[2020] IEHC 308

THE HIGH COURT

[No. 2017/8782 P.]

BETWEEN

RYANAIR DAC

PLAINTIFF

AND

SC VOLA.RO SRL

AND BY ORDER OF THE COURT

YPSILON.NET AG

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 22nd day of June 2020.

Introduction

1. In these proceedings, there are two applications before the court. The first is the plaintiff's application to strike out the first defendant's counterclaim pursuant to O.19, r.27 or r.28 of the Rules of the Superior Courts for "failing to disclose a reasonable or sustainable cause of action and/or being bound to fail and/or being frivolous and vexatious and/or constituting an abuse of process".

2. There are two alternative reliefs sought without prejudice to the foregoing reliefs. The plaintiff seeks an order pursuant to the inherent jurisdiction of the court staying the prosecution of the counterclaim pending determination of the plaintiff's claim. Alternatively, the plaintiff seeks a modular trial whereby the plaintiff's claim is prosecuted and determined firstly, with the first named defendant's claim being tried and determined thereafter as a second module.

3. Secondly, the first named defendant applies to this court for an order staying the prosecution of the plaintiff's claim pending the determination of the first named defendant's counterclaim, or alternatively a modular trial in which the counterclaim is tried and determined first, with the plaintiff's claim being tried and determined as a second module. The first named defendant's application therefore seeks equivalent relief to the two alternatives sought in the plaintiff's notice of motion.

4. In order to understand the issues involved in the motions, it is necessary to examine the nature of the proceedings issued by the plaintiff ('Ryanair') and the defence and counterclaim of the first named defendant ('Vola'). The second named defendant ('Ypsilon') was added to the proceedings by order of this Court of 8th March 2019 in circumstances which I shall set out, but did not take a substantive part in the applications before me.

5. The position of the plaintiff, as we shall see, is that the counterclaim is so lacking in particulars essential to establishing its case that it does not disclose a reasonable or sustainable cause of action, and should be struck out. The voluminous details set out in the amended statement of claim by the plaintiff concerning its operations, in particular in relation to the Ryanair website, and the position of the first named defendant in relation thereto, will only be considered in as far as is necessary to deal with the applications

before the court. It is not appropriate for the court to infringe upon issues which will, in the normal course, be for the trial judge to decide.

The Parties

6. It is not contested that Ryanair carries on an international business as a low-fares airline. In its statement of claim, Ryanair contends that it is also, through its website at www.ryanair.com ('the Ryanair website'), a provider "…of flight advertisement, search, information, reservation and purchase services in respect of its own flights, as well as additional facilities whereby complimentary and ancillary services such as accommodation – reservation, car hire and insurances services may be accessed and booked by Ryanair's customers". No admission is made in respect of this assertion by Vola in its defence.

7. Vola is a limited liability company incorporated in Romania and carries on a business as an online travel agent ('OTA') providing internet search and booking facilities in respect of airline flights and other services through its website www.vola.ro ('the Vola website').

8. Ypsilon is a limited liability company incorporated in Germany and accepts in its defence that it is a "provider of integrated information technology and payment solutions for the travel industry". Ryanair alleges that Ypsilon provides Vola with flight data pertaining to Ryanair through a process of "screen scraping", an allegation which Ypsilon denies.

The Plaintiff's Claim

9. The plaintiff issued a plenary summons on 29th September, 2017, and having served notice of the plenary summons, delivered a statement of claim on 17th November, 2017. As we shall see, the statement of claim was amended to accommodate the addition of Ypsilon as a defendant and reference hereafter to the statement of claim is to the amended version. While the amended statement of claim is lengthy and complex, a synopsis of the issues contained in it is necessary to get an understanding of the applications of Ryanair and Vola.

10. Ryanair contends that its website is "Ryanair's chosen primary route to market and is based on the attraction offered by its fares and known reputation as a low-cost carrier to attract internet users and ultimately customers in order to sell not only Ryanair flight tickets, but also complementary and ancillary products and services." (Para. 6 amended statement of claim). As Mr. Robert Bourke, in-house counsel of Ryanair, in his affidavit of 3rd October, 2019 grounding Ryanair's application puts it, "…Ryanair alleges that the Defendants, their servants and/or agents, engage in a process commonly known as 'screen scraping' whereby data (and flight data in particular), the property of Ryanair is taken and/or re-utilised and/or extracted from the Ryanair website through the use of an automated system of software, without Ryanair's consent and/or lawful authority". Ryanair contends that the terms of use of its website bind the defendants and prohibit them from using the website or its content, "for their own commercial benefit". It is alleged that the defendants are not permitted to use the Ryanair website in the manner set out in the proceedings, and in doing so are in breach of contract, have unlawfully infringed on Ryanair's intellectual property rights, and are guilty of conversion, trespass

to goods or property, and passing off. All of these matters are set out in very considerable detail in the amended statement of claim.

11. The plaintiff seeks a wide range of reliefs against the defendants, primarily injunctive in nature, seeking to prevent or restrain the defendants from perpetrating the alleged interference with the plaintiff's rights. There are claims for damages, including aggravated or exemplary damages.

The First Named Defendant's defence and counterclaim

12. Vola's defence is virtually a complete traverse of the amended statement of claim. Its counterclaim is set out briefly over two pages, and seeks a declaration that certain acts of Ryanair constitute an abuse of what Vola contends is Ryanair's "dominant position"; it seeks an injunction "restraining such further acts by Ryanair" and a licence "to use of such monopoly rights of Ryanair and on such terms as to this Honourable Court shall seem fit." Damages "including exemplary damages" are also sought.

13. As we shall see, extensive particulars were sought by Ryanair of Vola's counterclaim, and it is Ryanair's position that these particulars were so unsatisfactory as to warrant its present application. In her brief affidavit of 11th October, 2019 replying to Ryanair's motion, Ms. Tessa Robinson, the defendant's solicitor, did not take issue with the following summary of the defendant's counterclaim in Mr. Burke's grounding affidavit: -

> "10. As far as is discernible from the Counterclaim and replies to particulars delivered by Vola, Vola's Counterclaim may be summarised as follows. Vola alleges that Ryanair occupies a dominant position as a travel service provider providing the operation of passenger flight services as an airline carrier on identified city pair markets (in either direction) all of which contain a point of departure and/or arrival within Romania. Vola characterises this, for the purpose of Vola's Counterclaim, as being an upstream market in which Vola concedes it does not operate. Vola then contends that both Vola and Ryanair compete with one another in a downstream market defined by Vola as that providing OTA services for Romanian flights on the identified city pair markets (in either direction). Vola does not plead that Ryanair occupies a dominant position in this purported downstream market. In point of fact Vola admits it holds a 60% share in this purported downstream market, thereby confirming Vola occupies a dominant position in same.
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> 11. On foot of the replies to particulars now furnished by Vola the nub of Vola's counterclaim, insofar as it alleges Ryanair is engaged in an activity constituting an abuse of an alleged dominant position, is that should Ryanair succeed in its claim in these proceedings against the defendant thereby preventing Vola from offering for sale, and selling, Ryanair flights it will likely lead to the elimination of competition or harm to competition".

14. The defence delivered by Ypsilon on 1st November, 2019 does not concern us for the purpose of the present application, but for the sake of completeness it should be said that it comprises a complete traverse of the plaintiff's claim against it.

The course of pleadings between Ryanair and Vola

15. The present application must be seen in the context of the progress of the pleadings as between Ryanair and Vola. It may be summarised as follows: -

- Plenary summons issued 29th September, 2017;
- notice of plenary summons delivered 5th October, 2017;
- statement of claim delivered 17th November, 2017;
- memorandum of conditional appearance 1st December, 2017;
- application to contest jurisdiction by Vola heard by Ní Raiftearaigh J. judgment delivered 14th January, 2019. The application was refused and liberty was given to the plaintiff to apply to court to join Ypsilon as a defendant;
- 8th March, 2019: Ypsilon joined as a defendant and ancillary orders made regarding pleadings;
- an amended plenary summons issued on 14th March, 2019, and the amended statement of claim was delivered on 15th March, 2019;
- particulars raised on amended statement of claim by Vola on 5th April, 2019, replies on 26th April, 2019;
- 29th May, 2019: court extended time for filing of the defence's counterclaim by the first named defendant;
- 7th June, 2019: defence and counterclaim served;
- 21st June, 2019: the plaintiff raises particulars on the defence and counterclaim ('the first notice for particulars');
- 9th July, 2019: replies to the notice for particulars ('the first replies');
- 24th July, 2019: the plaintiff delivered a reply and defence to counterclaim;
- 24th July, 2019: the plaintiff raised a notice for further and better particulars ('the second notice for particulars');
- 30th September, 2019: the defendant replied to the foregoing notice for further and better particulars ('the second replies').

The Plaintiff's Motion

16. In his affidavit, Mr. Bourke set out the plaintiff's grounds for seeking the striking out of the counterclaims. These may be summarised as follows: -

- The counterclaim as particularised does not disclose factual or legal grounds capable of sustaining a claim in competition law that Ryanair is guilty of abusing a dominant position;

- the upstream and downstream markets for which Vola contends in their replies to particulars do not constitute an economic market for the purposes of competition law;

- Vola is required to plead a justification for its economic market definitions and the basis upon which claims can properly be asserted, but has not done so;

- Vola's contention that, should this Court find in favour of Ryanair in respect of the reliefs sought in the statement of claim, an abuse by Ryanair of its dominant position would occur which would justify the continuance of Vola's activities in offering for sale and selling Ryanair flights, is "wholly unsustainable and incapable of being redeemed";

- Vola is "wholly concerned with its own profitability regardless of market or competition concerns…Vola's attempt to plead an adverse impact on competition does not in truth go beyond its own business…"

- Ryanair should not be put to the considerable time and cost of defending the counterclaim where Vola has failed to plead a stateable claim in competition law;

- the claim as pleaded does not disclose a reasonable cause of action and is bound to fail.

17. Ms. Robinson's affidavit on behalf of Vola, to which I have referred above, does not seek in the main to debate the points made by Mr. Bourke. This approach was not in my view inappropriate, given that the contentions of Mr. Bourke in support of Ryanair's motion were mainly legal ones, a point made by Ms. Robinson at para. 3 of her affidavit.

