THE HIGH COURT

[2022] IEHC 385

Record No. 2010/8924 P

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

ON THE BEACH LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 23rd day of June, 2022.

Introduction

1. This is an application by the defendant ("On The Beach") to dismiss the claim of the plaintiff ("Ryanair") for want of prosecution by reason of inordinate and inexcusable delay. The application is made pursuant to the inherent jurisdiction of the court, in accordance with the well-known principles as set out in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, where Hamilton C.J. summarised the principles to be applied as follows:

> *"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

> *(i) the implied constitutional principles of basic fairness of procedures,*
>
> *(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
>
> *(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,*
>
> *(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
>
> *(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
>
> *(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

2. As stated by the Court of Appeal (per Irvine J.) in *Millerick v. Minister for Finance* [2016] IECA 206, the *Primor* principles require the court to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied, the application must fail. If on the other hand the court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the court conclude that the delay is both inordinate and inexcusable, it nevertheless should not dismiss the proceedings unless it is also satisfied that the balance of justice would favour such dismissal. I will consider this application by reference to those three broad issues.

Whether the delay was inordinate

3. These proceedings were issued on 27 September, 2010. A conditional appearance was not entered until 24 January, 2011. On The Beach then brought a motion, issued 11 March, 2011, contesting the jurisdiction of the Irish courts to hear the proceedings. On The Beach was unsuccessful in this Court (see judgment of Laffoy J. [2013] IEHC 124**)** and in the Supreme Court on 19 February, 2015 (see judgment [2015] IESC 11).

4. Ryanair delivered a statement of claim on 22 April, 2015, and On The Beach responded with a notice for particulars dated 4 June, 2015. The saga in relation to particulars did not conclude until December, 2017, and there was considerable dispute at the hearing of this application as to who was to blame for the time spent on particulars. On The Beach

pointed to the fact that Ryanair only delivered its first replies to particulars on 16 September, 2016, having served a Notice of Change of Solicitor and a Notice to Proceed on 7 September, 2016. The first replies were therefore served approximately fifteen months after the notice for particulars had been served.

5. By contrast, Ryanair stated that the particulars were excessive, and relied heavily on the fact that, although On The Beach had issued rejoinders by letter dated 21 December, 2016, seeking further responses in relation to all or part of 17 paragraphs of the original 22 paragraph notice for particulars, its motion to compel replies, which was issued on 5 May, 2017, pursued only three of the rejoinders.

6. That motion ultimately adjourned generally in December, 2017, as Ryanair had decided that it needed to amend its statement of claim. A draft amended statement of claim was served on the solicitors for On The Beach by letter dated 8 November, 2017. However, this elicited a one sentence reply stating that On The Beach did not consent to the amendment. No reason was given for the refusal.

7. In respect of the period from delivery of the Supreme Court judgment in early 2015, to the adjournment of the notice of particulars at the end of 2017, and the refusal of On The Beach to consent to the amendments, Ryanair says On The Beach is to blame for raising excessive particulars which were not pursued by way of motion and for failing to agree the amendment, or at least to point to some grounds for refusing. It asked the court to infer that On The Beach was acting unreasonably in seeking to contest every procedural step for the motion, particularly in light of the failure to motion for most of the particulars in relation to which the rejoinders were raised and the failure to consent to amendment of the Statement of Claim, given the extremely wide jurisdiction to permit amendments as established by the Supreme Court decision in *Croke v. Waterford Crystal Ltd.* [2005] 2 I.R. 383**.**

8. By contrast, On The Beach says that the particulars were necessary, that Ryanair delayed substantially in delivering its first replies for 15 months, and that if Ryanair needed to amend its statement of claim, it should have brought a motion to do so in December, 2017.

9. No step of any kind was taken by either party until a notice of change of solicitor and a notice of intention to proceed were served on 31 July, 2020, by Messrs Arthur Cox, Ryanair's current solicitors. However, notwithstanding service of those notices, Ryanair still did not move to amend its statement of claim or otherwise progress the proceedings.

10. Eventually, on 10 June, 2021, On The Beach's solicitors served this notice of motion to dismiss the proceedings. This apparently is the same date on which proceedings were instituted by On The Beach in England and Wales, pursuant to s.18 of the Competition Act, 1998, alleging that Ryanair is abusing its dominant position in the market. It was only apparently in response to this motion that Ryanair brought a motion to amend its Statement of Claim, which is awaiting the outcome of this application. Ryanair also brought a motion in the Chancery list to case manage these proceedings along with other proceedings to which I will refer further below, but that was refused as this application must first be dealt with. Ryanair has liberty to renew that application for case management should this application be dismissed.

11. It is, I hope, apparent from that chronology that there are three broad periods of time material to consideration of whether Ryanair has inordinately delayed in progressing its proceedings. First, there is the period from late 2010 until early 2015, that is, the period from the institution of the proceedings to the final dismissal of On The Beach's challenge to the jurisdiction of the Irish courts. Obviously, Ryanair is not responsible for this period of delay.

