving it of the ability to sell ancillary

products which is what enables it to operate its low-cost model.

- (5) Third, the practice of online travel agents has inhibited Ryanair from complying with its own regulatory obligations. To satisfy various regulatory obligations Ryanair needs to liaise with its passengers directly, and it requires customers' own e-mail addresses to do this.
- (6) Ryanair's position is that screen-scraping constitutes a breach of the terms of use of its website and the infringement of its intellectual property rights.

These proceedings

9. There are four sets of proceedings which need to be considered, namely this action and three actions pending in Ireland (collectively "**the Irish proceedings**").
10. So far as this action is concerned, the procedural history can be shortly stated:
 - (1) The claim form was issued on 10 June 2021.
 - (2) OTB applied for permission to serve Ryanair DAC out of the jurisdiction on 18 June 2021, and such permission was granted by former Chief Master Marsh, sitting as a Deputy Master, on the same day.
 - (3) OTB's Particulars of Claim were served on 1 October 2021.
 - (4) On 5 November 2021 Ryanair issued this application.
 - (5) By agreement between the parties (and a consent order dated 5 November 2021) time for service of the Defence has been extended until 28 days after determination of this application.

The Irish proceedings

11. The three Irish proceedings have each been brought by Ryanair DAC and are (1) a claim against OTB ("**the Irish OTB proceedings**"); (2) a claim against a Romanian online travel agent called SC Vola.ro SRL ("**Vola**" and "**the Vola proceedings**"); and (3) a claim against Skyscanner Ltd and associated companies ("**Skyscanner**" and "**the Skyscanner proceedings**").
12. The procedural history of the Irish OTB Proceedings is as follows:
 - (1) Ryanair DAC (then called Ryanair Ltd) issued a claim against OTB in the High Court of Ireland on 27 September 2010. The general endorsement claimed various relief for breach of contract and infringement of intellectual property rights. It was served on OTB in December 2010.
 - (2) OTB entered a conditional appearance in January 2011, and applied by motion in March 2011 to set aside service on the grounds of lack of jurisdiction. That was rejected by Laffoy J in a judgment on 22 March 2013 to the effect that the terms of use of Ryanair's website (which incorporated an express choice of Irish law) were sufficient to found jurisdiction: *Ryanair Ltd v On The Beach Ltd* [2013] IEHC 124. OTB appealed to the Supreme Court where the appeal

was heard together with another appeal concerning a claim by Ryanair against a German online travel agent. Both appeals were dismissed by the Court for reasons given by Charleton J on 19 February 2015: *Ryanair Ltd v Billigfluege.de GmbH, Ryanair Ltd v On The Beach Ltd* [2015] IESC 11.

- (3) On 22 April 2015 Ryanair served its Statement of Claim. On 4 June 2015 OTB issued a Notice for Particulars, asking for particulars of the Statement of Claim. Ryanair's replies were served on 16 September 2016 (over 15 months later). OTB considered some of the replies insufficient and sought better particulars by letter dated 21 December 2016; Ryanair replied on 7 April 2017.
- (4) OTB considered the further replies to be still insufficient, and issued a notice of motion to compel further particulars on 11 May 2017. That was ultimately adjourned generally on 7 December 2017, Ryanair's then solicitors, Philip Lee, having indicated an intention to amend the Statement of Claim. By letter dated 8 November 2017 Philip Lee enclosed a draft Amended Statement of Claim and asked for OTB's consent to amend, failing which they would apply to the Court for leave to amend. OTB declined to consent.
- (5) Ryanair did not however apply for leave to amend, and there matters rested for over 2½ years. Under the Irish rules of procedure one month's notice of intention to proceed is required where proceedings have been dormant for a year or more, and on 31 July 2020 Ryanair's new solicitors, Arthur Cox, filed both a notice of change of solicitors, and a notice of intention to proceed, serving them on 5 August 2020.
- (6) Despite that no further steps were in fact taken. OTB's response was to issue a notice of motion on 10 June 2021 for an order dismissing the proceedings for want of prosecution. That motion has recently been heard, on 8 and 9 March 2022 (the two days before the hearing of the current application before me); judgment was reserved and I was not told when it is expected.
- (7) In the meantime there have been two further applications. On 23 July 2021, Ryanair served a slightly updated version of its draft Amended Statement of Claim and again asked for consent to the amendment, but this was again refused, and on 30 July 2021 Ryanair issued a notice of motion for leave to amend. This is still pending, awaiting the outcome of OTB's motion to dismiss.
- (8) Then on 7 December 2021 Ryanair applied for case management directions. At the same time it made parallel applications in the Vola proceedings and a third set of proceedings, with a view to having all three sets of proceedings case managed together and overseen by one judge (but not consolidated). Those applications were heard together on 1 March 2022 by Allen J and he gave judgment on them on 3 March 2022. It was accepted by counsel for Ryanair that nothing useful could be done with the Irish OTB proceedings until the motion to dismiss had been decided. Allen J correctly predicted that judgment on that motion would be likely to be reserved, and said that he would not be in the least surprised if, whatever the outcome, the disappointed party were to appeal. Once the fate of the action was known, he foresaw no

reason why the Court would not be receptive of a focused case management application, but the next step, if the action survived, would be to list Ryanair's motion to amend the Statement of Claim. He therefore dismissed Ryanair's application for case management.