18. Ms. Robinson asserted that Vola would indeed "suffer economic harm as a consequence of Ryanair's abuse of its dominant position", and asserted that it was this harm which, in turn, would harm competition in the market. Matters such as whether the upstream and downstream markets were sufficiently defined or capable of constituting economic markets for the purpose of competition law were matters "which can only be determined at the hearing of the action". Competition would be damaged "if Vola and OTA's like it are removed from the market".

The Modular Trial issues.

19. Mr. Bourke set out in his affidavit the basis upon which Ryanair sought, in the alternative to an order striking out the counterclaim, an order staying its prosecution pending the determination of the plaintiff's claim, or alternatively an order directing a modular trial, with the plaintiff's claim being heard and determined as the first module.

20. By a notice of motion issued on 23rd October, 2019, Vola sought equivalent reliefs on its behalf in respect of the counterclaim, i.e. a stay on Ryanair's claim pending determination of the counterclaim, or a modular trial in which Vola's counterclaim would be heard and determined first.

21. Ms. Robinson swore a brief grounding affidavit in support of this application, explaining that Ní Raifeartaigh J. had given leave for the motion to be issued so that Vola's application would be formally before the court, and setting out a concise summary of the grounds for the application. There is no replying affidavit on behalf of Ryanair, Mr. Bourke having already set out the plaintiff's position on this issue in the affidavit grounding Ryanair's motion.

22. If I accede to Ryanair's application to strike out Vola's claim, the "modular trial" issues do not arise. I therefore propose to deal with these issues later in this judgment, after consideration of Ryanair's primary application.

The law on striking out claims

23. The law in relation to striking out claims under O.19, r.27 or r.28, under the inherent jurisdiction of the court is well settled, and is the subject of many reported decisions of the Superior Courts. There was no significant difference between the plaintiff and the first named defendant as to the applicable legal principles. There was of course complete divergence between the parties as to how those principles were to be applied to the facts of this case.

24. Both sides agree that the principles synthesised by Haughton J. in *Togher Management Company Limited v. Coolnaleen Developments Limited* [2014] IEHC 596 from the case law to that point compromise a useful and comprehensive summary:

- "The jurisdiction exists to ensure that an abuse of the process of the courts does not take place.

- The jurisdiction should be exercised sparingly and only in clear cases. ·

- It enables the court to avoid injustice.

- If a statement of claim admits of an amendment which might 'save it' and the action founded on it, then the action should not be dismissed.

- A variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial.

- It is a jurisdiction to dismiss where the proceedings are bound to fail.

- Such an application may be of particular relevance to cases involving the existence or construction of documents - in which it may be possible for a party to persuade the court that no reasonable construction of the document(s) concerned could give

rise to a claim on the part of the plaintiff, even if all the facts alleged by the plaintiff were established.

- Where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed.

- The plaintiff should not be required to show a prime facie case at the stage of an application to dismiss.

- The onus lies on the defendant to establish that the plaintiff's case is bound to fail.

- It follows from the foregoing point that the defendant must demonstrate that any factual assertion on the part of the plaintiff that the defendant contests could not be established."

25. The plaintiff submitted that, in determining whether a claim should be dismissed for failing to disclose on the facts a reasonable cause of action, the court could assess the legal basis upon which a claim was asserted. However, this power is limited: as Murray J. for the Supreme Court stated in *Jodifern Limited v. Fitzgerald* [2000] 3 IR 321 at 335:

> *"It is for the judge hearing the application, within the scope of his discretion, to determine whether any points of law raised can be so clearly and readily resolved in favour of the defendant that to allow the action to proceed would constitute an abuse of the process of the court. Legal issues that are sufficiently substantial as to fall outside that bracket should be left to the trial of that action in those proceedings."*

26. In relation to the court's jurisdiction under O.19, r.27, the plaintiff relied upon the following analysis by Laffoy J. in *Costello v. Commissioner of An Garda Síochána* [2007] IEHC 330:

> "…although the rule is broadly drafted, it is directed towards three main problems: where a party pleads unnecessary matters; scandalous pleadings; and prejudicial pleadings, i.e. pleadings which may delay, embarrass or otherwise prejudice the fair trial of an action, as, for example, where a party fails to plead his case with sufficient clarity and particularity such that the opposing party does not know the case that he has to meet."

The Plaintiff's submissions

27. The plaintiff made very extensive written submissions in relation to its motion, and these submissions were developed and augmented by Mr. Martin Hayden SC in the course of the hearing. Written submissions were also proffered by the defendant, and Mr. Ciaran Lewis SC addressed these in his oral submissions in reply to Mr. Hayden. I have read and assimilated all of the written submissions and the volumes of case law submitted by both parties, and I have also had the benefit of transcripts of the oral argument before me.

What follows is a synopsis of the respective arguments, with particular emphasis on those which have a particular bearing on what I have to decide.

28. The plaintiff claims that in pursuing a claim in competition law, Vola has a heightened obligation to plead its case in a way that Ryanair knows what case it has to meet at trial with sufficient clarity. It was emphasised that Irish courts have recently endorsed the view that, the more complex the case, the greater the onus on the claimant to particularise the basis for its claim. As Hogan J. stated in the decision of the Court of Appeal in *Quinn Insurance Limited (under administration) v. Pricewaterhousecoopers* [2017] IECA 94 at para. 16:

> "A further factor is that identified by Baker J. in her own judgment in *Playboy Enterprises International Inc v. Entertainment Media Networks Limited* [2015] IEHC 10, namely, that, generally speaking, the more complex the proceedings and the pleadings, the greater will be the need in the interests of the efficient use of court time and resources to ensure that the case is fully pleaded. This in turn suggests that the role of particulars in complex litigation is more expansive than in the case of more routine cases."

29. The plaintiff submits that this is particularly so in competition claims, and cites jurisprudence from England and Wales in this regard. In *Sel-Imperial v. The British Standards Institution* [2010] EWHC 854, Roth J. stated as follows:

> "17. Moreover, it is important that competition claims are pleaded properly. To contend that a party has infringed competition law involves a serious allegation of breach of a quasi-public law, which can indeed lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law. As Laddie J. observed in *BHB Enterprises plc v. Victor Chandler (International Limited)* [2005] EWHC 1074…:
>
> > 'These are notoriously burdensome allegations, frequently leading to extensive evidence, including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials'."
>
> Subsequent experience only reinforces the accuracy of that observation.
>
> "18 This is not to adopt an over-technical approach to pleadings. It is consistent with the overriding objective to enable the case to be dealt with expeditiously and fairly. It is only through the clear articulation of each party's position in its statement of case, with appropriate factual detail, that the other side can know what case it has to meet and what issues any experts have to address, and that the court can effectively exercise its case management powers".

30. Ryanair asserts that expert evidence requires to be obtained in advance of pursuing a competition law claim, and that such evidence should form the basis for the

particularisation of such a claim. It is submitted at pp. 7-8 of the plaintiff's written submissions that "... The successful conduct of any defence and the identification of the evidence required to defeat a competition law claim is very sensitive to the precise facts pleaded and is very dependent upon there being a clear and precise identification of the issues arising in the case and therefore Vola's failure to clearly and precisely particularise the counterclaim denies Ryanair fair procedures and constitutes an abuse of process".

31. Vola's claim is based on the allegation that Ryanair's conduct comprises abuse of a dominant position pursuant to Article 102 TFEU. Article 102 is as follows:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

32. Ryanair's written submissions go on from this to state as follows:

> "23. Any party advancing such a claim is required to plead, with specificity, the material facts grounding:
>
> 23.1 The properly defined relevant economic market;
> 23.2 The position and share of the responding party in the relevant economic market;
> 23.3 The position and share of other competitors in the relevant economic market;
> 23.4 The alleged offending conduct on the part of the responding party, i.e. the act of abuse;
> 23.5 The alleged impact that conduct has on the relevant economic market, i.e. the harm to competition;
> 23.6 The effect on trade between member states."

33. In accordance with this classification – which I should say is broadly accepted by Vola – the plaintiff addressed what it saw as the deficiencies of particularity in the defendant's counterclaim. It was submitted that the defendant had failed to define properly the economic market and the shares of the competitors. In this respect, the plaintiff relied on the "commission notice on the definition of relevant markets for the purposes of

community competition law" (97/C372/03) ('the Commission notice') and assorted case law. The Commission notice states at para. 2 of its text:

> "The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure".

34. As the court of first instance explained in *Dimosia Eticheirisi Ilektrismouae (DEI) v. European Commissioner* (case T-169/08) at paras. 60-61 of its judgment, "The purpose of that market definition is to define the perimeter within which it must be assessed whether an undertaking is in a position to behave to an appreciable extent independently of its competitors, customers and consumers…", echoing the seminal definition of dominance outlined by the Court of Justice in the *United Brands* case (C27/76). The court in *Dimosia* went on to say that "…the possibilities of competition must be assessed in the context of the market comprising the totality of products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other goods or services; these possibilities of competition must also be assessed in the light of competitive conditions and the structure of supply and demand…".

35. As regards Vola's counterclaim, the plaintiff submitted that the counterclaim had failed to identify any clear or defined economic market, or any basis on which it could be said that Ryanair occupied a dominant position in that market. There had however been a process whereby Ryanair had twice sought particulars from Vola, and these had been furnished, albeit in a manner which Ryanair submits is profoundly unsatisfactory. Mr. Hayden indicated to the court that, for the purpose of the motion he proposed to deal with the counterclaim on the basis that it incorporated and should be read with the replies to particulars, rather than adopt the position that the defendant should amend its pleadings. His submissions therefore related to the counterclaim as augmented or clarified by the defendant's replies to particulars.

36. The second notice for particulars, in seeking particulars of the product and service markets in which it was claimed Ryanair occupied a dominant position, set out extensively the ways in which it considered Vola's initial response "wholly inadequate", and called on Vola to "define, with precision, the relevant economic market(s) (by reference to product/service and geographic scope) in which it is claimed Ryanair occupies a dominant position and in which Vola also operates, as relied upon by Vola in grounding its counterclaim".