12. Secondly, there is the time spent from early 2015, until December, 2017, when, in my view, neither party dealt with the proceedings expeditiously. The criticisms of each side of the other are, in my view, merited. On The Beach raised rejoinders which it did not pursue by

way of motion, a tacit admission that replies were not necessary and that no risk as to costs would be taken in pursuing them. Furthermore, the motion for particulars was not issued with due expedition. If those particulars were really required in order to deliver a defence, On The Beach did not move to obtain them in the 15 month period during which Ryanair failed to respond. While the primary onus is on Ryanair to progress the proceedings, a notice for particulars does not in itself justify the non-delivery of a defence and therefore On The Beach should have moved to compel replies when it did not receive any.

13. Similarly, Ryanair only very belatedly replied to the notice for particulars and also delayed in serving an amended statement of claim. Furthermore, when it did not get consent to the amendments, it failed to apply to amend. In my view, On The Beach should have set out at least the essential basis on which it was refusing consent, given the liberal jurisdiction of the courts to amend pleadings, but if they were acting unreasonably, as they appear to have been, then Ryanair had an obvious remedy of bringing a motion to amend, which it chose not to do.

14. In my view, therefore, both sides are equally to blame for the fact, that for a period of almost three years, nothing very meaningful was achieved in relation to the proceedings.

15. Obviously, Ryanair are solely responsible for the third period of delay from late 2017 until the date of issue of this application on 6 June, 2021, albeit that the period from mid-March, 2020 to late June, 2020, or thereabouts, cannot be considered due to the crisis provoked by the Covid-19 pandemic and the very severe public health restrictions which were in place at that time, which led to a period where little work could be done until businesses adapted their work practices so as to accommodate fully remote working. Ryanair are therefore responsible for a delay of over three years from December 2017 to the issue of this motion.

16. It will be seen from the foregoing that both parties are to blame for significant periods of delay. Ryanair, as plaintiff, bears the greater onus of progressing proceedings, but there was nothing it could do before the spring of 2015, given that On The Beach was pursuing an ultimately unsuccessful challenge to the jurisdiction of the Irish courts. That period of just over four years is just over one year longer than the period of delay from December, 2017, to June, 2021, for which Ryanair is solely responsible in my view. The delay caused by the jurisdictional challenge brought by On The Beach is primarily material to the third enquiry as to where the balance of justice lies, and I refer to this further below.

17. In assessing whether the delay is inordinate, it appears to be well-accepted that the nature of the proceedings must be taken into account. On the one hand, these are novel and complex proceedings. However, their nature is to challenge the very business model of On The Beach and, given their complexity, while they must take time to prepare, the time necessitated by such preparation cannot be compounded by periods of complete inactivity. I am of the view that a delay by Ryanair for more than three years, in the context of this type of litigation, is inordinate.

Whether the delay is excusable

18. The primary excuse given for the failure of Ryanair to progress these proceedings was that Ryanair is involved in many law suits throughout Europe, including several more in this jurisdiction, of a similar nature against online travel agencies ("OTAs"), including On the Beach.

19. OTAs are travel agencies which book, *inter alia*, flights as agents for consumers. The consumer books on the OTA's website and it is the OTA which then makes the booking on the airline websites. Ryanair says that it does not consent to anyone other than the consumer

booking flights on its website and a key issue in these proceedings is that Ryanair contends that the OTAs breach its Terms of Use which are the terms on which it permits use of its website. Ryanair also alleges that the OTAs breach its intellectual copyright by displaying the Ryanair logo on their websites, and Ryanair also alleges that consumers are not actually made aware that they are not dealing directly with the airline company.

20. The consumer's bank details and emails are not passed on by the OTA to Ryanair. Instead, the OTA gives an alternative email address to Ryanair and its own bank details, so that Ryanair and the consumer cannot contact each other directly about the booking.

21. Ryanair has taken technological steps to try to prevent OTAs from accessing its website but, to date, OTAs have succeeded in bypassing those steps and continuing to use the website of Ryanair and other airlines. Sometimes the OTAs use third party companies to access the Ryanair website for them and, where Ryanair can ascertain the identity of these companies, they have been joined to proceedings.

22. Ryanair claims that the OTAs are damaging its reputation by adding their own margin to the price of the flights, thereby affecting Ryanair's reputation as a low cost airline, and by preventing Ryanair from providing updates and direct refunds (where applicable) to its passengers. It also claims that its business is damaged as the customer is not directed to its website and so does not buy ancillaries such as car hire through its site.

23. At least one of the proceedings brought by Ryanair in this jurisdiction, *Ryanair DAC v. SC Vola.ro SRL and Ypsilon.net AG* [Record No. 2017/8782 P] ("the *Vola* proceedings"), have been actively progressed by Ryanair and case managed, and orders for discovery have been made: [2021] IEHC 788. Those proceedings are therefore significantly more advanced than these proceedings against On The Beach.

24. The principal excuse given by Ryanair in the affidavits filed on its behalf for its failure to progress the proceedings is that the *Vola* proceedings will *"impact upon, if not*

resolve" this dispute. On The Beach vigorously disputes this, saying that it is not bound by those proceedings, and that in any event the various disputes that Ryanair has with the OTAs and the companies used by them to access airline websites are fact-specific.

