

THE HIGH COURT

[2024] IEHC 40

Record No. 2010/8924/P

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

ON THE BEACH LIMITED

DEFENDANT

JUDGMENT of Mr. Justice David Nolan delivered on the 6th day of February, 2024

General

1. This is an application pursuant to Order 63 of the Rules of the Superior Courts for directions in relation to the status of a document described as “*An appendix*” to the defence filed by the defendant. The motion seeks clarification as to whether the appendix can be incorporated into the defendant’s pleadings, the consequences of any potential incorporation of the appendix and the exclusion of certain matters contained in the appendix while the parties are engaged in litigation in the United Kingdom. Alternatively, the plaintiff seeks an order pursuant to the inherent jurisdiction of the court striking out whole or parts of the appendix of the defence.

2. In a nutshell, the purpose of the plaintiff's application is to exclude the appendix which they allege is a repetition of key elements of the pleadings of High Court proceedings the defendant has instituted in the United Kingdom entitled "*claim number CP-2021-000009 in the High Court of Justice Business and Property Courts of England and Wales the competition list between: (1) On The Beach Ltd claimant and (1) Ryanair UK Ltd and (2) Ryanair DAC (a company incorporated in the Republic of Ireland) defendants*". The plaintiff says that this is a highly unusual form of pleading and is not expressly provided for within the Rules of the Superior Courts (the Rules) and is, in essence, an attempt by the defendant to run virtually the same case for abuse of dominance under English and EU law, in two different jurisdictions, thereby complicating these proceedings for its own purposes and creating the risk of irreconcilable judgments.

3. On the other hand, the defendant says the plaintiff is attempting to provoke it into mounting a counterclaim in this jurisdiction, which it says it will not do. It alleges that the use of the appendix is merely a convenient internal reference to a location where the pleas to the competition law defences are grouped and point to the fact that the full title of that part of the defence is "*appendix – particulars of anti-competitive behaviour*". It points to the service of a notice of particulars concerning the defence and indeed a request for discovery made by the plaintiff.

4. In order to properly understand the context of this application, it is necessary to set out the nature of the claim brought by the plaintiff against the defendant, the associated proceedings instituted in the United Kingdom and the judicial history of these proceedings.

The Parties

5. The plaintiff is a well-known airline and is described in the proceedings as being a low-fairs airline as well as providing, through its website of flight advertisement, search,

information, reservation and purchase services in respect of its own flights as well as additional facilities including accommodation reservation, car hire and insurance services which may be accessed and booked by the plaintiff's customers.

6. The defendant carries on business as an online travel agent providing an internet search and booking facility in respect of airline flights and other services such as hotel reservation, car hire etc. Its business is conducted through its website.

7. The defendant offers for sale and sells flights on the plaintiff's airline to its customers through its website and its call centre. It does so without the permission of the plaintiff. The defendant uses an automated system or software which enables it to enter into and use the plaintiff's website by mimicking an actual customer. The customer never leaves the defendant's website. This activity is known as "*screen scraping*", "*crawling*", or the use of a "*robot*" or "*spider*". The plaintiff says the defendant has conceded that it screen scrapes the plaintiff's website.

These Proceedings

8. By plenary summons dated 27th of September 2010, nearly thirteen and a half years ago, the plaintiff sought various declarations that the defendants should be prohibited by way of injunction from using the plaintiff's website in such a way and in such a manner so as to unlawfully scrape Ryanair content from its website onto its own website. The plaintiff says that by utilising and accessing its website, the defendants are bound by its terms and conditions and, in essence, have attempted to breach those terms and conditions and pass off its own website as that of the plaintiff. This has given rise to loss, damage and expense and it is the case of the plaintiff that there have been multiple torts committed including those of passing off, infringement of copyright, breach of contract, misrepresentation, trespass to goods and conversion of the plaintiff's property namely its website.

9. Whilst the original proceedings were instituted in September of 2010, the statement of claim was not delivered until nearly five years later, in April of 2015. A notice for particulars was raised in June of 2015 and replies were received over a year later in September 2016. Thereafter in December 2016 a request for further and better particulars was made which was replied to in April 2017.