37. Vola replied as follows:

> "Upstream market (in which Ryanair but not Vola competes):

Ryanair operates as a travel service provider (TSP) providing the operation of passenger flight services as an airline carrier and is in a dominant position providing that service on the following city pair markets (in either direction):

[There follows a list of 16 "city pair markets", each of which involves either an arrival or a departure or both in Romania, e.g. "Bucharest – Rome", "Athens – Bucharest", etc.]

Downstream market:

Both Ryanair and Vola compete in the downstream market of providing online travel agency (OTA) services in the market for such Romanian flights. Sales of Ryanair flights on these routes are an input in this is downstream market [sic]."

38. Ryanair contends that these replies constitute a failure to define a relevant economic market, and asserts that "no effort has been made by Vola to particularise the material facts grounding any such definition" [written submissions, para. 40].

39. In respect of the upstream market, Ryanair asserts that Vola's definition does not clarify whether the market is that of all "travel service providers" or just airlines. If the latter, does the definition relate to all airlines or is it limited to a particular type of airline? It is suggested that Vola does not plead any "verifiable material facts justifying limiting the geographic scope of the market to so-called 'city pair markets' limited to routes on which the point of arrival or departure is situate within Romania …", or as to the basis upon which the alleged market is so geographically curtailed.

40. As regards the downstream market, Ryanair submitted that Vola had failed to define what were in fact the services which were the subject of the alleged economic market, or to specify any material facts which would suggest that Ryanair and Vola actually compete with each other in that market. Ryanair pointed out that Vola offers holidays and flights to destinations not serviced by Ryanair, and also offers flights that could not be compared to the low-fare flights offered by Ryanair. Criticism was also made of the alleged failure of Vola to provide "verifiable material facts" supporting a geographic limit on the market to "Romanian flights".

41. In respect of both markets, Ryanair complained that Vola had failed to comply with the requirements of the Commission notice in a number of respects. It was asserted that no material facts had been pleaded "identifying the competitive constraints that operate constituting the market definition now advanced by Vola in respect of the upstream market;" that Vola had refused to identify any competitors to Ryanair in this market; that Vola had failed to set out facts demonstrating that "actual competitors to Ryanair in the upstream market are capable, or incapable, of preventing Ryanair from behaving independently of effective economic pressure…". Vola had also failed to specify factors grounding the interchangeability/ substitutability of all products forming part of the upstream market, and had failed to demonstrate by material facts that the geographic scope of the economic market was limited to the extent contended for by Vola. Lastly,

Vola had failed to set out material facts as to whether the nature of the conditions of competition between undertakings was homogenous, or the extent to which they were so.

42. In relation to a request from Ryanair which sought particulars of the extent to which Ryanair is dominant in the markets relied upon by Vola in support of its counterclaim, Vola gave a cursory answer in the first replies which was clearly inadequate. Ryanair raised an extensive request for further and better particulars in this regard, and received a more informative reply in the second replies by way of a table, showing what Vola contended was the Ryanair market share for each of the city pair markets in three categories: "all carriers", "low cost carriers", and "share of bookings through Vola". The replies did not accede to Ryanair's request to identify all operators in the relevant market and their percentage market shares.

43. In the second replies, Vola refused Ryanair's request to give particulars of "the identities of each supplier or suppliers or third parties that offer travel related services sold by Vola in combination with the sale of flights", stating that this was "not a proper matter for particulars". Vola was also requested in the second replies to give further particulars of "the complete range of travel related services that Vola provides combined with the sale of flights in respect of which Vola alleges it is in competition with Ryanair" [second replies, p. 17]. This was a reiteration of a request in the first particulars, to which Vola had given the following reply:

> "Vola operates as an online travel agent (OTA). In that capacity, Vola inter alia offers customers the ability to search for and book combinations (i.e. travel bundles) of airline tickets, accommodation, travel insurance and car hire.
>
> Ryanair, through its website offers flights, along with the ability to search for and book hotels and car hire, and thus offers a similar combination of products/services to those that are offered by Vola, but for the fact that Vola offers its customers the ability to book flights with various airlines, whereas the Ryanair website does not.
>
> Vola reserves the right to further particularise following additional investigation, including following interrogatories and/or discovery".

44. Ryanair deemed this response inadequate as not addressing the "complete range" of such services, and reiterated the request in the second replies; Vola replied simply that its range of travel related services "has been sufficiently identified".

45. Trenchant criticisms were made by Ryanair of the figures proffered by Vola to represent Ryanair's market share in the upstream market: "No basis for these numbers is provided. The numbers are in fact meaningless. Moreover, it appears that Vola is assessing Ryanair's market power in respect of individual routes. In that regard it appears that Vola contends that each route on the identified city pair markets constitutes an economic market of itself. This runs contrary to the defined economic markets at particulars 7(a) and (b)." [Paragraph 46 p. 17 written submissions].

46. Ryanair also contends that the refusal of Vola to give information in respect of competitors to Ryanair means that Vola cannot sustain its claim that Ryanair has the power to behave independently of competitors within the defined market. In his submissions, Mr. Hayden made the point that one must define the market in order to identify accurately the competitors in that market. One may be able to fly from Bucharest to London, but are airlines flying that particular route the only competitors in the market of travel on that route? If it is cheaper to fly with another airline from Bucharest to Paris, and by connecting flight from Paris to London, should the airline offering this service not be considered a competitor of the airline offering the direct flight? Are other modes of transport in competition with airlines for certain routes? If one can travel by train from Bucharest to Vienna, should such a mode of transport not be considered a competitor of an airline flying the same route?

47. This issue of competition between different modes of transport has particular relevance to the question of whether an airline can behave to an appreciable extent independently of its competitors, customers and consumers. If it is practicable and considerably cheaper to travel a certain route by train, many customers will do so rather than incur the extra cost of a flight. The train service is therefore a competitor of the airline in respect of the same route, and the airline is less likely to be able to behave independently as regards price in the market for that route.

48. While the foregoing examples are somewhat simplistic, they serve to demonstrate to some degree the contentions of Ryanair that the particulars in relation to the composition of the market contended for by Vola, and the competitors in that market, must be pleaded both to ground a proper competition law claim and to allow Ryanair to understand the case it has to meet. Ryanair contends that, if such particulars are not furnished after two notices for particulars which went to some lengths to point out the deficiencies of information in the counterclaim and the necessity for such information, the counterclaim must be regarded as insufficient to establish a reasonable cause of action, and should be struck out.

49. Ryanair contends that "Vola's case as pleaded concedes no actual abusive conduct has occurred to date …" [written submissions para. 51]. It is submitted that "On the case as pleaded and particularised by Vola, Ryanair is not presently engaged in any acts capable of constituting an abuse of a dominant position. Rather, Vola's entire claim pursuant to Article 102 TFEU is premised upon Ryanair succeeding in preventing Vola from selling Ryanair flights …Vola's Counterclaim is entirely hypothetical and does not presently constitute a sustainable cause of action. It is therefore frivolous and vexatious and ought to be struck out". [Paragraphs 55-56 written submissions].

50. Ryanair also submitted that "…should this Court determine in Ryanair's favour on its claim it would follow that this court will have determined that Vola's use of the Ryanair website, and its content, is unlawful for breach of contract, and/or contrary to the Copyright and Related Rights Act 2000, and/or trade mark infringement, and/or conversion, and/or trespass to goods or property, and/or passing off. The law on competition does not, and

cannot render lawful what is otherwise an unlawful act. The law on competition does not occupy a paramount position within our legal system. Should this Court find in favour of Ryanair's claim it will be determining that Ryanair is entitled to protect its property in the manner it does, and contract and distribute same in the manner that it does. The law on competition cannot, and will not, usurp that." [Paragraph 57 written submissions].

51. In this regard, Ryanair relies on the decision of the English High Court in *Humber Oil Terminals Trustee v. Associated British Ports* [2011] EWHC 352. In that case, the defendant ("ABP") was the freehold owner and operator of the port of Immingham on the south bank of the river Humber. The plaintiff ("HOTT") operated an oil terminal on foot of a lease. When negotiations for the statutory renewal of a lease between ABP and HOTT broke down, the plaintiff issued proceedings against the defendant on the basis that the defendant was abusing its dominant position contrary to the domestic English equivalent of Article 102 TFEU (s. 18 of the Competition Act, 1998) by, *inter alia*, demanding, in the course of negotiations, abusively high prices for the continued provision of facilities, and seeking court orders for such rent. HOTT argued that a successful defence of the proceedings would result in an inability on the part of HOTT to operate the terminal effectively and that such an outcome would be evidence of abuse by ABP of its dominant position.

52. ABP's application to strike out the competition claims of the plaintiff was successful, and the particulars of claim served for the purpose of pleading the competition claims were struck out. The court rejected the contention of the plaintiff that "to propose, in the course of negotiations, prices which are excessive was of itself and without more abusive conduct within s. 18 or Article 102" [para. 20 of judgment]. It was accepted by counsel for HOTT that any rent fixed by the court could not constitute abuse, "not least because any ransom element would be excluded from consideration" [para. 32].

53. It is submitted by Ryanair that, similarly, a finding in Ryanair's favour on its claim in the present proceedings would be "a judicial determination [which] cannot be regarded as facilitating abusive conduct for the purpose of Article 102 TFEU" [para. 60 submissions]. As the court put it in *Humber*, "…any element of compulsion which might arise from the dominant position of the proposer is negatived by the jurisdiction of the Court, in the absence of agreement, to assess the rent or price on the basis of a statutory formula which necessarily excludes any ransom element" [para. 33 judgment].

54. The court in *Humber* held that, until the defence of ABP to the claim for a new tenancy succeeds, the competition claim did not arise, and if the defence did succeed, there would be "bound to be further negotiations in which ABP is willing to participate" [para. 47]. The court found in any event, that even if the competition claim were a present issue and there would likely be no further negotiations, there was "no proper pleading of the anti-competitive effect of what is alleged" [para. 48].