25. However, while it is undoubtedly the case that On The Beach cannot be formally bound by proceedings to which it is not a party, it seems quite likely, if not probable, that any final decision in the *Vola* proceedings will have ramifications for this case in that it will no doubt result in the determination of legal issues which will create a precedent for this case.

26. The material issue for this application is whether it is legitimate for Ryanair to sue On The Beach and then not progress the proceedings, preferring instead to pursue its claim against an unrelated third party in entirely separate proceedings, albeit that the proceedings share legal issues in common.

27. In my view, although it was decided in the context of very different proceedings, the decision of *Millerick v. Minister for Finance* is material, as the Court of Appeal held in that case that the Minister for Finance should not have been left with proceedings hanging over him while the plaintiff chose to progress a different, albeit related, claim against the Motor Insurers Bureau of Ireland. There are similar *dicta* to the same effect in *Comcast International Holdings Inc v. Minister for Enterprise* [2012] IESC 50.

28. Applying that approach, it does not appear to be a legitimate course of action for Ryanair to take, to simply leave these proceedings lie dormant while choosing to progress other proceedings. Having sued On The Beach, On The Beach is entitled to have that claim determined with reasonable expedition, and the primary obligation to progress the proceedings lies with Ryanair, as plaintiff.

29. If Ryanair felt that the issues could be more advantageously dealt with in other proceedings, then the proper course was to bring an application for case management back in 2017, when it sued *Vola.* This was also around the time when On The Beach was motioning

for replies and Ryanair was deciding that its 2010 statement of claim no longer reflected changes to its website made in 2015 or indeed all of the causes of action which it wished to pursue. It was open to Ryanair at that time, therefore, to progress its application to amend and then seek to have these proceedings case managed along with *Vola,* and this Court would determine which, if any, of the proceedings would go forward for hearing, in what order, and on what issues.

30. Further proceedings, *Ryanair DAC v. Flightbox SP Zoo* 2020 No. 1644P ("the *Flightbox* proceedings"), were issued by Ryanair in 2020, but it was only well after the issue of this application, on 7 December, 2021, that Ryanair sought case management of these proceedings alongside the *Vola* and *Flightbox* proceedings. As that only occurred six months after the issue of this motion, it cannot be taken into account in excusing delay, but it serves to demonstrate that these proceedings were simply "*parked*" while others were being pursued.

31. Accordingly, it is my view that delay of in excess of three years from late 2017 to June, 2021 (excluding a period of approximately three months at the beginning of the Covid-19 pandemic) which was occasioned by Ryanair's failure to take any step of any kind in the proceedings is not capable of being excused.

32. As Ryanair are therefore guilty of inordinate and inexcusable delay in prosecuting the proceedings, it is therefore necessary to consider whether On The Beach have shown that the balance of justice favours dismissal of the proceedings.

Does the balance of justice favour dismissal?

33. As set out at the commencement of this judgment, the Supreme Court many years ago in *Primor* set out a variety of matters to be considered under this heading, not all of which

will be relevant in any particular case. Insofar as they are relevant, they are considered as part of the overall question of whether justice favours the dismissal of the proceedings.

34. Before considering this issue, I should first refer to a particular legal argument made by On The Beach to the effect that the principles relevant to the balance of justice had recently been recalibrated so as to place more emphasis on delay, with the consequence that only moderate prejudice need be established by a defendant in order to succeed in this type of application.

35. This submission was based principally on *Cassidy v. The Provicialate* [2015] IECA 74, which was itself based on *Stephens v. Paul Flynn Ltd.* [2008] IESC 4, [2008] 4 I.R. 31.

36. In response, Ryanair says that *Cassidy* could not alter the effect of the applicable Supreme Court jurisprudence and relies on *Lismore Builders Limited (In Receivership) v. Bank of Ireland Finance Limited* [2013] IESC 6, where the Supreme Court overturned this Court on the basis that there had been an excessive emphasis on the delay in the proceedings rather than on the correct focus which was whether justice required that the proceedings would be dismissed.

37. As I understand it, there has been a line of case law in recent years, including *Cassidy* which accepts that, while the *Primor* principles still apply, they have been *"recalibrated"* to reflect the State's obligations under Article 6 ECHR and the Constitution, so that there will be less tolerance of delay in litigation.

38. This approach can be traced primarily to the judgments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, 2005 1 ILRM 290, and that of Kearns J. in *Stephens v. Paul Flynn Ltd.* [2008] IESC 4, [2008] 4 I.R. 31 (in which the parties appear to have accepted the judgment of Clarke J. to this effect in the High Court). Clarke J. subsequently, in *Comcast International v. Minister for Public Enterprise* [2012] IESC 50, reiterated his view, stating (at para. 3.13):

> *"...I do, however, remain of the view that tightening up is required. While the court will, understandably, be concerned to balance the interests of justice arising in the case before it, and, in that regard, to consider all relevant facts, nonetheless the overall approach of the courts, if unduly lax, has the potential to create injustice by delay across a whole range of cases whose facts may never come to be considered by a judge, but whose progress is adversely affected by a culture of delay."*

39. The practical effects of such a recalibration were set out by Clarke J. in *Stephens v. Paul Flynn Ltd.* [2005] IEHC 148 where he stated (at para. 24):

> *"... [I]t seems to me that for the reasons set out by the Supreme Court in Gilroy the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly re-assessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."*

40. As is clear from *Desmond v. MGN Ltd.* [2008] IESC 56, [2009] 1 I.R. 737, this recalibration did not alter the *Primor* principles, which remain good law. However, there is now a consensus that they will be applied in a manner which is less tolerant of delay.