10. Little further occurred in this jurisdiction for some years until a notice of change of solicitor in July 2020. Thereafter a notice of intention to proceed was furnished and following an application to the High Court in March 2023, an amended statement of claim was delivered in April of last year.

11. It could be said that the reason for the acceleration of activity in relation to these proceedings had more to do with what went on the United Kingdom than what went on in this jurisdiction.

The Proceedings in the United Kingdom

12. In or around the year 2021 the defendant instituted proceedings in the United Kingdom against the plaintiff for damages and injunctive relief and for what it claimed to be a concerted campaign by the plaintiff aimed at preventing competition from online travel agents including the defendant, which it said was unlawful as a breach of Section 18 of the UK Competition Act, 1998, which prohibits conduct that amounts to an abuse of a dominant position in a market if it may affect trade within the UK and as constituting the tort of causing loss by unlawful means.

13. Thereafter the plaintiff herein brought an application to stay those proceedings pursuant to Article 30 of the EU Regulation 1215-2012 also known as “*Brussels Recast*”, on the ground that there were related proceedings ongoing in this jurisdiction, namely these

proceedings. It was agreed between the parties that Article 30 continues to apply despite the UK having ceased to be a member of state of the EU.

14. The matter came before Lord Justice Nugee in London in March of 2022. He gave judgment in April 2022. In that judgement he noted that it was common ground that the application gave rise to two questions: (1) whether the proceedings in Ireland (these proceedings) were “*related proceedings*”: and (2) whether the UK court should exercise its discretion to order a stay.

15. He set out the case made by the defendant in its UK proceedings and noted that Ryanair had not yet pleaded its case, but that correspondence clearly showed the nature of the case which it was going to make. He then went through the procedural history of these proceedings, a brief summary of which is set out below, together with associated proceedings instituted against SC Vola.Ro SRL (the Vola proceedings) and against Sky Scanner Ltd and associated companies (the Sky Scanner proceedings).

16. Dealing with Article 30 of Brussels Recast, he quoted Recital 21 which noted that in the interests of the harmonious administration of justice, it was necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments should not be given in different member states.

17. Referring to the agreement of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Agency Community, in particular Article 67, he noted that since the Irish proceedings were instituted before the end of the transition period, the effect of that Article meant that the temporal limitations of Brussels Recast do not apply.

18. He found that these proceedings were related proceedings having regard to the likely defences to be filed in either action. At para. 37 of his judgment he said as follows:

“If both cases go to trial there would likely to be a very significant overlap between them, such that it would indeed be expedient to hear them together to avoid the risk of inconsistent judgments. Put simply, there would be an obvious inconsistency if one court decided that OTB’s screen scraping was unlawful and Ryanair’s conduct not abusive, and the other court decided the opposite.”

19. At the time of writing his judgment, there was a motion pending in this jurisdiction to strike out these proceedings which I will deal with below.

20. Exercising his discretion, he noted that in the normal case the court second seised will assume that if a stay is refused, both actions will proceed to trial. However, he felt that that was quite uncertain. In what seems to be a pertinent to the exercise of his discretion he said as follows:

“In deciding ‘the extent of the relatedness between the actions and the risk of neutrally irreconcilable decisions’ I think it is a relevant consideration that the Irish action may well never come to trial at all. When asking to what extent it is expedient to hear the English action together with the Irish action, or to what extent there is a risk of irreconcilable decisions, the fact that it is currently entirely unclear if the Irish case will be heard at all or if there will ever be a judgment in it to my mind necessarily weakens both the desirability of hearing the English action with the Irish one and the likelihood of inconsistent judgments.”

Ultimately, he concluded that both proceedings were very closely related there was a risk of mutually irreconcilable judgments which he said was high.

21. Taking all matters into account he refused the application to grant a stay.

The Proceedings in this Jurisdiction

22. As noted above, very little, if any, procedural steps were taken by either party in relation to these proceedings until the end of 2021. In December 2021, Allen J. refused an *ex parte* application for case management of these proceedings in conjunction with proceedings against Vola and Flightbox. Indeed, Nugee L.J. referred to the refusal in his judgment.