55. Ryanair relies heavily on this authority as demonstrating that what it alleges is the "as of yet non-existent conduct on the part of Ryanair" [para. 63 submissions] cannot be relied upon by Vola as anti-competitive. Ryanair also asserts that "Hypothetical musings as to

possible breaches of competition law fall far short of what is required in order to ground a sustainable claim in that regard" [para. 62 submissions], and rely on the decision of *Packet Media Limited v. Telefonica UK Limited* [2015] EWHC 3873, in which the court found that "the opinion of an expert economist that a hypothetical scenario he has constructed cannot be ruled out because there are too many unknowns" was insufficient to establish the basis for a claim in competition law, with the result that the plaintiff in that case had not established a serious issue to be tried sufficient to ground an application for an injunction.

56. Ryanair takes particular exception to para. 11 of the second replies. In the first replies, to a request for particulars of material facts grounding the plea in the counterclaim that "Ryanair seeks to prevent and/or hinder Vola providing flight information, comparison and booking services (as an online travel agent) in respect of Ryanair flights", Vola responded as follows:

> "Ryanair is seeking to prevent Vola from displaying and selling Ryanair flights. This amounts to exclusionary anti-competitive behaviour as:
>
> - Ryanair's tickets are objectively necessary for Vola to compete effectively;
> - Refusal to supply is likely to lead to the elimination of effective competition; and
> - Refusal to supply is likely to lead to consumer harm.
>
> Vola reserves the right to further particularise following additional investigation, including following interrogatories and/or discovery."

57. When Ryanair found this reply unsatisfactory and sought further particulars in the second request, Vola replied more comprehensively. While the passage in response from the replies is lengthy, in view of the reliefs sought by Ryanair in its motion, it is appropriate to reproduce it here:

"Elimination of competition

> Vola is reliant on a small number of low-cost carriers to generate sales. On a per route basis, Vola typically derives the bulk of its sales from a single carrier.
>
> The effectiveness of Vola as an OTA is contingent on it being able to offer and compare flights from the broadest range of carriers.
>
> Ryanair accounts for a significant proportion of overall Vola booked passenger numbers (20.2%), and there are a number of routes on which Ryanair accounts for the bulk of sales. On those routes where Ryanair is the largest carrier it accounts for 64% of Vola's sales on average.
>
> For those routes that Vola sells and on which Ryanair operates, Ryanair accounts for approximately 50% of the service fees Vola earns on these routes.
>
> Vola would suffer a very significant loss of revenue if it were prevented from selling Ryanair flights.

The loss of Ryanair flights from the Vola platform will render the platform much less attractive to customers in general, which will lead to reduced sales of other carriers' flights, as well as other ancillary services.

The financial impact on Vola of no longer being able to sell Ryanair flights would be substantial, and this, in turn, would have an appreciable adverse impact on Vola's ability to compete effectively.

While it is difficult to predict with certainty the full extent of the damage which would be caused to Vola, the most likely outcome is that Vola will be rendered unprofitable thereby putting it out of business.

Harm to competition

Ryanair itself competes with OTAs like Vola in the retailing of flights and other ancillary services such as insurance, car hire and accommodation. By impeding Vola's ability to compete with Ryanair in this downstream market, effective competition will be eliminated.

Vola is also a route to market for competing airlines. The elimination of Vola will remove this route to market and have an adverse effect on competition in the upstream market.

Vola is the largest OTA in the Romanian market with an approximated share of the OTA segment of that market of 60%.

Vola's success in this market is due to its focus on value added services, which differentiate it from competitors such as Ryanair's website and other OTAs. These include, *inter alia*:

- 24 hours per day, 7 days per week Romanian language customer support;
- Smart Connection, a Vola product launched in 2015 that involves connecting two or more flights from different airlines, resulting in a unique route at a minimum price;
- Vola's Fare Alerts To, whereby travellers can receive personalised flight offers based on their own criteria, such as preferred flight time, departure, destination, journey time and price;
- the rates calendar tool on Vola's website, which displays the prices of tickets to a specific destination for a period of three months, indicating the dates when costs are lowest;
- Vola Rambursabil, a new product offered by Vola in partnership with AXA whereby customers can make their flights refundable by purchasing blanket insurance;
- the ability to accept a wide range of payment options, from credit cards to instalment cards (popular with the Romanian public), bank transfers and cash in Vola's Bucharest Sales Office.

> The loss of Vola's non-price offering as a consequence of the harm that it would suffer would lead to a direct adverse impact on consumers." [Pages 20-21, second replies].

58. Ryanair contends that these particulars make it clear that Vola is not in fact concerned with competition and the integrity of the market, but rather is concerned with the loss of revenue it will suffer if it is precluded from using the Ryanair website in the manner in which it has used it until now. As Mr. Hayden puts it, Vola is not seeking the protection of the consumer but the protection of its own business model. Ryanair asserts that financial loss suffered by Vola is not evidence of conduct by Ryanair which is capable of constituting abuse of a dominant position.

59. As regards the necessity to show an effect on trade between Member States in the counterclaim, Vola dealt with this issue at para. 12(i) of the second replies. It asserted that the effect on trade between states was evident from the counterclaim "in that Vola (as an OTA) and Ryanair (selling directly online in the sale of flights) compete in the sale of consumer flight tickets between specified Romanian airports to specified destinations in European Member States…". Ryanair contends that this response is "wholly inadequate", and that Vola's failure to particularise the facts relied upon to demonstrate the effect on trade and the extent to which it is affected "renders the Counterclaim unstateable" [para. 67 written submissions].

60. Having lodged very substantial written submissions well in advance of the hearing, Ryanair proffered supplemental and substantial written submissions on the first day of the hearing. While these submissions dealt mainly with the question of whether there should be a modular trial, they also made reference to three judgments of Clarke J. (as he then was) in the case of *Ryanair Limited v. Bravofly*. The course of events in that case are summarised in the supplemental submissions as follows:

> "Bravofly delivered a counterclaim on competition law grounds. On foot of an application of Ryanair parts of that counterclaim were struck out and, in respect of other parts, Bravofly was afforded a further opportunity to particularise its claim ([2009] IEHC 41). On receipt of the further and better particulars of Bravofly Ryanair challenged same and sought to have the counterclaim struck out for failure to comply with the earlier order of the court. Clarke J. determined that Bravofly has in fact failed to comply with his earlier order and afforded Bravofly a further opportunity to do so ([2009] IEHC 224.) Bravofly provided further replies but, once more, these fell short of what was required. Ultimately Clarke J. made an "unless" order to the effect that unless Bravofly delivered proper particulars within a defined period those parts of its defence and counterclaim would be struck out ([2009] IEHC 387)."

61. Mr. Hayden submitted that, while the jurisprudence requiring detailed pleading of competition law cases was more developed in England and Wales, the Bravofly decision, and in particular the decision of Clarke J. of 29th January, 2009 ([2009] IEHC 42), was on all fours with these decisions. It was submitted that, while Clarke J. had been prepared

to give Bravofly an opportunity to redraft its pleadings, Ryanair had in fact given Vola a second opportunity to mend its hand, and Vola's replies to the second request for particulars were still such as to render the counterclaim unsustainable. In such circumstances, it was submitted that no further indulgence should be given to Vola and that their counterclaim should be struck out. This would not necessarily preclude Vola from pursuing its claim against Ryanair, but it would have to do so in separate proceedings.

62. Although Mr. Hayden dealt with the counterclaim on the basis that it be deemed for the purpose of the application to incorporate the various replies to particulars, he made numerous criticisms of what he contended was the lack of coherence and inner consistency between the counterclaim and the various replies offered, as well as a failure to observe what he asserted was a "heightened obligation" to plead all material facts upon which the competition claim was based. He maintained that Vola used the sale of Ryanair's tickets as the "hook" by which it could sell all its ancillary services, but did not show that it was in any way precluded from selling these ancillary services in the event that it could not sell Ryanair tickets. It was submitted that there was a complete absence of information about the downstream market for which Vola contended that would clarify the effect of Ryanair's refusal to allow OTAs to sell Ryanair tickets on other OTAs in the downstream market. It was suggested that this market was utterly inadequately defined, and that the lack of clarity in pleadings was a "fudge to slow this case down" [day 1, p. 48 lines 19-20].

The Defendant's Submissions

63. Written submissions were delivered on behalf of the defendant, including a brief replying submission to the plaintiff's supplemental submissions. Submissions at the hearing of the motions were made by Ciaran Lewis SC. While all of the written submissions have been read and considered by the court, and Mr. Lewis's submissions reviewed in transcript, what follows is a non-exhaustive synopsis of the essential points submitted on behalf of Vola.

64. Mr. Lewis began his submissions with an analysis of Ryanair's statement of claim, which sets out details of how its business model operates. He drew attention to Ryanair's emphasis on its website as the primary route to market, and its function of selling ancillary services in addition to Ryanair flight tickets, with a feature of these services being third party products offered to users based on agreements with ancillary partners. As para. 7 of the statement of claim put it: "The Ryanair business model encompasses the provision of all such goods and services under the access rubric of Ryanair and they endeavour to provide and deliver an ecosystem of travel related goods and services". The statement of claim alleges at para. 8(c) that Ryanair "is deprived of the opportunity to earn ancillary revenue in circumstances where its passengers are diverted from engaging directly with Ryanair at the point of sale of flight tickets…".

65. The terms of use of the website make it clear that the Ryanair website is "the only website authorised to sell Ryanair flights, whether on their own or as part of a package" [para. 2 see para. 13 statement of claim]. It is alleged that Vola offers Ryanair flights for

sale, using the Ryanair website for this purpose "by engaging in an activity commonly referred to as "screen scraping", "crawling", or the use of a "robot" or "spider". It is alleged that Ypsilon offers services in this regard "which enable online travel agents, such as the first named defendant to offer for sale and sell Ryanair flights…" [para. 26 statement of claim].

66. It was accepted by Mr. Lewis that Ryanair was entitled to protect its position through its contractual terms. He asserted however that Ryanair was not entitled to stand on its contractual rights when their exercise involved abuse of a dominant position that affected competition.