41. On The Beach has stressed that this recalibrated approach to the *Primor* principles means that it need demonstrate only *"moderate"* prejudice, albeit that it properly concedes that the test remains the overarching one of justice.

42. The Court of Appeal in *Cassidy v. Provicialate* [2015] IECA 74 certainly stated that the type of prejudice required to succeed by reference to the *Primor* principles was

"moderate" by comparison with that required for an application pursuant to the *O Domhnaill v. Merrick* jurisprudence, which is not relevant to this application. However, I do not understand that case to say that no prejudice need be shown at all, and on the facts of that case, it was clear that the delay in issuing the proceedings had given rise to very significant prejudice to the defendant in attempting to defend the proceedings.

43. As to whether the required prejudice can be defined in absolute terms as merely *"moderate"* in nature (as opposed to moderate relative to the significant risk to an unfair trial under the *O Domhnaill v. Merrick* jurisprudence) I think it is more helpful, rather than seeking to define the nature or level of prejudice which will in general be required, to place it in the balance with the other factors in the balance of justice. At the end of the day, the overall test is that the interests of justice must favour the dismissal of the proceedings. Depending on the circumstances in an individual case, perhaps including the nature of the claim made and the alleged injustice to the plaintiff, the prejudice required to justify dismissing a claim will be lesser or greater depending on the circumstances.

44. Rather than find, therefore, that the prejudice need in all cases only be moderate in nature, I prefer to consider the evidence as to the type of prejudice assessed, before weighing it in the balance with the other factors set out in the *Primor* test itself. As stated at the outset of this section, whether the various matters set out by Hamilton C.J. at paras. (d)(i) to (vii) are relevant in all cases will depend on the precise facts and circumstances being considered. In some cases, (vi) might be important and it will be necessary to show that there is a substantial risk of an unfair trial. In other cases, (ii) may operate to justify dismissal without any significant impact on the trial.

45. However, I accept the submission that prejudice can take many forms and may not necessarily relate to the fairness of the trial and the impact of delay on a defendant's ability to defend the proceedings. In that sense, I agree with the submission that no prejudice to the

fairness of the trial need be shown if the continued existence of the proceedings is otherwise causing such injustice to a defendant as would justify dismissing them.

46. In considering these matters, it would appear from the authorities that any focus on delay or acquiescence in delay by a defendant is relevant in tempering the effects of any prejudice occasioned to a defendant by a plaintiff's delay. It would be material if the defendant has gone along with that delay or even brought it about to some extent.

47. On the facts of this case, I do not think that too much weight can be attached to the fact that the first period of delay resulted from On The Beach's unsuccessful motion challenging jurisdiction. If On The Beach wished to challenge jurisdiction, it was entitled to do so, and it was entitled to appeal any adverse decision of this Court to the Supreme Court. This cannot be equated with the complete failure of Ryanair to take any step to progress its case for a period of over three years from December, 2017, to June, 2021. As both parties are, in my view, roughly equally to blame for the delay in the second period from early 2015 to December, 2017, it seems that On The Beach is not guilty itself of such culpable delay as would materially alter the balance of justice in the case.

48. As a result, the balance of justice in this case really turns on whether On The Beach has demonstrated prejudice, even if moderate in nature, which would now make it unjust to permit the proceedings to continue. In this respect, On The Beach have asserted four categories of prejudice, referred to above, which they say either cumulatively or individually justify dismissal of the proceedings in the interests of justice. These are:

(i) the alleged damage to the defendant's business reputation,

(ii) the effect of the litigation on the defendant's efforts to raise funding,

(iii) the alleged collateral reliance by the plaintiff on this litigation so as to gain advantage in other disputes, and

(iv) both general and specific prejudice relating to the ability of witnesses to give evidence.

49. As a preliminary remark, it should be noted that while I set out the relevant considerations separately, they must all be weighed in the balance together. I am therefore going to comment on each alleged prejudice before coming to an overall conclusion on the level of prejudice which has been established and how it weighs in the balance of justice.

i. Effect on the defendant's business reputation

50. Mr. Cooper states that Ryanair has "*embarked upon a smear campaign"* against On The Beach which "*seeks to denigrate its reputation*." It is asserted that the public statements made by Ryanair in which it is alleged that On The Beach is a "*screen scraper*" which acts "*illegally*" using "*fake*" customer contact details and payment cards to make bookings, and that it "*dupes*" and "*overcharges*" its customers, and having these proceedings extant is sufficient to legitimise and give credibility to that smear campaign.