23. In March of 2022, Allen J. struck out the motion and awarded costs to the defendant.

24. Thereafter, in July of 2022, the defendant brought an application to dismiss the plaintiff's claim for want of prosecution due to inordinate and inexcusable delay, presumably in conjunction with the application brought in the UK. Stack J. refused that application, and the matter was appealed to the Court of Appeal who affirmed her order.

25. In March of 2022, O'Moore J. allowed the matter to be case managed and also allowed the plaintiff liberty to deliver an amended statement of claim and allowed the defendant to deliver a defence and/or a counterclaim within six weeks of the date of delivery of the amended statement of claim.

26. In May 2023 Stack J. made directions in relation to the delivery of notice of particulars and replies. A further order was made by O'Moore J. on the 11th of July 2023 in relation to a timeline of the delivery of replies to particulars, the delivery of a notice for particulars by the defendant and replies to be received from the plaintiff. Thereafter, a timeline was set out for the request for voluntary discovery and if necessary, a motion to issue.

27. A motion has issued in that regard and judgment is pending from Sanfey J.

28. In the meantime, the plaintiff sought an application during the long vacation for directions in relation to case management before Phelan J. in August 2023. That application was refused. However, that gave rise to this motion.

The Amended Proceedings

29. Following the decision of Nugee L.J., the plaintiff has taken a tougher approach to the prosecution of these proceedings.

30. Pursuant to the order of O'Moore J. the plaintiff served an amended statement of claim in April of 2023. The amended statement of claim contained far more detail in relation to the importance of its website, the need for the plaintiff to maintain direct contact with its customers and the manner in which the website is used to promote the plaintiff's business, including understanding its customer's requirements, the opportunity to earn ancillary revenue and the opportunity to expand and improve the goods and services it offers to its passengers. These include arrangements which the plaintiff has made with rental car partners allowing the plaintiff to provide a business model which encompasses the provision of goods and services under the access rubric of the plaintiff in order to provide an ecosystem of travel related goods and services.

31. Further the statement of claim went into some detail into the manner in which the plaintiff's website operated both before November 2015 and after it. In particular, it alleged that the defendant was involved in the act of screen scraping and notwithstanding establishing a defence mechanism or platform known as a "*shield*", the defendant has been able to circumvent that shield.

32. Further details are provided in the amended statement of claim in relation to the defendant's access to the plaintiff's website, emphasising that it had to have accepted the terms of use of the website under various options including a front-end acceptance, acceptance at payment, and a back-end acceptance.

33. Under the heading of "*Copyright and Database Rights*", the plaintiff makes a new case in relation to the compromise of the plaintiff's copyright and database rights and an abuse of its literary works on the basis that the database was an "*original database*" which

had been compromised by the defendants in the manner in which they infringed or authorised the infringement of it.

34. Further details were furnished in relation to a trademark infringement and, in particular, its EU trademark (EUTM pursuant to Regulation (EU) No. 2017-1001) as well as the Trademarks Act of 1996.

35. Under the heading of “*Conversion and Trespass to Goods and/or Property*” further particulars the alleged conversion and trespass are furnished as were details in relation to alleged passing off of the plaintiff’s property as that of the defendant.

36. Finally, further declarations were sought in the amended statement of claim.

37. Crucially, as far as the defendant is concerned, the amended statement of claim contains a number of appendices. Appendix A dealt with the EUTM file information. While appendix B sets out the various alliteration of the plaintiff’s website from pre-March 2014 to its current configuration.

The Defence

38. On 9th of June 2023, the defendant filed its defence. It is a relatively straightforward document, bar one matter. It puts in issue all the claims that the plaintiff makes, including the “*terms of use*”, the “*original database*”, the claim that the website constituted an “*original literary work*” for the purposes of the Copyright and Related Rights Act 2000, and all other claims made by the plaintiff.