67. A point emphasised by Mr. Lewis was that the jurisprudence in applications to strike out such as the present established that there was a "very high bar" for the applicant to surmount in seeking to persuade the court that such an order was warranted. It was submitted that many of Ryanair's criticisms in its submissions related to the substantive case, which might ultimately be valid but could only be tested in a full trial with oral evidence. It was suggested that the submissions on behalf of Ryanair "repeatedly conflate the pleaded case and the substance of the case" [day 1, p.182 lines 7-8].

68. Vola's written submissions also take issue with Ryanair's assertion that a claimant must set out all material facts on which it relies, citing the judgment in *Sel-Imperial* as speaking, not of "all material facts", but of "appropriate factual detail". Reference is also made to the dicta of Laddie J. in *BHB Enterprises* at para. 43 of that judgment, in which the court stated that "it is incumbent on the party making the allegation to set out clearly and *succinctly the major facts upon which it will rely*" [emphasis in original].

69. Counsel then referred to the criteria suggested by the plaintiff at para. 23 of its submissions (see para. 32 above) as being matters which must be pleaded to ground a competition claim, and accepted that "…generally…that is a fair description of what has to be pleaded…" [day 1, p.184 lines 3-4].

70. Counsel addressed firstly the question of whether the market had been adequately defined. He contended that the upstream and downstream markets had been identified at paras. 95 and 96 of the statement of claim respectively, and that both sets of particulars furnished on behalf of Vola made the delineation of those markets clear. The upstream market consists of city pair markets, and the individual city pairs are set out in the second replies. The reference in those replies to "passenger flight services", according to Vola's written submissions, made it clear that the market comprised only airlines, and not "all travel service providers". It was further contended that the description of the downstream market in the second replies, "…both Ryanair and Vola compete in the downstream market of providing online travel agency (OTA) services in the market for such Romanian flights…", sufficiently identified this market.

71. Mr. Lewis referred to the *Sel-Imperial* case already referred to by Mr. Hayden, which considered the concept of "related market" abuses, concluding that such abuses were "not unusual". Reference was also made to the decision of the European Commission of

27th February, 2013 as to the proposed merging of Ryanair Holdings plc and Aer Lingus Group plc (case no. Comp/14.6663), in which the Commission stated at para. 7.2.1 that "…in its decisional practice, the Commission has traditionally defined the relevant market for scheduled passenger air transport services on the basis of the "point of origin/point of destination…city pair approach". Mr. Lewis suggested that defining a market in terms of city pairs could not be deemed "somehow novel or beyond understanding, or exotic in some way" [day 2, p.21, lines 23-24].

72. Counsel also referred to the decision of the court of first instance in *European Nights Services Limited* (ENS) (case T-374/94) in which that court acknowledged the Commission's consideration that the application of ENS for a declaration that competition rules relating to transport by rail, road and inland waterway did not apply to a number of agreements concerning the carriage of passengers by rail through the channel tunnel should be confined to four routes actually to be served by ENS. The court of first instance noted that this definition of the geographical market had not been challenged by ENS, and proceeded to address the correctness or otherwise of the Commission's ultimate decision on this basis.

73. In relation to Ryanair's alleged dominance in the upstream market, counsel relied on the particulars which identified the individual city pairs, and gave percentages for Ryanair's market share of all carriers, low-cost carriers, and its share of bookings via Vola. In its written submissions it was stated that "…it is Vola's contention that Ryanair is dominant in the cited city pair markets whether taken individually or together". It was submitted that the question of whether these statistics were reflective of dominance on the part of Ryanair was to be resolved by the application of standard legal principles of assessment: whether the position of economic strength allegedly enjoyed by Ryanair enabled it to prevent effective competition by affording it the power to behave independently of its competitors, customers and ultimately its consumers. It was suggested that the law acknowledges a rebuttable presumption of dominance where the undertaking has a market share of 50% or more.

74. In short, it was submitted that the case had been sufficiently pleaded to allow Ryanair to know the case it had to meet. Whether or not that case would succeed, was, it was suggested, a matter for the trial judge.

75. As regards the concept of abuse of its alleged dominant position, Ryanair sought details arising out of para. 98 of the defence and counterclaim as follows:

> "11. Arising out of paragraph 98 of the defence and counterclaim, please provide full and detailed particulars of the material facts grounding the plea that "Ryanair seeks to prevent and/or hinder Vola providing flight information, comparison and booking services (as an online travel agent) in respect of Ryanair flights".

76. The response to this from Vola was as set out at para. 56 above:

"Ryanair is seeking to prevent Vola from displaying and selling Ryanair flights. This amounts to exclusionary anti-competitive behaviour as:

- Ryanair's tickets are objectively necessary for Vola to compete effectively;
- Refusal to supply is likely to lead to the elimination of effective competition; and
- Refusal to supply is likely to lead to consumer harm.

Vola reserves the right to further particularise following additional investigation, including following interrogatories and/or discovery."

77. Ryanair sought further particulars of the material facts underlying these assertions, and the reply in this regard was set out as at para. 57 above.

78. Mr. Lewis then referred in detail to the decision of the European Commission in *Magill TV Guide*, which decision was ultimately upheld by the Court of Justice. In that case (89/205/EEC), Magill TV Guide Limited ('Magill') wished to publish a weekly magazine containing information on TV programmes available to viewers in Ireland and Northern Ireland. It was intended that the listings would include programmes from RTE, BBC and ITV. These entities reserved the right to publish separate magazines setting out their own listings and maintained that any entity publishing their listings was infringing their copyright. Magill argued that this behaviour was anti-competitive.

79. The Commission found that there was an abuse of a dominant position because of the refusal of the broadcasting entities to supply their listings, notwithstanding their intellectual property rights. In addition, the Commission found that this abuse had an effect on trade between member states, inter alia, because the proposed TV guide would be marketed in both Ireland and Northern Ireland. It was submitted that this case was closely analogous to the present case.

80. The alleged impact of Ryanair's activities on the relevant economic market, i.e. the harm to competition, is addressed at paras. 99-106 of the counterclaim as follows:

"99. The effect and purpose of the Ryanair's [sic] acts to prevent and/or hinder Vola providing flight information, comparison and booking services (as an online travel agent) is to stymie competition in the relevant markets in which Vola has operated, and may do so again, and constitutes a prohibited abuse of Ryanair's dominant position within the meaning of Article 102 of the TFEU.

100. Ryanair's denial of access to its flight details and its booking systems is preventing and stymieing the emergence and maintenance of new and separate products, such as combined offerings of flights, accommodation-reservation, car hire reservation and insurance services to those booking online flights provided by online competitors, and for which there is consumer demand (or potential consumer demand).

101. The denial is unjustified and is such as to exclude (or damage) competition on the market for the provision of such combined offerings.

102. Revenues related to the sale of Ryanair's flights account for a substantial proportion of Vola's total revenues. Were Vola no longer able to offer Ryanair's flights the revenue impact on its business would be substantial, and would significantly undermine Vola's ability to compete, and thus in turn would harm competition.

103. Further, the flight comparison service that Vola provides gives consumers and the market generally the opportunity to establish the flight package that best suits a user's requirements, including prices, for given travel times and routes. Ryanair's said denial of access has as its effect (and this is intended by Ryanair) the stifling of competition on the market for flight comparison and flight combination offerings that Vola's comparison service engendered.

104. Vola also offers a number of services to customers that Ryanair does not offer (such as full and comprehensive Romanian-language customer services and the ability to pay via bank transfer).

105. The removal of Vola and firms like it from the market would thus result in these value added services disappearing.

106. In the premises Ryanair is motivated, not by any objective justification for the withdrawal of access to its flight bookings, but by its intention to marginalise competitors in the provision of Ryanair flights either alone or in combination with other travel services, thereby boosting its own sales of said ancillary services such as hotel reservations, car hire and insurance, through its own website."

81. Mr. Lewis suggested that para. 106 above "is exactly what Ryanair pleaded in their own case" [day 2, p.49, line 18]. While this may overstate matters somewhat, counsel's point was that Ryanair does indeed wish to prevent operators in the downstream markets selling flights, *inter alia*, because this diminishes its income from ancillary services sold with flights. Ryanair of course argues that it is perfectly entitled to do so.

82. Mr. Lewis then referred to the various replies to particulars in this regard, and in particular the replies set out at para. 57 above by way of demonstrating the damage to competition. In response to a comment from the court that much of these particulars related to the effect on Vola rather than the market, save for the last line which stated that "…the loss of Vola's non-price offering as a consequence of the harm that it would suffer would lead to a direct adverse impact on consumers…", Mr. Lewis contended that a serious impact on Vola in the market in which it was dominant would inevitably lead to less competition in that market, and the probable loss of the various value added services set out in the particulars, both of which factors would harm the consumer.

83. Finally, it was submitted that it was manifest that the trade between Member States was affected by Ryanair's conduct, and counsel relied in this regard on para. 75 of the

Commission's "Notice/Guidelines on the Effect on Trade Concept" (2004/C101/07) as to exclusionary conduct and its effect on trade between Member States.

84. Counsel made reference to some of the cases regularly relied upon for guidance as to the purpose of pleadings, and in particular the dicta of Fitzgerald J. in *Mahon v. Celbridge Spinning Company Limited* [1967] IR 1:

> "The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words, a party should know in advance, in broad outline, the case he will have to meet at the trial".

85. Mr. Lewis contended that the defendant had complied with the requirements of this test, and the stricture of Laddie J. in *BHB Enterprises* that "…it is incumbent on the party making the allegation to set out clearly and succinctly the major facts on which it will rely". It was also submitted that an application of the principles set out by Haughton J. in *Togher* as set out at para. 24 above to the facts of the present case made it clear that an order striking out the defendant's claim would be inappropriate: In this regard, see counsel's submissions at day 2, pp. 54-59.

86. Counsel laid particular emphasis on the decision of McGovern J. in *Ryanair Limited v. Google Ireland Limited & Ors*. [2017] IEHC 90. In that case, the plaintiff's amended statement of claim pleaded – in addition to various claims regarding alleged infringements of the plaintiff's intellectual property rights – claims for breach of competition law pursuant to Articles 101 and 102 TFEU and s.5 of the Competition Act 2002. Two Google companies, ('the Google defendants') brought an application pursuant to O. 19, r.27 and the inherent jurisdiction of the court to have the competition law pleas struck out on the basis that they disclosed no reasonable cause of action and/or were frivolous, vexatious and/or bound to fail.