51. Mr. Cooper then exhibits various blogs and other public postings by Ryanair in which Ryanair sets out its reasons for saying that consumers should book directly with them rather than any OTA. Mr. Cooper refers specifically to various statements by Ryanair, including those of Ryanair's well known chief executive, Mr. Michael O'Leary, and describes them as a *"smear campaign"*. Most of the exhibited statements relate to OTAs generally, and not On The Beach specifically, and On The Beach is usually mentioned as an example rather than being the primary target of the statement.

52. It should be noted that these public statements by and on behalf of Ryanair are all dated from mid-July 2020 to May, 2021. What is notable about that timeline for the purposes of this analysis is that, if the proceedings were a cover for a smear campaign, then the smear

campaign started approximately ten years after the proceedings were issued and several years after they had become dormant. If the motivation (or even part of the motivation) behind the proceedings were to conduct some form of smear campaign, one would have expected it to start earlier. Alternatively, the public statements by Ryanair about OTAs including On The Beach which have been put in evidence are so recent and of such limited duration that it could not justify the dismissal of the proceedings.

53. It seems to me that a fairer analysis of these statements by Ryanair is that they constitute a somewhat strongly worded summary of their legal position as asserted in these proceedings, which is that OTAs generally, of whom On The Beach is one, are unlawfully using the Ryanair website. They have, as I think On The Beach acknowledge, actively progressed proceedings against other OTAs. It does not appear therefore that the real motivation for the proceedings is as a screen for a *"smear campaign"*.

54. Furthermore, while Ryanair's description of the email addresses and payment details given by On The Beach to Ryanair as "*fake*" is probably correctly regarded as exaggerated and could also possibly be regarded as inaccurate, On The Beach has failed to provide any legal basis for the proposition that it was improper or illegal for Ryanair to comment publicly on the lawfulness or otherwise of the business model of On The Beach.

55. Reliance was placed on caselaw to the effect that to have negligence proceedings hanging over solicitors and other professionals for a protracted period was sufficiently prejudicial to warrant dismissing proceedings. However, the position of professionals is not equivalent to that of commercial undertakings. Professionals who are sued for negligence may have difficulty in obtaining the necessary professional indemnity cover or it may be more costly as a direct consequence of the existence of the proceedings. In the case cited in On The Beach's written submissions, *McGuinness v. Wilkie and Flanagan Solicitors* [2020] IECA 111, the Court of Appeal referred to the inevitably serious consequences for the

professional reputation of solicitors practising in a small local community, where the existence of a long-running claim would be widely known. I do not think the current proceedings are comparable in their effect on the defendant.

56. Certainly, businesses need to protect their brand but statements of this kind from competitors are part of the cut and thrust of business and the situation of a company like On The Beach is removed from that of a professional firm who can show that the mere existence of proceedings is damaging their reputation in the pool of actual and potential clients. There is no evidence here that the public statements of Ryanair are dissuading the public from using On The Beach to book flights or holidays through their website.

57. In any event, On The Beach has now sued Ryanair in England and Wales, and while the roles of the parties as plaintiff and defendant are reversed and the legal issues are identified in competition law terms, rather than by reference to the causes of action relied upon by Ryanair in these proceedings, the very existence of the English proceedings, for so long as Ryanair defends them, means that Ryanair are likely to maintain this public stance by reference to those proceedings in any event.

58. I therefore do not see that On The Beach has established the more moderate prejudice relevant to the application of the *Primor* principles under this heading.

ii. Alleged prejudice to attempts to raise finance

59. Mr. Cooper asserts that the obligation to disclose the continuing existence of the litigation to investors has dissuaded private equity investors from investing in 2013, and has caused difficulties in proceeding with an IPO in 2015, albeit that Mr. Cooper in his affidavit concedes that there were other issues at play, and it was not submitted by counsel for On The

Beach that the proceedings were the sole cause of difficulties in raising funding on those occasions.

60. As part of this allegation of prejudice, On The Beach complains that it is obliged to disclose the existence of the litigation on an ongoing basis in its annual reports and asserts that this dissuades investors and is a matter referred to in the reports of financial analysts.

61. If it were in fact the case that proceedings were preventing or impeding a a defendant in its efforts to raise necessary capital or attract investment, in my view, that would be prejudice which would weigh heavily in the balance of justice. However, I do not think that On The Beach has established that this prejudice exists.

62. First, insofar as the attempts in 2013 to raise private equity are concerned, I think counsel for Ryanair is correct in stating that para. 24 of Mr. Cooper's grounding affidavit and the exhibits consisting of reports of responses of potential investors to approaches on behalf of On The Beach consist of inadmissible hearsay.

63. Secondly, insofar as such hearsay is admissible, Ryanair has exhibited an extract from Travel Weekly, July 7, 2021, where it is reported that On The Beach in fact raised £26 million by way of a share placing in July, 2021**.** There is no evidence that this was in any way inadequate or inhibited On The Beach from either carrying on or developing its business in the manner in which it saw fit. Indeed, there is no evidence of any difficulty in raising finance occurring later than 2015 and therefore there is no evidence linking any such alleged difficulty - even if it could be said to be referable to the litigation - to the inexcusable period of delay.