- (9) OTB has not yet pleaded a Defence.
13. Mr Brian Kennelly QC, who appeared with Ms Emma Mockford for Ryanair, took me through the latest iteration of Ryanair's draft Amended Statement of Claim. After pleading that direct contact with its customers is fundamental to its business model, and that its website is a key part of its business, Ryanair alleges that OTB's screen-scraping activity (i) is in breach of the terms of use of Ryanair's website; (ii) infringes Ryanair's intellectual property rights, namely its copyright and database rights, and its trademark; and (iii) constitutes the conversion of Ryanair's property and trespass to its goods, and unlawfully interferes with its economic and contractual interests.
14. The procedural history of the Vola proceedings is as follows:
- (1) Ryanair DAC issued proceedings against Vola in the High Court of Ireland in September 2017.
 - (2) Ryanair's Statement of Claim was delivered on 17 November 2017. It is in similar terms to that sought to be advanced against OTB in the Irish OTB proceedings, alleging that Vola is engaged in screen-scraping and has committed breaches of contract, infringements of Ryanair's intellectual property rights, and a number of other torts.
 - (3) Vola challenged the jurisdiction of the Irish Courts, but this dispute was resolved in Ryanair's favour in January 2019.
 - (4) In March 2019 Ypsilon.net AG, a German entity that is alleged to have provided the data to Vola, was added as 2nd Defendant.
 - (5) Vola served its Defence and Counterclaim on 7 June 2019. The Defence denies that Vola has committed any breach of contract, infringement or other wrongful act. The Counterclaim however pleads a competition law claim alleging that Ryanair's acts constitute the abuse of a dominant position.
 - (6) Ryanair served its Reply and Defence to Counterclaim on 24 July 2019. Among other things, in its Defence to Counterclaim Ryanair admits that it objects to Vola selling Ryanair flights directly on Vola's website, or on any website other than Ryanair's, but pleads that this objection is justified to protect its technology and systems, its content, intellectual property, business goodwill, customers and business model.
 - (7) It appears from the judgment of Allen J in the case management motions that Ypsilon delivered its Defence in November 2019, but not at that stage a counterclaim, although it had since flagged in correspondence an intention to apply for leave to amend to add a counterclaim raising competition issues.
 - (8) The proceedings were considered by Sanfey J on a number of occasions in

2020 and 2021; he decided that there should be what is called a “modular trial”, that is that there should first be a trial in effect of Ryanair’s claim that the defendants’ screen-scraping is *prima facie* unlawful, and then a second trial to determine whether the practice of screen-scraping can be defended under competition law. The first module is currently in the discovery phase. It is apparent from Allen J’s judgment that Vola also wanted to progress discovery in relation to the second module, but that that had not yet been agreed or decided.

- (9) Allen J made a case management order and fixed a case management conference for the end of April 2022. It appears that that will primarily be concerned with directions for the trial of the first module.

15. The procedural history of the Skyscanner proceedings is as follows:

- (1) Ryanair DAC issued proceedings against three Skyscanner companies on 5 December 2019. It is proceeding in the Commercial List (unlike the Irish OTB and Vola proceedings which are proceeding in the Chancery List).
- (2) Ryanair delivered its Statement of Claim on 7 February 2020. This is not in quite the same form as the claims in the Irish OTB and Vola proceedings, as Skyscanner is not (or at any rate professes not to be) an online travel agent but a price comparison website. But Ryanair complains that it engages in screen-scraping activities and in selling, or facilitating the sale of, Ryanair flights and the claims that it brings for breach of the terms of use of its website, infringement of its intellectual property rights, and other torts are similar to those alleged against OTB and Vola.
- (3) Skyscanner’s Defence and Counterclaim was delivered on 21 October 2020. Its Counterclaim pleads an extensive case that Ryanair has been guilty of an abuse of dominant position, and it relies on this abuse in its Defence as precluding Ryanair from maintaining its various causes of action.
- (4) Ryanair’s Reply and Defence to Counterclaim was served on 19 November 2021.
- (5) Ryanair also applied for an interlocutory injunction against Skyscanner. That was refused by Twomey J in the High Court on 30 July 2020: *Ryanair DAC v Skyscanner Ltd* [2020] IEHC 399. An appeal by Ryanair to the Court of Appeal was heard on 28 and 29 October 2021. Judgment was reserved and had not been handed down at the time of the hearing before me, although it appears that the Court has now in fact dismissed the appeal for reasons given by Murray J on 16 March 2022: *Ryanair DAC v Skyscanner Ltd* [2022] IECA 64.
- (6) In January 2022 Ryanair applied to transfer the Skyscanner proceedings from the Commercial List to the Chancery List. Skyscanner opposed the application and it was due to be heard on 28 March 2022, but I was informed after the hearing that Ryanair had in fact withdrawn that application.
- (7) There is no suggestion that directions have yet been given for a trial of the

Skyscanner proceedings.

Art 30 of Brussels Recast

16. Brussels Recast, or, to give it its full title, Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, contains a number of provisions for allocating jurisdiction between courts of the Member States of the EU. It is a rewriting of Regulation (EC) No 44/2001 (“**Brussels I**”).
17. Recital (21) of Brussels Recast is as follows:

“In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.”
18. Section 9 of the Regulation (Arts 29 to 34) is headed “Lis pendens – related actions”. Art 29 applies where proceedings involving the same cause of action and between the same parties are brought in courts of different Member States. It is in mandatory terms, providing that any other court than the first seised shall first stay its proceedings until the jurisdiction of that court is established and then, once it has been established, decline jurisdiction in favour of that court.
19. Art 30 by contrast provides for a discretionary power to stay where there are related actions pending in the courts of different Member States, as follows:
 - “1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
 2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”
20. Arts 31 to 34 contain various supplementary provisions (including by Art 32 provision as to when a court is to be deemed to be seised) but nothing turns on them in the present case.
21. Art 30 is the successor to Art 22 of the 1968 Brussels Convention and Art 28 of Brussels I, which were in very similar terms, subject to some minor differences which

are not material for present purposes. Similar text is also found in Art 28 of the Lugano Convention 2007 in relation to actions pending in courts of different Convention States.