87. In conducting an analysis of the Google defendants' application in the context of the facts of the case, Mr. Justice McGovern stated as follows:

> "17. There can be no doubt from reading the amended statement of claim that within para. 50-61 is a claim that the defendants' conduct is in breach of competition law. Furthermore, the defendants accept, as they must for the purpose of this application, that the matters pleaded in the amended statement of claim can be proved. Therefore, the only issue to be decided at this stage is whether or not legal issues of a sufficiently substantial nature have been raised so that it cannot be said that the plaintiff's claim on the competition law point is bound to fail."

88. McGovern J. then concluded as follows:

"23. This application was heard over two days and involved very extensive legal submissions by the parties. It is impossible to read the transcript of the hearing without coming to the conclusion that weighty and substantial arguments were made on the issue as to whether or not it is legally permissible for the plaintiff to maintain a claim for breach of competition law in addition to the infringement of its community trademark and whether an attempt to do so is an attempt to extend the plaintiff's right under the C.T.M. [community trademarks] in a manner that is not permissible. Even a cursory reading of the transcript establishes that these issues can neither properly nor appropriately be dealt with in a motion to strike out a portion of the plaintiff's claim having regard to the authorities in this jurisdiction."

89. Mr. Lewis urged that the same approach be adopted by the court in relation to Ryanair's application in the present case. It was submitted that it could not be said that Vola's case had no prospect of success, and that the high standard required by the jurisprudence to justify the application had not been achieved.

90. It was further submitted that the fact that Vola had claimed that it was damaged by the alleged anti-competitive activities of the plaintiff did not preclude a complaint by Vola in Competition Law. It was suggested that the plaintiff in *Magill* was in exactly this position. Mr. Lewis also referred to Directive 2014/104/EU ('the Damages Directive'), which set out "rules governing actions for damages under national law for infringements of the Competition Law provisions of the Member States and the EU…", which in Recital No. 3 in particular, emphasises the "essential part" played by national courts in "protect[ing] subjective rights under Union Law, for example by awarding damages to the victims of infringements".

91. The defendant also relied on dicta in the opinion of Jacobs A.G. in *AOK Bundesverband* [2004] ECR I-2493 as follows:

"105. If the appellants could be shown to have acted autonomously in setting fixed amounts, in such a way as to breach Article 81 EC, and if they did not succeed in defending their conduct under Article 86(2), I have no doubt that both damages and injunctive relief would have as a matter of Community law been available to anyone suffering loss as a consequence of that conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness. As the Court has held, the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition of Article 81(1) would be put at risk if it were not open to any individual in proceedings before a national court to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort composition. The same analysis would in my view apply equally to injunctive relief."

92. It was submitted that, accordingly, there could be no objection to an application for injunctive relief by Vola if it were in a position to establish that rights which Ryanair asserted were anti-competitive and liable to cause damage to Vola.

93. Counsel also submitted that reliance by Ryanair on the *Bravofly* case as a close analogy to the present proceedings was misplaced. It was suggested that the court had in fact held that allegations in the course of pleading an anti-competition case which asserted "abuse" and "aggressive behaviour" by Ryanair in the flight market were inappropriate, as they were not relevant to the question of whether Ryanair was dominant in that market; as Clarke J. put it "…it is only those facts which might, arguably, go to show a sufficient level of market power to establish dominance that are relevant, and not whether those facts might also amount to an abuse" [para. 5.9 [2009] IEHC 41]. It was for that reason that Clarke J. gave Bravofly "…an opportunity to redraft the pleadings in such a way as confines the allegations in respect of the flight market to underlying facts which might, arguably, be relevant to the assessment of whether Ryanair is dominant in that market…" [5.11]; the allegations of "abuse" and "aggressive behaviour" were unnecessary and/or scandalous within the meaning of O.19, r.27.

94. Vola also submitted that the second and third judgments of Clarke J. in *Ryanair v. Bravofly* "…had no application to the competition pleading aspect. They concerned the adequacy of particulars of technical matters in the defence itself, such as the precise mode of operation of booking systems…" [para. 10, supplemental submissions].

Discussion and analysis

95. There was no dispute between the parties in relation to the general principles of law governing what constitutes appropriate pleading. In the present case, Ryanair argues for a "heightened obligation" in relation to pleading in competition cases. Normally there is a distinction between the factual allegations which enable an opposing party to discern the case being made in a pleading, and the evidence by which those allegations are proved. Throughout its requests for particulars, Ryanair sought "material facts" upon which Vola's pleadings were based. While such a request might blur the distinction between facts and the evidence by which those facts were to be proved, Ryanair claimed that jurisprudence in England and Wales justified this approach.

96. There can be no doubt that, the more complex a case is, the greater the onus on a party to plead with particularity. If each party must understand the other's case, it may be that the complexity of a case may require that much more detail than usual be given. Where a case depends on a definition of an economic market, it may also be that considerable detail, often comprising the detail and opinion of an expert, may be required to delineate that market properly and enable the party alleged to have abused its dominant position in a market to understand exactly what the market is. What is or is not an appropriate level of detail depends on the facts of each case.

97. The court must ensure that sufficient detail is given by a litigant so that the opposing party can understand the case being made. Only if the detail proffered suggests that the case is frivolous and vexatious, or has no reasonable prospect of success, can a court intervene to accede to an application to strike out the proceedings.

98. For this purpose, the court must engage with the case as pleaded. However, the court does not embark upon an exercise which involves a detailed interrogation of the merits of

the case. The jurisdiction to strike out "should be exercised sparingly and only in clear cases… if a statement of claim admits of an amendment which might 'save it' and the action founded on it, then the action should not be dismissed…a variety of circumstance may emerge at the trial of an action which might not be entirely contemplated at earlier stages in proceedings, and what may appear clear and established at an early stage may become less so at trial…where there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence, it is difficult to envisage circumstances where an application to dismiss on the grounds that the action is bound to fail could succeed…" [Haughton J. in Togher as quoted above at para. 24].

99. In addition to the dicta of McGovern J. in *Ryanair v. Google* quoted above, the approach adopted by Clarke J. in *Ryanair Limited v. Bravofly Limited* [2009] IEHC 41 is instructive:

"5.1. As will have been seen, the first set of issues under this heading concern those parts of the pleadings contained in the counterclaim under the general heading of 'Particulars of Dominant Position" which contain allegations of aggressive or abusive activity by Ryanair in the flight services market. In order to access the argument under this heading it is necessary to consider the sort of matters that could, arguably, be relevant to the counterclaim which Bravofly brings against Ryanair in these proceedings.

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

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

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

100. Ryanair submits that neither the upstream market nor the downstream market are sufficiently well defined to enable it to understand the case it has to meet. This assertion is emphatically denied by Vola. Mr. Lewis pointed out that Mr. Burke was able to summarise the essence of the defendant's counterclaim neatly and concisely in his grounding affidavit as quoted at para. 13 above. It was submitted on behalf of Vola that, while Ryanair may disagree profoundly with the assertion that upstream and downstream markets as defined by Vola in the counterclaim and particulars are appropriate and justified by verifiable economic conditions, this is a matter for the trial judge rather than an application to strike out.

101. There is no doubt that there will be very substantial dispute at trial as to whether the upstream and downstream markets have been sufficiently or appropriately defined. For instance, it appears from the particulars furnished by Vola that the upstream market relates only to nominated city pairs involving "passenger flight services". Ryanair contends that such a market is ill-defined, *inter alia*, because it fails to take account of how travel may be achieved on these routes by means other than direct flight between the cities.

102. Vola has clearly opted for a very narrow definition of the upstream market. The burden of proof at trial will rest on Vola to establish that this narrow definition is justified, and that such a market exists. It will also have to prove that Ryanair is dominant in that market, and that it has abused its position in such a way as to harm competition in the downstream market.

103. Vola maintains that Ryanair and Vola "compete in the downstream market of providing online travel agency (OTA) services in the market for [the nominated city pair flights] …". The replies to particulars of Vola set out at paras. 56 and 57 above suggest that Ryanair "competes with OTAs like Vola in the retailing of flights and other ancillary services such as insurance, car hire and accommodation…". Vola is "the largest OTA in the Romanian market with an approximated share of the OTA segment of that market of 60%".

104. As regards the upstream market, and bearing in mind the approaches adopted by McGovern J. and Clarke J. in *Google* and *Bravofly* respectively, and applying the well-established principles summarised by Haughton J. in *Togher*, I am of the view that it would be neither proper nor appropriate to strike out the plaintiff's counterclaim at this stage on the basis that the upstream market has been improperly or insufficiently defined. It seems to me that Ryanair understands in broad outline the case it has to meet, and clearly has substantial arguments to advance that the markets as contended for by Vola are misconceived and inappropriate. However, this issue must be determined at a full hearing rather than at this preliminary stage.

105. In relation to the question of whether the downstream market is sufficiently defined, there is some justice in Ryanair's assertion that the emphasis in the particulars cited at para. 57 above as to the "elimination of" or "harm to" competition is on the alleged damage which would be done to Vola, rather than the downstream market for which Vola contends. In *Attheraces Limited v. The British Horse Racing Board Limited* [2007] UKCLR 309, the Court of Appeal for England and Wales emphasised that the overall context of Article 82 – as it then was – was to prevent distortion of competition and to safeguard the interests of customers. The court cited with approval the dicta of Jacobs A.G. in *Bronner v. Mediaprint* [1998] ECR 1-7791 at 7811, para. 58:

> "…it is important not to lose sight of the fact that the principal purpose of Article [82] is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter's upstream market power and conclude its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on customers unless the dominant undertakings final product is sufficiently insulated from the competition to give it market power".