64. Thirdly, On The Beach has exhibited the report of Numis Securities Ltd., the investment bank retained by On The Beach to handle an IPO in 2015, for the purpose of demonstrating that at least some investors were dissuaded by the litigation from investing in On The Beach. Apart from the hearsay objection, I think the complaint of Ryanair that this

document is so heavily redacted that little weight should be attached to it might be well-founded. Mr. Cooper says in his grounding affidavit that it has been redacted for relevance, for reasons of commercial sensitivity, and on the assumption that both Numis Securities Ltd. and the individual investors in question produced the report and the information referred to in it, respectively, on a confidential basis.

65. I do not think it is open to a party to redact a document based on relevance. Ryanair has had no opportunity to review the document so as to make submissions on any part it might think material to this application and the court is similarly restricted in its ability to place the disclosed portions in their proper context. It is a fundamental aspect of the administration of justice that both sides should have access to documents tendered in evidence.

66. However, I do not need to come to a decision on the objection to the admissibility of the document on the basis that it is redacted as it seems to be in the nature of inadmissible hearsay in any event.

67. Even if I am wrong about that, and insofar as I can attach any weight to the redacted documents it should be noted that it discloses the attitudes of various potential investors to the litigation and its impact on their interest in investing in On The Beach. These responses of investors point in different directions. On pp. 2, 3 and 10, it is recorded that certain potential cornerstone investors were put off by the existence of the Ryanair litigation. However, at pp. 9 and 11, the investors approach appears to be relaxed on the issue of whether the Ryanair litigation would affect their attitude to investment.

68. Significantly, at p. 12, the investor did not mention the litigation as such, but instead referred to the business model of On The Beach as *"an adversarial relationship with their largest suppliers"* which they described as "*unusual*" and which *"could throw up problems [including the outstanding litigation with Ryanair, the single largest supplier]".* This

suggests a concern about the relationship between On The Beach and their suppliers, including Ryanair as their largest supplier. A further, related concern which is recorded is that at some point the technology used by On The Beach (and other OTAs) to access Ryanair's website could be detected and blocked which would cut off a crucial source of flights. This latter concern is not related to the current proceedings, at least as the pleadings stand at present. It is a concern that would exist even if the proceedings had never been instituted.

69. Similar concerns are expressed by a different investor on p. 13, along with the view that *"pretending to be a consumer feels slightly disingenuous".*

70. Therefore, different views were expressed, and not all of the negative views are related to the litigation as such, but instead comment on the business model itself and whether it can survive technological changes. Indeed, the reference by one investor to the business model being somewhat "*disingenuous*" does suggest that at least some investors have ethical issues with On The Beach's business model.

71. It therefore seems that at least some of the investors quoted in the unredacted portions of the report would have declined to invest even if there were no litigation in place, purely based on their concerns about the business model itself and its vulnerability to technological changes.

72. On The Beach also relied on the fact that its annual reports from September, 2015, to September, 2020, all disclose a litigation risk arising out of these proceedings. For example, in the 2019 accounts, the most recent pre-pandemic accounts available, it is stated:

> *"The Group is one of several online travel agents involved in litigation with Ryanair in connection with Ryanair's efforts to prevent OTA's from booking and selling its flights. The legal process is ongoing but remains at an early stage. There have been no developments since the last annual report, so this has caused a delay to the anticipated timescale set out in the prospectus. Other airlines could seek to emulate*

Ryanair's claim against OTA's. Litigation is unpredictable and if Ryanair were to prevail, this could have a material impact on the Group's business."

73. However, I do not think that On The Beach have shown even moderate prejudice on the basis of these disclosures. They are included for the benefit of investors and, as set out above, no effect on the ability of On The Beach to attract investment subsequent to the 2015 IPO has been established. In fact, as submitted by counsel for Ryanair in the course of the application, for so long as the proceedings are not determined, On The Beach continues to trade in accordance with its existing business model and it may well be getting a benefit from that delay.

74. Finally, as noted by counsel for Ryanair in his submissions, the documentation exhibited by On The Beach in these proceedings indicates that, as of 10 March, 2017, Peel Hunt were recommending a Buy in relation to On The Beach, as were Citibank on 14 March, 2019. This was notwithstanding the existence of the litigation. On 22 July, 2019, Stifel recommended a Hold. However, by 17 March, 2021, Redburn were advising a Sell. The full document is not exhibited, but under the heading of "*hostile suppliers*" it was noted that On The Beach's longer-term reliance on EasyJet and Ryanair flight supply was becoming increasingly hazardous. It was then noted:

"Perhaps the most significant threat comes from Ryanair. The airline has previously opened litigation against On The Beach, alleging the practice of aggregating and displaying online air fares ("screen scraping") amounts to copyright infringement. In recent years, Ryanair has parked the litigation as flight aggregators have generally contributed positively to the company's load factor active strategy. However, we see signs the situation has become more hostile after Ryanair delayed airfare refunds to several online aggregators during the pandemic, forcing aggregators like On The Beach to refund their own customers in lieu of payment to protect their brands. With

the relationship becoming more fractured as of late, it is certainly possible the litigation could be revisited."