22. As already referred to, Art 30 of Brussels Recast continues to apply in the present case despite the fact that the UK has ceased to be a Member State of the EU. There was no dispute about this, but for completeness the relevant provisions are as follows:
- (1) Art 67(1) of the Withdrawal Agreement entered into on 12 November 2019 (the full title of which is Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community) provides that various provisions should continue to apply in the UK in respect of legal proceedings instituted before the end of the transition period (which ended on 31 December 2020), and proceedings related to them pursuant to Arts 29 to 31 of Brussels Recast. By Art 67(1)(a) that included the provisions regarding jurisdiction of Brussels Recast.
 - (2) EU law was in general retained in domestic UK law during the transition period. At the end of the transition period Brussels Recast was revoked by reg 89 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479.
 - (3) But there was a saving in reg 93A of those regulations whereby nothing in them affected the application of Art 67(1)(a) of the Withdrawal Agreement.
 - (4) Since all the Irish proceedings were instituted before the end of the transition period, the effect of Art 67(1)(a) of the Withdrawal Agreement is that Art 30 of Brussels Recast applies to this application, notwithstanding that this action was commenced in England after the end of the transition period. (There is in fact a subtle point on the wording of Art 67 of the Withdrawal Agreement. The Irish OTB proceedings were instituted in 2010 and Brussels Recast does not generally apply to legal proceedings instituted before 10 January 2015 (see Art 66(1)). But Art 67 of the Withdrawal Agreement refers to “legal proceedings instituted before the end of the transition period”, and Mr Kennelly’s submission is that this means that it disapplies the temporal limitations of Brussels Recast, and that Art 67 applies to the Irish OTB proceedings as well as the other Irish proceedings. I heard no argument to the contrary and will assume that that is right.)
23. Art 30 and its predecessors (and the equivalent provision in the Lugano Convention) have been much litigated, and there is a substantial body of authority on them. Very little of this was in dispute, although there was one point of some potential significance that was. I can therefore take the law for the most part quite shortly.
24. It follows from the wording of Art 30 that there are two questions which arise: (i) a jurisdictional or threshold question as to whether the two sets of proceedings in question are related within the meaning given by Art 30(3); and, if they are, (ii) a discretionary question whether to grant a stay.

“*Related proceedings*”

25. On the question of whether two sets of proceedings are related:

- (1) It is clear from the contrast with Art 29, which refers to proceedings involving the same cause of action and between the same parties, that the concept of related proceedings is wider than this.
- (2) Thus the expression is to be given a broad interpretation, and covers all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive: see the judgment of the ECJ in *The Tatry* (C-406/92) [1999] QB 515 at [53].
- (3) This language is, at any rate to me, a little opaque and I find it helpful to look at examples to understand what it means. A useful one is given by Advocate General Tesouro in his Opinion in *The Tatry* at [28] where he refers to separate actions brought against two persons allegedly responsible for an accident, one of which succeeds and one of which fails on the grounds that the damage does not merit compensation. In such a case the judgments can both be given effect to, as the parties are different. But the decisions are still contradictory in coming to a different conclusion on the same question. Or, to take another example referred to in argument, if A brings a claim against X for negligence in writing an opinion and the claim fails on the basis that X neither owed A a duty of care nor was negligent, that would not (at least in English law) usually prevent B, another person in materially the same position as A, from bringing his own claim against X for negligence based on the same opinion. If B’s claim succeeded, the two judgments would not be mutually exclusive, but the substance of the decisions (did X owe a duty of care to those in the position of A and B? was X negligent?) would conflict.
- (4) The leading domestic case is *Sarrío SA v Kuwait Investment Authority* [1999] AC 32 (“*Sarrío*”). Lord Saville said (at 40C) that the wide words of the article were designed to cover a range of circumstances from cases where the matters before the courts were virtually identical to cases where the connection was close enough to make it expedient for them to be heard and determined together, and (at 41F) concluded that there should be a broad commonsense view to the question whether the actions in question were related, applying the simple wide test set out in what is now Art 30, and refraining from an over-sophisticated analysis.
- (5) Assessing whether two actions are related is not an entirely mechanical process. It requires an assessment of the degree of connection and then a value judgment as to the expediency of hearing the two actions together in order to avoid the risk of inconsistent judgments: *Research in Motion UK Ltd v Visto Corp* [2008] EWCA Civ 153 at [37] (“*Research in Motion*”).
- (6) “Expedient” does not mean that it is in fact practicable or possible for the two actions to be heard together. It means rather that it would in principle be desirable for the two actions to be heard together: see *JSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708 (“*Kolomoisky*”) at [191] where the Court of Appeal examined a number of first instance decisions

which differed on this point and expressed a clear preference for this interpretation. Subsequent judgments at first instance have identified a tension between this aspect of *Kolomoisky* and the later decision of the Court of Appeal in *Euroeco Fuels Poland Ltd v Szsecin* [2019] EWCA Civ 1932, but have treated *Kolomoisky* as authoritative: see the very helpful summary of the position by Henshaw J in *Viegas v Cutrale* [2021] EWHC 2956 at [154]-[156]. It was not suggested to me that I should take any different view.

26. None of the above was in dispute. The one point of law which was in dispute was this. It is established that the exercise of seeing whether actions are related may require one to look not only at the claim but also at the defence to it: *Research in Motion* at [36]. Mr Kennelly, for Ryanair, says that in considering whether the Irish OTB proceedings are related to these proceedings, I can therefore consider the defence that OTB is likely to advance in the Irish OTB proceedings (and indeed the defence that Ryanair intends to plead in these proceedings). Mr Robert O'Donoghue QC, who appeared with Mr Max Schaefer for OTB, said that I could not do so as neither OTB in Ireland nor Ryanair in England has yet pleaded any defence, so the proceedings cannot be said to be currently related, even if they might become related in the future. This is a point that I consider below when considering the Irish OTB proceedings.