106. The Court of Appeal went on to state as follows:

> "108. Refusal by a dominant undertaking to supply does not necessarily constitute an abuse. For example, the refusal will not be an abuse if it does not distort competition or if the customer will not abide by regular commercial practice. Abuse of a dominant position by refusal to supply may occur, however, as a result of the cutting off of an existing customer, or refusing to grant access to an essential facility, unless the act or refusal is objectively justified. It may also consist of the refusal to grant a licence of an IP right."

107. Bearing these comments in mind, the case made by Vola in relation to the downstream market was unclear to me in a number of respects. The particulars proffered by Vola concentrate on the damage it alleges it will suffer if precluded from offering Ryanair tickets for sale. It was unclear how the market in the provision of OTA services generally would be affected, and in particular how the consumer would be affected. It was suggested that enforcement by Ryanair of its contractual rights would damage OTAs and Vola in particular, possibly driving Vola out of business, but it was not expressly set out how this would affect other OTA's, or the consumer of services in this downstream market.

108. I am not disposed to strike out the counterclaim on the basis of what in my view is a lack of clarity and precision. However, I do consider that Ryanair, in order to understand the parameters of the market contended for, and the way in which its actions or proposed actions are alleged to harm consumers, requires, as a matter of urgency, answers to the following queries:

- Who are the ‘other OTAs’ [para. 11 of the second replies] which it is alleged compete with Ryanair and Vola in respect of ‘the retailing of flights and other ancillary services such as insurance, care hire and accommodation’ [para. 11 second replies]?

- What percentage of the alleged downstream market is alleged these “other OTA’s” comprise?

- What does Vola contend will be the effect on these ‘other OTAs’ if the plaintiff is successful in its claim; and what is the basis of this contention?

- What percentage of the specific downstream market contended for by Vola (as opposed to the ‘Romanian market’ referred to at para. 11 of the second replies) does Vola say that it holds?

- If Ryanair succeeds in its claim, and prevents Vola and other OTAs from selling Ryanair tickets, how does this distort competition in the downstream market and affect consumers, given that Ryanair tickets and ancillary services will still be available from Ryanair?

109. I would propose to order that, as a condition of being allowed to proceed with the counterclaim, Vola proffer substantive replies to these queries set out above. In the course of submissions, Vola readily accepted that the court had the power to require it to furnish any further particulars, and such an approach is consistent with the principle enunciated by Haughton J. in *Togher* that, if there were an amendment that would “save” pleadings, that amendment should be ordered. I will expect substantial and meaningful replies to these queries, and will hear the parties as to whether an “unless” order should be made in respect of the replies to be furnished by Vola.

110. Vola maintains that, if it is correct in asserting that Ryanair’s conduct in seeking to prevent those in the downstream market from selling Ryanair tickets is anti-competitive, it is entitled to defend its position by seeking injunctive relief and damages. In this regard, Vola relied on the decision of *AOK Bundesverband* as cited at para 91 above, and on para. 16.150 of Bellamy and Child on European Law of Competition [8th Edition], as authority for the proposition that it was open to a party threatened with loss as a result of anti-competitive behaviour to apply for injunctive relief. Vola rejects the assertion that its case is “hypothetical” and that it is therefore frivolous and vexatious; it is submitted that it is entitled to plead its counterclaim in response to what it maintains is an assertion by Ryanair of anti-competitive contractual rights.

111. It seems to me that there is a substantial argument that Vola is entitled to proceed with the counterclaim notwithstanding that Ryanair has not yet achieved its object in vindicating its alleged rights and preventing Vola from selling its tickets. The harm apprehended by Vola is not hypothetical- there is a clear and present assertion in Ryanair’s claim of its entitlement to relief which Vola contends is consequent upon abuse

by Ryanair of its alleged dominant position. Whether this contention is correct is a matter which can be considered by the trial judge in due course.

112. Ryanair also sought to make a related argument, referred to at para. 50 et seq. above, that if the court were to hold in Ryanair's favour in respect of its claim, this would constitute a determination that of itself precluded a contrary finding that Ryanair's actions were anti-competitive. Ryanair relied heavily on the *Humber Oil* case in this regard.

113. In that case, referred to at paras. 50-55 above, if the rent for the proposed new lease between HOTT and ABP were fixed by the court, the imposition of such a rent could not constitute an abuse of a dominant position – a position accepted by counsel for HOTT. As the court commented at para. 33, "…even if the landlord does occupy a dominant position and even if he does seek the payment of excessive rent all the other party need do is refer the matter to the court for its adjudication". Resolution of the amount of rent payable by the court therefore precluded a competition claim.

114. Similarly, it is suggested by Ryanair that, if the court were to uphold Ryanair's claims and find that Vola had acted unlawfully in selling Ryanair tickets, and were therefore in breach of contract and otherwise liable pursuant to a number of associated causes of action, there is no basis upon which the court could validate or excuse those wrongs by holding that the exercise by Ryanair of its contractual rights was anti-competitive. However, as counsel for Vola pointed out, the Ryanair claim does not canvass any competition issues, which are raised only in the counterclaim, which is in reality offered as a defence to the Ryanair claim. The possibility that exercise by Ryanair of its contractual rights could be deemed to be anti-competitive cannot be discounted at this preliminary stage.

115. In the circumstances, it does not seem to me that I can strike out the claim on the basis that resolution of the plaintiff's claim in its favour necessarily precludes a counterclaim. I think that the decision in *Humber Oil* is readily distinguishable in this regard.

Modular Trial

116. If the court is not disposed to strike out the counterclaim, the plaintiff seeks an order pursuant to the inherent jurisdiction of the court staying the prosecution of the counterclaim pending determination of the plaintiff's claim. Alternatively, the plaintiff seeks a modular trial in which the plaintiff's claim is heard and determined, with the counterclaim being heard and determined as a second module. Vola's motion mirrors that of Ryanair, with Vola seeking an order that the counterclaim be heard and determined first.

117. As with the other legal principles involved in these applications, there is no material controversy between the parties as to the law governing modular trials. Both sides delivered written submissions in this regard and set out their views as to why the reliefs they sought should be granted.

118. Since the hearing of the motions, judgment was delivered by Barniville J. in *Nolan v. Dildar Limited* [2020] IEHC 243. At paras. 113-143 of that judgment, Barniville J. sets

out a very helpful analysis of the applicable legal principles in this jurisdiction regarding modular trials, which I am satisfied to adopt as an accurate and perceptive summary of the law.

119. It was well established prior to 2016 that the court had an inherent jurisdiction to direct a modular trial. Express provision for modular trials has now been made in the Rules of the Superior Courts by the amendment of O.36, r.9 by the Rules of the Superior Courts (Conduct of Trials) [2016] SI. No. 254 of 2016. This order now confers a general power on the court to order, in any cause or matter, or from time to time:

"(a) that different questions of fact arising therein be tried by different modes of trial;

(b) that one or more questions of fact be tried before the others;

(c) that one or more issues of facts be tried before any other or others".

120. Order 36, r.9(2) confers express power on the judge in certain circumstances, including cases listed for trial in the Chancery List, to make an order:

"(i) directing that the trial be conducted in particular stages (in this rule, 'modules') and determining the questions, issues or set of questions or issues of fact, or of fact and law, to be the subject of each or any module, and the sequence in which particular modules shall be tried;

(ii) specifying the nature of the evidence, or the witnesses, including expert witnesses, required to enable the court to determine the questions or issues arising in each or any module;

(iii) directing the exchange and filing in court, either in advance of each or any module or following the conclusion of the module concerned, of written submissions on the questions or issues of law arising in that module."

121. In his analysis, Barniville J. considers the leading cases in which the principles governing how the courts should exercise its inherent power to order a modular trial should be exercised. Those principles were first considered by Clarke J. (as he then was) in *Cork Plastics (Manufacturing) v. Ineos Compound UK Limited* [2008] IEHC 93. In that case, Clarke J. set out a number of factors which he considered might cause a court to depart from the default position that there should be "a single trial of all issues at the same time".

122. Of particular note in relation to the present applications, Clarke J. noted the perceived advantage of a modular trial to be that, depending on the outcome of the earlier module or modules, subsequent modules may either become unnecessary or may be capable of being dealt with "in a much more focussed fashion" [para. 3.2]; lengthy cases with significant and complex issues might potentially be amenable to modular trials; another relevant factor was the extent to which there might be "significant overlaps in the evidence or witnesses that would be relevant to all modules" [para. 3.12].

123. A further helpful analysis of the considerations to be taken into account by the court was given by Charleton J. in *McCann v. Desmond* [2010] 4 IR 554. As summarised by Barniville J. in Nolan, those considerations were as follows:

"(1) Are the issues sought to be tried by way of a preliminary module, '*readily capable of determination in isolation from the other issues in dispute between the parties?*'. Charleton J. stated that a modular trial should not be directed if the case '*could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues'.*

(2) Will there be a clear saving of court time and costs if a modular trial is ordered? This is not the only factor to be considered but is one which should be seen '*in the context of the need to administer justice in the entire circumstances of the case'*.

(3) Would a modular trial prejudice any of the parties? If it would, such as where one party's case is weakened by having a part of it heard in advance of another part, then a modular trial should not be ordered.

(4) Is the application for a modular trial a 'device' to suit the parties seeking it or does it '*genuinely assist the litigation by being of help to the resolution of the issues'?* (para. 7 p.558) …" [Emphasis in original].