75. The timeline of these proceedings, therefore, including the timing of the bringing of both the proceedings in England and Wales and this application, is consistent with that statement (albeit hearsay) that the relationship between Ryanair and On The Beach has become more fractured in the aftermath of the pandemic.

76. However, the key point for the purposes of my consideration is that there is nothing in any of this advice to show that the litigation in itself is curbing On The Beach's ability to raise finance or to conduct its business. While the litigation is highlighting a doubt over On The Beach's business model, On The Beach has not shown that these proceedings have prevented it, in any material way, from raising capital or attracting investment. The fact that the only Sell note post-dates the pandemic may have as much to do with the hugely negative impacts of the pandemic on the businesses of both parties to these proceedings, as to the litigation risks arising from the proceedings themselves.

77. It is my view, therefore, that On The Beach has not established even a moderate prejudice under this heading arising out of the very existence of the proceedings, such as to tip the balance of justice in favour of the dismissal of them in light of the inexcusable and inordinate delay by Ryanair in progressing them from December, 2017, to June, 2021.

iii. Alleged collateral benefit in other proceedings

78. On The Beach alleges that Ryanair has somehow leveraged these proceedings in order to obtain some kind of a collateral benefit against it in relation to what appears to have been a protracted dispute between the parties as to the manner in which passengers were to be refunded for flights when they were cancelled due to the Covid-19 pandemic. Ryanair has

exhibited a decision of the Danish regulator which has ordered Ryanair, even where a passenger books through an OTA, to refund the passenger directly. This is required by Regulation (EC) No. 261/2004.

79. In brief terms, Ryanair says that it is obliged by Regulation (EC) No. 261/2004 to refund passengers directly where flights were cancelled by reason of Covid-19 restrictions. However, according to Ryanair, it could not do this because it did not actually have the credit card details and email addresses of passengers in order to notify them of their refund and to actually give them their refund. This is because On The Beach does not give these details to Ryanair, but gives alternative email addresses and credit card details through which payments and refunds are processed and communications are made and received.

80. According to On The Beach, Ryanair has failed to refund monies to it even though On The Beach has itself refunded passengers in order to protect its brand. It has also initiated credit card disputes, i.e. "*chargebacks*", in order to recover substantial funds from Ryanair. It contends that Ryanair is trying to starve On The Beach of cash by refusing to refund it on behalf of the customers.

81. If it is the case that Ryanair is going to be obliged by the regulators of various member states of the European Union to refund passengers directly and not through the OTA who made the booking on behalf of the customer, I find it difficult to see how this amounts to Ryanair obtaining a collateral benefit out of the proceedings for the purposes of its dispute with On The Beach in relation to passenger refunds. This seems to me to be a separate dispute which would exist even if the proceedings had never been instituted. Accordingly, I do not think I can ascribe much, if any, weight to it in the balance of justice.

iv. General and specific prejudice in defending the proceedings

82. Under this heading, On The Beach submits that it has been prejudiced in its ability to defend the proceedings itself. This is the only prejudice asserted which relates to the fairness of the ultimate trial.

83. First, On The Beach relies on general prejudice, asserting that the memory of witnesses and the recollection of matters dating back to 2010 will be affected given the failure of Ryanair to progress the proceedings. Secondly, On The Beach points to the fact that Ms. Wendy Parry, Chief Financial Officer, left its employment in January 2017. Beyond that particular witness, On The Beach has not identified any other individual witness or even category of records which it would have difficulty in obtaining in order to defend the proceedings should they go to trial in a few years time.

84. In contrast, Ryanair says that the critical evidence in the case would be documentary and technical, involving expert evidence. It seems to me that Ryanair are broadly correct in this submission.

85. As regards the general prejudice arising from the ability of any witness to recollect the detail of matters going back twelve years at this stage, it must be recalled that the first four and half years of this was relevant in On The Beach's unsuccessful challenge to the Irish courts' jurisdiction. Therefore, this prejudice can only be assessed, in my view, insofar as the difficulties arise due to Ryanair's delay from November, 2017 onwards, and at best from early 2015 onwards, a period of over six years prior to the issue of this motion.

86. It seems to me that this type of case is somewhat similar to *Comcast,* where Clarke J. pointed to the fact that while oral evidence would be necessary, documents would be essential in proving the plaintiff's case and it was not wholly dependent on oral testimony. In

fact, the nature of the issues in these proceedings is such that oral evidence is less likely to be material than was the case in *Comcast.*

87. In my view, there are several features of this case which mean that it can still be fairly tried. First, it relates to the general business models of both Ryanair and On The Beach dating back to 2010. However, it is clear from the documentation exhibited by On The Beach, that there is some form of technological cat and mouse game going on between Ryanair and On The Beach as to whether On The Beach can continue to access the Ryanair website. Therefore, as a matter of common sense, the evidence as to the relevant technology will relate to different time periods and different practices, some of which will be quite recent.