The discretion

27. If proceedings are related the Court has a discretion to grant a stay. Again there was little dispute on the law.
28. The leading domestic authority on the exercise of the discretion is *The Alexandros T* [2013] UKSC 70 at [92] per Lord Clarke (with whom all the other members of the Court agreed, at any rate on this point). He there referred to the opinion of Advocate General Lenz in *Owens Bank Ltd v Bracco* (C-129/92) where the Advocate General identified a number of factors which he considered to be relevant to the exercise of the discretion. Lord Clarke summarised what he said as follows. The circumstances of each case are of particular importance but the aim of what was then Article 28 of Brussels I is to avoid parallel proceedings and conflicting decisions, and in a case of doubt it would be appropriate to grant a stay. (The Advocate General also appeared to say that there was a strong presumption in favour of a stay but in the light of the way this statement has been regarded in later cases (see *Office Depot International BV v Holdham SA* [2019] EWHC 2115 (Ch) at [53] per Vos C) Mr Kennelly placed no reliance on this.) Three particular factors were identified as being of importance:
- (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions;
 - (2) the stage reached in each set of proceedings;
 - (3) the proximity of the courts to the subject matter of the case.

In conclusion the Advocate General said that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question.

29. Three other points of general principle can conveniently be mentioned at this stage. First, the burden of persuasion is on the applicant: *Centro Internationale Handelsbank AG v Morgan Grenfell Trade Finance Ltd* [1997] CLC 870 (“*Centro Internationale*”) at 891f per Rix J, followed in many other cases.
30. Second, although the Court of Appeal decided in *Kolomoisky* that the requirement, before two actions could be said to be related, that it be expedient for them to be heard together did not mean that it had to be shown that it was in fact possible for them to be consolidated or heard together, only that it would in principle be desirable (paragraph 25(6) above), nevertheless the Court went on to say that, when it comes to the exercise of the discretion, the fact that two actions could not be consolidated was highly significant, saying (at [210]) that “absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay”.
31. Third, in his written argument, although not I think repeated orally, Mr O’Donoghue submitted that the applicant must show a compelling reason to *grant* a stay, citing *SCOR SE v Barclays Bank plc* [2020] EWHC 133 at [32] per Mr Christopher Hancock QC. Mr Hancock did say that, but I do not think he was seeking to enunciate any principle of general application, merely to record what was agreed to be the position on the facts of the case. That was a case where it was common ground that English proceedings could not be heard with French criminal proceedings (see at [22]), and in those circumstances it was not disputed, on the basis of *Kolomoisky*, that there needed to be a compelling reason to grant a stay. I do not read Mr Hancock’s decision as intending to say any more than that.
32. A number of other matters were argued, but it is more convenient to consider them when considering the application of the principles to the present case.

The Irish OTB proceedings – are they related?

33. As appears above, in neither this action nor in the Irish OTB proceedings has any Defence yet been served. If one considers the matters that have already been pleaded, there is little overlap: the claims pleaded by OTB in this action are that Ryanair has abused its dominant position and caused loss to OTB by a number of unlawful acts, whereas the claims pleaded by Ryanair DAC in the Irish OTB proceedings are that OTB’s screen-scraping practices are wrongful in a number of different ways (contrary to the terms of use of Ryanair’s website, an infringement of Ryanair’s intellectual property rights and involving a number of torts). It was not I think disputed by Mr Kennelly that if I am confined to a comparison of the claims currently pleaded the two actions are not related.
34. Mr Kennelly however submits that I should have regard to what is likely to be pleaded by way of defence in both actions. So far as the Irish OTB proceedings are concerned, he submitted that I could safely infer that if OTB’s motion to dismiss the action fails, then it will plead its case on abuse of a dominant position by way of defence. OTB has not in terms said what it would plead, but Mr Hutton of Hogan Lovells International LLP, OTB’s solicitors, said in his witness statement that he understood that OTB intends robustly to defend Ryanair’s claims; OTB’s position that Ryanair’s conduct is an abuse of a dominant position is clear from its claim in the English proceedings; and, Mr Kennelly submitted, it is not obvious what other

defence OTB might have. Indeed in October 2010, when the Irish OTB proceedings were at a very early stage, Field Fisher Waterhouse LLP, OTB's then London solicitors, wrote to Ryanair denying that there was any substance to its claims, and one of the points they took was that Ryanair's conduct was anti-competitive and contrary to competition law.

35. I accept Mr Kennelly's submission as to the likely content of OTB's Defence in Ireland. If the Irish OTB proceedings survive OTB's application to dismiss them for want of prosecution, it seems to me wholly unrealistic to suppose that OTB will not deploy its competition arguments by way of defence. I asked Mr O'Donoghue if he had any instructions as to what OTB's Defence, if it comes to it, would look like, to which his answer was that he did not; and that it would depend on when a Defence had to be pleaded as Ryanair's conduct keeps evolving and the pleading might not be the same as that pleaded in the English action. No doubt that is the case, but Mr O'Donoghue did not deny that OTB would rely on Ryanair's conduct being anti-competitive, and since OTB's position is that it is, it seems to me obvious that they will say so in Ireland.
36. So far as the English proceedings are concerned, Mr Phillips' evidence is that if Ryanair has to defend the claim it intends to do so, among other things, by relying on its conduct not being abusive, or being objectively justified. That will involve considering a number of matters already in issue in the Irish OTB proceedings such as the nature of Ryanair's business model, the screen-scraping activities of OTB, whether that amounts to a breach of the terms of use of Ryanair's website and an infringement of Ryanair's intellectual property and so on. I have no reason to doubt that evidence.
37. In those circumstances I have no hesitation in concluding that if I can have regard to the Defences likely to be served in the respective actions, then they are indeed related for the purposes of Art 30. If both cases got to trial there would be likely to be a very significant overlap between them, such that it would indeed be expedient to hear them together to avoid the risk of inconsistent judgments. Put simply, there would be an obvious inconsistency if one Court decided that OTB's screen-scraping was unlawful and Ryanair's conduct not abusive, and the other Court decided the opposite.
38. So the next question is whether I can have regard to defences that have not yet been pleaded. It appears that there is no binding authority on the point, but Mr O'Donoghue said that I could not do so and that that followed from the decision of the Court of Appeal in *FKI Engineering Ltd v Stribog Ltd* [2011] EWCA Civ 622 ("**FKI**"). I will therefore look at that case in some detail.
39. The facts were as follows. In 2005 a German company called DeWind GmbH ("**DeWind**") agreed to sell its business assets to Stribog Ltd ("**Stribog**") by way of a business transfer agreement ("**BTA**"). In 2008 DeWind became insolvent at a stage when a sum of some €33m was still outstanding to it from Stribog by way of purchase price under the BTA, and a Dr Pannen was appointed as insolvency administrator in October 2008. In August 2009 he purported to assign to FKI Ltd and its subsidiary FKI Engineering Ltd (together "**FKI**") various claims that DeWind had, including claims against Stribog. On the basis of that assignment FKI on 2 September 2009 started proceedings in California against various members of the Stribog group. That precipitated a claim in Germany by Stribog, which issued proceedings in Lübeck on