124. Clarke J. gave the matter further consideration in *Donatex Limited v. Dublin Docklands Development Authority* [2011] IEHC 538, reiterating some of the observations he had made in *Cork Plastics* and referring with approval to the considerations identified by Charleton J. in *McCann*. At para. 2.8 of his judgment, Clarke J. identified "two broad considerations":

"A. Whether there is a logical division of the case into modules as a result of which it is realistic to hope that so dividing the case will truly save time and costs; and

B. Whether there might be any true prejudice to any of the parties (as opposed to mere tactical disadvantage) as a result of the proposed division. (Paragraph 2.8)"

125. In his analysis in Nolan, Barniville J. refers to the discussion and further refinement of these principles in the Supreme Court decision of *Weavering Macro Fixed Income Fund Limited v. PNC Global Investment Servicing (Europe) Limited* [2012] 4 IR 681. Of particular pertinence to the present case are the following comments of Barniville J. in relation to the decision in *Weavering*:

"132. Having referred to some of the similarities between modular trials and trials of preliminary issues, the court [in *Weavering*] noted that where issues are tried first on a modular basis (such as liability and/or causation), the trial court will hear all matters relevant to those issues (whether of a fact of law) [sic] and come first to a conclusion of those issues. The court stated that if, while hearing such a module,

the trial court were to form the view that it could not safely reach a final conclusion on some or all of the issues to be determined in the module, without also considering evidence and legal argument relevant to issues intended to be dealt with in a later module, the court could 'act in an appropriate way to ensure that no injustice is caused' (para. 6.6). Presumably the court has in mind that the trial court could defer ruling on the earlier module until the subsequent module was heard and then rule at the same time on both modules, or something like that. The court further noted that when a modular trial is sought, there are a '*range of practical circumstances to which the court should have regard in determining whether, in reality, there is likely to be a net benefit in directing a modular trial'*. The court continued:

> *'the factors that may be important in determining where the balance lies may vary from case to case depending on all the relevant circumstances of the case in question' (para. 6.6)."*

126. Barniville J. went on to discuss the application of the various principles above by Twomey J. in *Sheehan v. Flynn* [2018] IEHC 188, before proceeding to apply them to the circumstances in *Nolan*, ultimately concluding that he should not direct a modular trial at that stage of the proceedings.

127. Ryanair urges that "the cause of action the subject of the Counterclaim does not in fact accrue until such time as this Court determines Ryanair's claim in its favour and prevents Vola from using the Ryanair website, and its content, for, *inter alia*, the purpose of selling Ryanair flights…" [written submissions para.75]. This proposition is not accepted by Vola, which contends that its counterclaim stands independently of Ryanair's claim and should in fact be heard and determined first.

128. It is submitted on behalf of Ryanair that "should Vola successfully defend Ryanair's claim the counterclaim will automatically fall away", and accordingly that "this is an ideal case in which to either stay the prosecution of the Counterclaim or direct it to be the subject of modular trial" [written submissions para. 75]. Ryanair characterises the counterclaim as "a standalone and discrete cause of action. It does not require to be prosecuted and determined in conjunction with Ryanair's claim" [written submissions para. 76].

129. It should be said that counsel for Ryanair complained of what he perceived as culpable delay and dilatory conduct on the part of Vola in its defence of the proceedings to date, and the consequent frustration of Ryanair's aim of getting the proceedings on to trial as quickly as possible. In this regard, he referred to, *inter alia,* an unsuccessful application by Vola contesting jurisdiction and the manner in which Ryanair had had to repeatedly request replies to particulars which should have been furnished at the outset. While these complaints were strongly rejected as unsustainable by counsel for Vola, it was suggested – without prejudice to the contention that the counterclaim should in any event be struck out – that the conduct of Vola warranted at very least that Ryanair be allowed to proceed with its claim regardless of whether Vola was in a position to prosecute its counterclaim.

130. Vola equally contended that the counterclaim involved determination of "a discrete set of factual issues". The case would be relatively short compared to the likely length of the claim, and unlike Ryanair's claim, would involve only two parties. It was also submitted that the counterclaim was effectively a defence to Ryanair's claim against Vola, but if it were successful, Ryanair's claim against Vola would fall away.

131. In response to queries from the court, Mr. Lewis fairly defined his position as being that, if there were to be a modular trial, it should be the counterclaim rather than Ryanair's claim that would go first, but that his view was that "the most efficient use of the court's time would be to run the entire case as one" [day 2, p.97, lines 16-18, p.98, lines 6-10].

132. As we can see, both parties contend that each of their cases is discrete, and can be prosecuted independently of the other with little fear of overlap or repetition. A perusal of the pleadings to date would suggest that this is correct.

133. There was some dispute between the parties as to the likely respective lengths of the trials of the claim and counterclaim. Vola argued that the counterclaim was likely to take far less time than Ryanair's claim, contending that the issues were relatively net, and capable of requiring only one expert on each side. Ryanair did not accept that there was any material difference between the likely lengths of the trial of the claim or counterclaim, but submitted that this factor should not in any event determine which module went first.

134. In relation to the vital question of prejudice, Vola argues that, if Ryanair's claim is heard first and determined in its favour, and the reliefs it seeks are granted to it, Vola will be heavily prejudiced by being deprived of the opportunity to proffer its counterclaim as a defence to Ryanair's claim and argue that Ryanair's assertion of its contractual rights is anti-competitive and should not be permitted. It is suggested that the reliefs sought by Ryanair might well drive it out of business before it had a chance to press its case. On the other hand, Vola contends that success in its counterclaim would obviate the need to hear the claim against it at all.

135. It seems to me that, if the counterclaim were to go first, Vola would be proceeding on the basis that, even if Ryanair's claims were valid, Ryanair would not be entitled to rely on its rights because they are anti-competitive. In effect, the court would not be required to assess whether Ryanair had proved its case, but would be expected to proceed on the basis that it should be assumed for the purpose of the counterclaim that it would or at least might succeed in its case. This would be notwithstanding the position adopted by Vola in its defence, which is an outright denial of Ryanair's claim which puts the plaintiff on full proof of all material aspects of the statement of claim.

136. In all the circumstances, I do not think that hearing the counterclaim first would be a proper or appropriate way to proceed. While I do not accept Ryanair's repeated characterisation of the defendant's claim as "hypothetical", it is fair to say that the threat to Vola's ability to sell Ryanair tickets does not take effect until Ryanair establishes the rights for which it contends and obtains orders of this Court enforcing them. Hearing the counterclaim first seems to me – to use a colloquialism – to be putting the cart before the

horse. It also leaves undetermined the allegations of Ryanair against Ypsilon, which would have to await the outcome of the counterclaim to judge the impact of the court's decision on its defence of Ryanair's claim.

137. Also, while I think it probable that the trial of Ryanair's claim would take longer than that of the counterclaim, I do not believe that any disparity in the respective lengths of claim and counterclaim would be sufficiently stark to justify hearing the counterclaim first. I will in any event be proposing case management procedures with a view to, *inter alia,* streamlining the expert evidence and narrowing the technical issues between the parties which will hopefully reduce the length of trial of both claim and counterclaim.

138. The real issue is whether claim and counterclaim should be heard together, or whether Ryanair's claim should be heard as a first module. In my view, there are strong grounds for the latter. Both sides are agreed that claim and counterclaim are each discrete, with little or no evidential overlap between the two. If Ryanair's claim against Vola did not succeed, there would be no need to hear the counterclaim at all, resulting in a saving of court time and costs. While Vola's submissions before me emphasise that the counterclaim is effectively a defence against Ryanair's claim, I was not given any reason to believe that Vola does not intend to defend Ryanair's claim vigorously and in accordance with its defence.

139. The prejudice suffered by Vola would be that referred to at para. 134 above, i.e. that orders in favour of Ryanair on foot of its claim would cause such damage to Vola's business that, as counsel for Vola put it, "…the prospect of [Vola] being able to actually mount the counterclaim would be gravely diminished" [day 2, p.92, lines 16-17]. However, I agree with the views expressed by Barniville J. at para. 132 of his judgment in *Nolan*, set out at para. 125 above, that the Supreme Court in *Weavering* contemplated that a court would have jurisdiction to "defer ruling on an earlier module until the subsequent module was heard and then rule at the same time on both modules".

140. Alternatively, it seems to me that it would also be permissible for the court in the present case to hear and determine the liability issues in Ryanair's claim against both defendants, but, in the event of a determination of liability in favour of Ryanair, to defer the making of orders in the proceedings until the counterclaim had been heard and determined.

Conclusions

141. For the reasons set out in this judgment, I am not disposed to strike out Vola's counterclaim. However, I am of the view that the matters set out above at para. 108 should be addressed in a substantial and meaningful fashion by Vola in further particulars, and I will grant a further period of six weeks from the date of the order of this Court for this purpose.

142. Taking all of the circumstances into account, I am of the view that there should be a modular trial of the issues of liability in Ryanair's claim against both defendants. I believe that proceeding with Ryanair's claim will focus the minds of the parties and ensure that this part of the litigation at least will proceed expeditiously to trial. If Vola prevails in its

defence of the liability issues, the counterclaim does not arise. If Ryanair's claim is successful, the court will hear argument at that point as to whether it should make orders against one or both defendants immediately, or defer a ruling on the orders to be made until the hearing and determination of the counterclaim.

143. In view of the complexity of the issues and the contested complaints of delay in the proceedings to date, I propose to avail fully of the case management powers given to the court by O.36, r.9 and O.63C of the Rules of the Superior Courts to give directions as to preparation for the trial and the conduct of the trial itself. I would envisage that a strict timetable would be established for any further interlocutory applications, and the exchange of witness statements and written submissions. I will give the parties an opportunity to make submissions in relation to these issues, and would welcome suggestions as to any procedures which promote the streamlining of technical evidence and the narrowing of issues in particular.

144. The parties will need to consider the extent to which procedures are taken to advance the counterclaim. On the one hand, the purpose of ordering the modular trial is to ensure an expeditious trial of Ryanair's discrete claim, while providing for the possibility that Vola will not be unduly penalised by having orders made against it until its claim is determined. On the other hand, if Ryanair is successful in its claim, it should be entitled to an expeditious hearing of the counterclaim and not be subjected to undue delay in this regard.

145. It seems to me therefore that, should Ryanair be successful in relation to the liability aspect of its claim, the success of any argument on behalf of Vola that orders in Ryanair's favour should be deferred until the determination of the counterclaim will depend to a large extent on there being no undue delay with Vola prosecuting its counterclaim. This in turn may require that any pre-trial procedures relating to the counterclaim have been completed. It is in the interests of both Ryanair and Vola therefore that all appropriate steps are taken to ensure an early hearing of the counterclaim in the event that the first module is determined in Ryanair's favour.

146. As this judgment is being delivered electronically, I would invite the parties to make submissions within 14 days from the date of receipt of the judgment as to the terms of the orders to be made, and particularly the question of costs.