88. This case does not concern a specific event or finite series of events which will be proved primarily by oral testimony, but rather the respective business models of the parties, in respect of which there must be a form of corporate memory. Apart from the departure of Ms. Parry, there is no affidavit evidence from On The Beach to show a wholesale alteration of senior personnel in On The Beach, or any suggestion that evidence as to business practices from a couple of years ago could not be safely tendered. In any event, the proceedings have been in being for a considerable time and it has been open to On The Beach throughout to keep appropriate records so as to allow it to defend the proceedings. In short, I do not believe this case will be determined in any significant way by oral testimony.

89. Secondly, the illegalities asserted by Ryanair are ongoing ones, albeit ones to be judged against the background of different practices relating to the Ryanair website and the technology used by both sides overall, of the relevant period. I note that in the amended statement of claim, for example, one of the key amendments relates to changes to the Ryanair website from 2015 onwards. As a result, at least some of the issues will be decided by reference to business practices taking place over the last number of years, and not a defined event which took place in 2010, or some years before the issue of the plenary summons.

90. Thirdly, insofar as Ms. Parry is concerned, no evidence has been tendered to show what she in particular could prove as a fact that could not be proven by other members of senior management of On The Beach. Nor is there any evidence that she will not agree to give evidence, even though she is working elsewhere.

91. In my view, On The Beach has failed to show even moderate prejudice to the fairness of the trial, and the prejudice asserted under this ground does not weigh heavily in the balance of justice in this case.

92. In any event, it seems that while the causes of action are quite different, the business practices and relevant facts which will be in issue in the English proceedings are very likely to overlap considerably with the issues of fact to be proven in these proceedings. If On The Beach is currently prepared to litigate the lawfulness of its business model by reference to the Competition Act in England and Wales, then it can have no difficulty in supplying the necessary evidence to show why Ryanair should not succeed in these proceedings.

Conclusion on the balance of justice

93. Even taking all of the prejudice established - such as it is - together, it is my view that On The Beach has failed to show even the moderate prejudice required to discharge the onus on it to demonstrate that justice requires that the proceedings would be dismissed. The height of the prejudice which has been established is that at least some investors were dissuaded, during the IPO in 2015, from investing in On The Beach. Others were not put off and, in any event, there were substantive concerns about the viability of the business model. However, On the Beach has recently raised significant capital, notwithstanding the existence of these proceedings.

94. Balanced against the possibility that On The Beach may be operating a business model which is based on a breach of Ryanair's legal rights – a matter which of course remains to be determined – the balance of justice in my view clearly favours the continuance of the proceedings.

95. Finally, it should be noted that Ryanair asserts that On The Beach is forum shopping and that the true purpose of this application is to ensure that the issues between the parties are litigated in the English courts. As previously noted, On The Beach sued Ryanair in England and Wales on the same day as it issued the within motion. Those proceedings are based on s. 18 of the Competition Act 1998, which is applicable in that jurisdiction. However, Mr. Cooper, the CEO of On The Beach, says on affidavit that the cause of action is entirely different in the United Kingdom.

96. I am not convinced that formal distinction between the causes of action, as the pleadings stand at present, is conclusive. As will be clear from the procedural history set out above, On The Beach has never delivered a defence in these proceedings. They may well deliver a defence and counterclaim in the future alleging that Ryanair is abusing its dominant position, which is essentially the same cause of action as it has invoked in its English proceedings.

97. However, in view of my conclusion on the balance of justice, I do not have to make any determination on foot of this submission.

Conclusion

98. In short, it is my view that Ryanair is guilty of inordinate delay in respect of the period of over three years from the time at which the motion for particulars was adjourned generally in December, 2017 until this motion was issued in June, 2021 (excluding the period

from mid-March 2020 to June, 2020 when the difficulties caused by the very severe public health restrictions imposed at the outset of the pandemic probably made it very difficult to progress litigation in any meaningful way).

99. This delay is not excusable as Ryanair seems to have simply *"parked"* this litigation while progressing proceedings against other OTAs.

100. However, the balance of justice favours the continuance of the proceedings. On The Beach have not shown even moderate prejudice or injustice to them arising out of Ryanair's delay. It has at best shown some impact on the 2015 IPO, which took place only shortly after its challenge to the jurisdiction to the Irish courts which had failed in the Supreme Court, and On The Beach has failed in my view to demonstrate prejudice thereafter.

101. The issues of fact and law in the case are ones which it is safe to try, as this is not a case of a one off event dependent on the recollection of witnesses which has either faded or become distorted by the passage of time. On the contrary, the essential business models of both parties remain the same, even if certain technological aspects of their practise have necessarily changed over the years. The alleged unlawfulness is a continuing one which can be safely tried in the next few years.

102. Insofar as On The Beach is concerned about the proceedings lying dormant, it was open to it at any time to seek case management. While I accept that Ryanair have not applied for case management promptly, insofar as these proceedings will not be determined by related proceedings such as those involving *Vola,* any remaining issues can be tried later. In addition, the parties have liberty to reapply for case management when this application has been finally determined.

103. I will therefore refuse the application.