18 September 2009 against FKI, claiming a declaration of non-liability with respect to any claims or rights asserted by FKI against it. There was an express carve-out of purchase price claims under the BTA where there was an English jurisdiction clause (somewhat eccentrically specifying Milton Keynes as the exclusive place of jurisdiction). At that stage nothing was said in the German proceedings about the possible invalidity of the assignment. On 21 January 2010 FKI brought proceedings in England against Stribog for the balance of the purchase price under the BTA, relying on the assignment. On 12 February 2010 Stribog, having obtained a copy of the assignment, served a voluntary statement in the German action which for the first time raised the argument that the assignment was void under German law.

40. In those circumstances Stribog applied in the English proceedings for a stay of them under what was then Art 28 of Brussels I on the basis that the proceedings were related and the German court was first seised. The application was heard by Burton J. He refused it on the ground that it was the English court that was first seised. His analysis was that the actions were not related until the question of the validity of the assignment was raised in the German action in February 2010, by which stage the English court was already seised of the English action.
41. The Court of Appeal allowed Stribog's appeal. Mummery LJ said that the first step was to identify if both courts were seised of an action. The second step was to identify when each court was seised of each action, here 18 September 2009 for the German court and 21 January 2010 for the English court. The third step was to compare those dates to see which court was first seised, here the German court. The fourth step was for the English court, as the court not first seised, to compare the proceedings to see if they were related: see at [41]-[44]. On this last point he said (at [44]):

“In making the comparison the court looks at all the circumstances, not just at the circumstances at the date of the institution of the English Action, in order to see how closely related the actions are and whether there is a risk of irreconcilable judgments in separate proceedings. In this case it is agreed that the actions were related at the time of the issue and hearing of the application. There is a risk of irreconcilable judgments in these actions if the English courts decide that the Assignment Agreement is valid and the German courts decide that it is void (or vice versa).”

At [48] he said:

“Article 28, under which a stay is discretionary, looks to the current position and to matters that post-date the onset of the proceedings to consider the relationship between actions that *are pending* to see if they are related and if there is a risk of irreconcilable judgments.”

42. Rix LJ gave a detailed judgment of his own which reached the same conclusion, although he thought that one should first ask if two actions were related and then, if so, which court was first seised: see at [119]-[120], [125]. Wilson LJ agreed with both judgments, saying he did not see why the order in which the questions were asked mattered, but Rix LJ seemed to have the terminology on his side.
43. Mr O'Donoghue made two points by reference to *FKI*. First, by reference to the

passages from Mummery LJ's judgment that I have cited above, he submitted that what was significant was the current position at the date of the hearing, not what might be pleaded in the future. This seems to me a good example of the danger of taking statements out of a case and applying them to a different situation, something that Mummery LJ referred to in *FKI* itself at [40] where he said that "one should be cautious about placing too much weight on passages in authorities which, while in the same area of law and couched in general terms, are not directly in point."

44. In *FKI* the point Mummery LJ was making was that it did not matter that the two actions were not related at the time that they were first issued; what mattered was whether they were related at the time of the hearing. He drew an explicit contrast with what was then Art 27 of Brussels I (now Art 29 of Brussels Recast) which does require one to look back to the outset of proceedings: see at [47]. He was simply not addressing the question that arises in the present case, which is whether in assessing if two actions are related one can have regard not only to the current pleadings but, if a defence has not yet been pleaded, to what is likely to be pleaded by way of defence. I therefore do not accept the submission that it follows from Mummery LJ's statement in *FKI* at [48] that Art 28 "looks to the current position" that a prospective defence must be ignored.
45. Mr O'Donoghue's second point was based on something said by Mummery LJ at [32] where he said:

"The judge rejected Stribog's submission that the alleged invalidity of the Assignment Agreement, though not actually raised before 15 February 2010, was embryonic, inherent or intrinsic in the German Action from its inception."

Mr O'Donoghue suggested that Stribog's argument at first instance was therefore the same as that put forward here by Ryanair, namely that one could look not only at what was already in issue but what might be pleaded in the future, and that that had been rejected.

46. That seems to me to be a good example of another danger, which is trying to understand what happened in a case without reading the judgment. If one in fact looks up Burton J's judgment (*FKI Engineering Ltd v Stribog Ltd* [2010] EWHC 1160 (Comm)), it is entirely clear that what he rejected was the factual submission that the invalidity of the assignment was intrinsic in the German proceedings from the outset: see at [26]-[28], and in particular at [28] where he said that it was "quite clear that invalidity of assignment had not ... already been intrinsic within the German proceedings". He did not say anything about what he thought the legal position would have been had he accepted the factual basis for the submission. In fact he made a comment at [27(i)] as follows:

"It is not the case that the German proceedings were an action in which a claimant is relying on an assignment for the purposes of his claim, when it may be anticipated, and, even if not anticipated, turns out to be the case, that a defendant alleges the assignment to be invalid."

That suggests, if anything, that he was prepared to contemplate that the Court might have regard to a defence that had not yet been pleaded but could be anticipated.

47. There are a number of other suggestions to the like effect. First, in *FKI* itself, it was common ground that the two actions were related at the time of the hearing of the application. This was despite the fact that Stribog had not yet pleaded its defence in the English action, and so the issue as to the invalidity of the assignment was not yet raised on the pleadings in the English action. Although this was not disputed, none of the members of the Court of Appeal saw anything wrong with this, and Rix LJ explained the position at [68] as follows:

“As of the time of the current proceedings for a stay of the English action, Stribog had not yet filed a defence in the English action, but, in the light of the development mentioned immediately below in the German action [ie the February 2010 statement], it could be predicted that one at least of its defences would be that the assignment of DeWind GmbH’s claim under the BTA is void and thus ineffective.”

Although the point was not argued, that seems to me inconsistent with Mr O’Donoghue’s submissions, and entirely on all fours with Mr Kennelly’s submission that where no defence has yet been pleaded but the Court can confidently predict what it will be, the Court can take account of it in deciding whether there is a risk of irreconcilable judgments.

48. Second, Rix LJ refers to an earlier decision of the Court of Appeal in *The Happy Fellow* [1998] 1 Ll Rep 13. I was not referred to this case, but it is apparent from Rix LJ’s judgment in *FKI* that both Longmore J at first instance and Saville LJ giving the leading judgment in the Court of Appeal proceeded on the basis that a French court would regard itself as seised of the issue of limitation (in a marine collision sense) despite the fact that it did not appear to have been explicitly raised in those proceedings. That is not quite the same point, but it does suggest that in applying the “broad commonsense approach” enjoined by Lord Saville in *Sarrío*, the Court is not confined to issues explicitly raised in the proceedings but can have regard to what each court is in fact likely to resolve.
49. Third, in *Nomura International plc v Banca Monte dei Paschi Di Siena SpA* [2013] EWHC 31897 (Comm) (“*Nomura*”) the defendant to English proceedings applied for a stay of them under what was then Art 28 of Brussels I on the grounds that they were related to Italian proceedings, the Italian court being first seised. The defendant had not yet served a defence in the English proceedings but counsel acting for it confirmed in the course of the hearing that if the English action continued it was likely that the defendant would oppose the declarations sought and that it would seek to rely on all the matters pleaded that it had raised in the Italian proceedings: see at [40]. Eder J held (at [71]) that since the question whether actions are related is answered not just by looking at the claims alone but by looking at the claims and defences:

“it seems to me that in the context of article 28(3), I must proceed on the basis of the indication given by Mr Nash ... viz that if the present proceedings were to continue in England, the defendant is likely to oppose the declarations sought and that it would seek to rely on all matters which have already been raised in the Italian proceedings.”

50. Mr O’Donoghue said that *FKI* was not cited in *Nomura*, there does not seem to have

been any argument on the point, and the decision was *obiter* anyway as although Eder J held that the actions were related he declined to grant a stay as a matter of discretion. All of that may be right, but for the reasons I have attempted to give, I do not think that citing *FKI* would or should have made any difference, and Eder J's decision does seem to me consistent with the explanation given in *FKI* by Rix LJ at [68].

51. Although none of these indications is a binding decision on the point they do give considerable support to Mr Kennelly's submission. Moreover this seems more in accord with the purpose of Art 30, and the broad commonsense approach, eschewing an oversophisticated analysis, required by *Sarrio*. As Mr Kennelly suggested, it is no doubt often the case that a defendant will apply for a stay under Art 30 at the earliest possible stage of the second action as the whole point of doing so is to avoid having to engage with those proceedings, and hence that a defendant will often make an application before pleading a defence. But the Court hearing such an application is required by Art 30(3) to assess whether the two actions are so closely connected that it is expedient for them to be heard together to avoid the risk of irreconcilable judgments, which necessarily requires the Court to look forward to those future judgments with a view to considering whether they are likely to be dealing with the same issues. What those issues will be will depend not only on the claims, but also on the defences. Where the Court can see from the material before it what the defences are likely to be, it seems unnecessarily restrictive – and out of line with the broad commonsense approach – for it to ignore those matters simply because they have not yet been formally pleaded.
52. In my judgment therefore the better view is that where an application for a stay is made at a stage when the defence to an action has not yet been pleaded, the Court can have regard to the substance of a defence that it can confidently predict is likely to be pleaded. That may be (as in *Nomura*) because the defendant has confirmed that that is what it intends to do, or (as in *FKI*) because it is obvious, or (as in the present case) because the inference that that is what it will do is compelling.
53. On the question of principle therefore I accept Mr Kennelly's submission. But Mr O'Donoghue had another submission on the particular facts of this case which is that the Court can hardly proceed on the basis that OTB is likely to plead any particular matter by way of defence in the Irish OTB proceedings as if its motion to dismiss the action for want of prosecution succeeds, there never will be a defence. At that point any chance of the two actions being related will disappear.
54. Admittedly with some hesitation I think Mr O'Donoghue is right about this. I have concluded that the Court can have regard to a defence that has not yet been pleaded if it can confidently predict that it is likely to be. The Court will no doubt normally assume when asked to stay the second action that if no stay is granted both actions will continue to trial. That is what gives rise to the risk of irreconcilable judgments. It is in that context that I consider that the Court can properly take account of defences that are likely to be raised even though they have not yet been. But the present case is not like that. I was not asked by either party to form any view of the likely outcome of OTB's motion to dismiss, and I would in any event be very reluctant to do so as this is self-evidently a matter for the Irish court. I must therefore proceed on the basis that there is at the lowest a real prospect that the motion might succeed, and the Irish OTB proceedings be dismissed. Mr O'Donoghue is obviously right that in those

circumstances OTB never will plead a competition defence, or indeed any defence, in that action. He is also right, it seems to me, that that means that as matters stand, I cannot be sure, or indeed have any degree of confidence, that any competition issues will ever be raised in Ireland. But it is the prospect that OTB's competition case will be pleaded in Ireland that makes the cases closely connected.

55. I have not overlooked the fact that Ryanair intends to plead its business model and the like in support of its defence in England that its conduct is not abusive, or is objectively justified. But if one looks at the Irish proceedings as they stand, with no competition issues yet raised, there does not seem to me much overlap between the claims there made and Ryanair's prospective defence in England which will be focused very largely on competition issues.
56. I have come to the conclusion therefore that in the unusual circumstances of this case the current position is that the Irish OTB proceedings and these proceedings are not related, and that they may never become related because there is a real prospect that the Irish OTB proceedings will come to an end before any competition issues are ever raised in it. That means that no question of the exercise of the discretion to grant a stay under Art 30 arises. But I will go on to consider how I would have exercised it in case I am wrong on relatedness.

The Irish OTB proceedings – discretion

57. I will assume for these purposes that I am wrong on the question of relatedness. It is convenient to consider the question of discretion by reference to the three factors identified in *Owens Bank Ltd v Bracco* (paragraph 28 above).
58. The first is the degree of relatedness between the two actions and the risk of mutually irreconcilable judgments. Even if I am wrong that OTB's motion to dismiss means that the two actions are not currently and may never become related, it seems to me that it is still relevant to the exercise of discretion. In the normal case, as I have said, the Court second seised will no doubt assume that if a stay is refused both actions will proceed to trial. But in the present case that is quite uncertain. In deciding "the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions" I think it is a relevant consideration that the Irish action may well never come to trial at all. When asking to what extent it is expedient to hear the English action together with the Irish action, or to what extent there is a risk of irreconcilable decisions, the fact that it is currently entirely unclear if the Irish case will be heard at all or if there will ever be a judgment in it to my mind necessarily weakens both the desirability of hearing the English action with the Irish one and the likelihood of inconsistent judgments.
59. But let me assume that is wrong too, and that the comparison that should be made is between the issues that are likely to be raised in Ireland and England respectively on the assumption that both cases proceed to trial. On that assumption, then I accept that the Irish OTB proceedings and these proceedings would be very closely related – indeed, they are likely to be almost mirror images of each other – and the risk of mutually irreconcilable judgments is high.
60. The second factor is the stage reached in each set of proceedings. Here Mr O'Donoghue places particular reliance on the delay in the Irish OTB proceedings.

It is indeed quite striking that in proceedings issued as long ago as 2010, they have not yet progressed to the stage of pleadings being closed. Some of that is of course due to OTB's own decision to challenge the jurisdiction and appeal that question to the Supreme Court, but that only accounts for the first 4½ years or so. Some of the remaining delay would seem to be undoubtedly down to Ryanair, most obviously the 2½ years between OTB declining to consent to the amendment to the Statement of Claim and Ryanair's notice of intention to proceed, but also perhaps the length of time taken to answer OTB's Notice for Particulars and the lack of active steps being taken after the notice of intention to proceed (see paragraph 12(3)-(6) above).

61. Mr Kennelly said that the past delay was explicable because Ryanair, rather than progressing all the cases, was hoping that the Vola proceedings, which were progressing quickly, would come to trial first and act as a kind of test case for the others. What was important he said was not what had happened in the past but what would be likely to happen in the future. Ryanair was now attempting to move the Irish OTB proceedings on: it had applied, albeit unsuccessfully, for it to be case-managed together with the Vola proceedings, and it had applied for leave to amend. Allen J's judgment showed that he was open to case management of the Irish OTB proceedings once the motion to dismiss had been dealt with.
62. Mr O'Donoghue invited me to consider the suggestion that matters are now being actively progressed with a healthy degree of scepticism given the history of the Irish OTB proceedings to date. Moreover, nothing would happen in those proceedings until judgment was given on the motion to dismiss, and there was then a realistic possibility of an appeal which would take a certain amount of time. I accept that an appeal is a reasonable likelihood, and notice that Allen J, who is likely to have a better idea than me, said that he would not be in the least surprised if, whatever the outcome, the disappointed party were to appeal. I have no formal evidence before me as to how long such an appeal might take to be heard and disposed of, but I accept that I can get some indication from the appeal against the refusal of an interlocutory injunction in the Skyscanner proceedings, which I would have thought to be fairly comparable, where it appears that the appeal was heard about 15 months after the judgment of Twomey J, and judgment on the appeal was delivered about 4 months later (paragraph 15(5) above). That is no doubt a slender basis on which to form any view, but I think I can reasonably assume that an appeal might take between 1 and 2 years.
63. Moreover, as Mr O'Donoghue pointed out, Mr Phillips' evidence is that Ryanair expects the outcome of the Vola and Skyscanner proceedings to have a substantial impact on, if not resolve, many of the issues in the Irish proceedings. Mr O'Donoghue submitted that that can only mean that Ryanair expects the Vola proceedings to be resolved before the Irish OTB proceedings; and indeed Allen J refused to case manage them together saying that he could not see how a case that was the subject of a motion to dismiss could be sensibly case-managed with a case in which the pleadings were closed and the parameters of discovery decided at least as to one module. But Vola itself would not be resolved for some time to come: the competition issues were in the second module where there had not yet been discovery, and trial of the second module was some way off yet. On the basis that the Irish OTB proceedings would be resolved after that, it was obvious, he said, that they would not be resolved for many years.
64. I accept Mr O'Donoghue's submissions. I should make it clear that I do not intend to

suggest that there is any systemic delay in Irish proceedings, or seek to criticise the Irish courts. But on the facts of this case it does seem to me a reasonable inference that it will take some considerable time before the Irish OTB proceedings are likely to come to trial.

65. That means that although both the English and Irish actions are procedurally at much the same stage – in that claims have been pleaded but not yet defences – if they both continue there is likely to be more progress more quickly in the English action than in the Irish one where there is in practice a *de facto* stay pending resolution of the motion to dismiss, and the Statement of Claim is not yet in final form. In the English action, by contrast, if I refuse a stay on the present application there is no reason why the action should not progress in the usual way. I accept this and conclude that if both actions continue, the English action is likely to be ready for trial first, and by some distance.
66. Mr O’Donoghue said that that was a material consideration in deciding whether to grant or refuse a stay of the English proceedings: see eg *Centro Internationale* at 893 per Rix J, *Cooper Tire & Rubber Co v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm) at [113]-[114] per Teare J and on appeal sub nom *Cooper Tire & Rubber Co Europe Ltd v Bayer Public Co Ltd* [2010] EWCA Civ 864 at [54]-[57] per Longmore LJ. Mr O’Donoghue cited numerous other examples, but it is not necessary to detail them all as I did not understand the principle to be disputed. Mr O’Donoghue also made the point that OTB is not just complaining of a historic wrong but of an ongoing course of conduct by Ryanair which it says is causing it continuing difficulties, and that the longer it goes on the more damaging it is. OTB therefore wishes matters to be resolved sooner rather than later. There seems to me to be considerable force in that, and, other things being equal, I think I should be slow to drive it away from a jurisdiction where it can take the initiative in progressing the action to one where it is less in control and where it fears that Ryanair’s interests lie in not progressing the litigation, or at any rate the competition aspects of it, quickly.
67. In summary the second factor seems to me to point strongly in favour of refusing a stay.
68. The third factor is the proximity of the courts to the subject matter of the case. I can deal with this quite shortly as I regard it as neutral overall. OTB is an English company that for relevant purposes sells holidays to UK consumers and complains of abuse by Ryanair of a dominant position in those (UK) markets. Its claim in this action is clearly a thoroughly English claim, and the torts it complains of are English law torts. On the other hand Ryanair’s claim is that OTB has acted in breach of the terms of use of its website, a contract governed by Irish law with an exclusive jurisdiction clause in Ireland; and its proposed defence of objective justification to the competition claim will require evidence from Ryanair of the benefits to consumers from its business model, all of which Mr Kennelly told me was in Ireland. In those circumstances I do not think that either court can be said to have significantly greater proximity to the subject matter of the case.
69. Taking all these factors into account, however, if I had a discretion to exercise in relation to a stay by reference to the Irish OTB proceedings, I would refuse to grant a stay.

The Vola and Skyscanner proceedings

70. I can deal with the other Irish proceedings very briefly. Mr Kennelly expressly disavowed any suggestion that the English action could be consolidated with them. On the authority of *Kolomoisky* (paragraph 30 above), it follows that, even assuming they are related to the English action, there needs to be some strong countervailing factor to displace what would otherwise be a compelling reason to refuse a stay. I do not think there is any such strong countervailing factor.
71. Mr Kennelly relied on the same matters as he did with the Irish OTB proceedings, but none of them seems to me to point strongly in favour of a stay. There is a dispute between the parties as to how closely related the Vola and Skyscanner proceedings are to the English proceedings. I suspect that largely turns on the different perspectives from which the parties view the dispute. From Ryanair's point of view the case is primarily about preventing screen-scraping and sale of flights in breach of its website's terms of use and in defiance of its intellectual property rights, and, insofar as it concerns competition, about its ability to justify any prima facie abusive behaviour by pointing to the benefits to consumers of its business model. All of those matters are likely to be common to the Vola proceedings and the OTB proceedings as they do not really turn on whether the particular Ryanair flights in issue are those sold by OTB in the UK (flights to and from the UK) or those sold by Vola to Romanian consumers (which may include flights to and from the UK). The same is true of the Skyscanner proceedings. Although Skyscanner is, or claims to be, a price comparison website not a travel agent, Ryanair's complaint is much the same, namely that it is unlawfully engaging in screen-scraping and facilitating sales by online travel agents, including sales to and from the UK.
72. From OTB's perspective however the case is primarily about Ryanair's abuse of a dominant position. For that the starting point is the definition of the relevant market, and since the market for flights for each "city pair" (London to Corfu say) is a separate market, the markets in issue in each set of proceedings will be different, and whether Ryanair has a dominant position, and what may be an unlawful abuse of it, and the effects on competition of Ryanair's conduct, may vary from one market to another. I notice that Allen J said in the case management motions that he was not persuaded that there was any commonality in the competition claims which had been made (viz in the Vola and/or Skyscanner proceedings) and which might later be made (viz in the Irish OTB proceedings). Mr Kennelly described that as surprising, but I tend to agree with him.
73. I accept therefore that there will be some, but very far from complete, overlap, between the Vola and Skyscanner proceedings on the one hand and the English proceedings on the other. But I still do not see that that constitutes sufficient of a countervailing factor, let alone a strong countervailing factor, to displace what would normally be a compelling reason to refuse a stay. Since it is accepted that OTB's claims could not be brought in the Vola proceedings or Skyscanner proceedings, it would mean that OTB's claims would be put on hold for what could be quite a number of years to await the resolution of the Irish proceedings. But for what benefit? The decisions of the Irish courts in those cases could not determine all the issues in the OTB proceedings: indeed their decisions on the facts would not even be admissible under the well-known rule in *Hollington v Hewthorn* [1943] KB 587, and their conclusions on the legal effect of the facts would not be binding on OTB: *Ward*

v Savill [2021] EWCA Civ 1378 at [81], [86] per Flaux C. No doubt their decisions on pure questions of law might be of some persuasive effect, although of course not binding, but that seems quite a slight potential benefit. Mr Kennelly also said that if there were a decision in the Vola or Skyscanner proceedings on such matters as the objective justification for Ryanair's conduct, then it might as a matter of practicality encourage settlement in the English OTB proceedings. I can see that it might, but it might not and either Ryanair or OTB might want to have another go in the English proceedings. Overall I do not see that there is here any strong countervailing factor that would justify holding up OTB's English proceedings to await a decision in cases between different parties with which they could not be consolidated.

74. In those circumstances I do not think it appropriate in the exercise of the discretion to order a stay even assuming the claims are sufficiently related, something which I do not need to decide.

Stay under case management powers

75. As referred to above, Ryanair's application asks in the alternative for a stay under the Court's general case management powers. No separate argument was addressed to me on this, and given the conclusions I have come to, I am not persuaded that there is any more reason to grant a stay on this basis than under Art 30.

Conclusion

76. For the reasons I have given I will dismiss Ryanair's application. I am very grateful to counsel for their most helpful and comprehensive submissions.