39. However, on five occasions the defendant refers to an appendix.

40. Paragraph 5(b) pleads that the defendant will contend that what are referred to as the “*terms of use*” constitute an anti-competitive agreement and/or instruments utilised by the plaintiff in furtherance of the abuse of its dominant position, which is particularised in the appendix and, accordingly, it is alleged that the plaintiff is precluded from relying on such

matters in aid of any purported cause of action or claims for relief asserted in the proceedings. Similar pleas appear at paras. 17(c), 19(c), 21(c), 43 and 44.

The Appendix

41. The appendix is headed “*Appendix – particulars of anti-competitive behaviour*”. It runs to over nine carefully drafted pages. The plaintiff alleges that the appendix replicates in large part the claim which the defendants UK proceedings make.

42. By way of example, the plaintiff alleges that paras. A6 to A20 of the appendix is virtually the same as paras. 10 to 28 of the UK proceedings. On reading both documents the allegation seems to be correct.

43. A random example of my own choosing appears at para. A8 of the appendix which reads as follows:-

“Ryanair has not welcomed such competition. It does not want consumers to have a free and fair choice between booking directly or via defendant (including the incorporation of Ryanair operated flights into package holidays operated by the defendant). Rather, Ryanair wants to ‘own’ the consumer relationship via its own website and apps, monopolise the market for booking services in respect of its own flights and reduce competition and choice as respects services ancillary to travel (e.g. hotels and car hire). As a result, Ryanair wants – and has for some years been aggressively seeking – to eliminate competition from the defendant (and other online travel agents) throughout the EU – EEA and UK.”

44. Paragraph 12 of the UK proceedings reads as follows:-

“Ryanair has not welcomed competition. It does not want consumers to have a free and fair choice between booking directly or via OTB. Rather, it wants to ‘own’ the consumer relationship by its own website and apps, monopolise the market for

booking services in respect of its own flights and reduce competition and choice as respects services ancillary to travel (e.g. hotels and car hire). As a result, Ryanair wants – and has for some years been aggressively seeking – to eliminate competition from OTB (and OTAs) in the UK and throughout the EU – EEA.”

45. As can be seen, they are almost identical.

The Correspondence

46. On receipt of the defence, solicitors for the plaintiff wrote by letter dated 27th of June 2023, to solicitors for the defendants addressing the issue. They pointed out that the use of the appendix was highly unorthodox and resulted in a significant lack of clarity. They pointed out that Order 21, rule 9 of the Rules of the Superior Courts required that *“Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall in his defence, state specifically that he does so by way of counterclaim”*, and that the particulars contained in the appendix, in large part, replicated the claim advanced in the UK proceedings. It further pointed out that, whilst the defence does not specifically advance a counterclaim, the plaintiff would be treating the particulars, upon solely by way of a defence, with the burden of proving the allegations resting firmly upon the defendant. The letter stated that they will be treating the particulars as forming part of the pleadings.

47. In a short response, solicitors for the defendant stated that they would not be advancing any counterclaim and awaited delivery of the replies to particulars.

48. There was, however, a further letter sent on the 3rd of August 2023, which was not exhibited in the grounding affidavit, but was exhibited in the replying affidavit of the defendant.

49. This represented something of a change of attitude on the part of solicitors for the plaintiff. At para. 2, it said as follows: -

“As we have previously stated, your client’s defence runs to 8,760 words, 3,906 of which are contained in the ‘appendix’ which in large part mirrors the Particulars of Claim delivered by your client in the proceedings which were issued in the UK on 30 July 2021. In your letter dated 28 June 2023, you did not clarify the status of this ‘appendix’.”

50. The letter then went on to say that it was manifestly unfair and unjust for the plaintiff to not understand the status and import of the appendix. The lack of certainty surrounding the status of the appendix was demonstratively prejudicial to the plaintiff’s ability to adequately respond in the absence of clarity on the precise claim that the defendant was seeking to run in this jurisdiction. They alleged that the filing of the appendix was an attempt to delay and confuse the Irish proceedings while maintaining the defendant’s position with regard to the competition claim in this jurisdiction, which was likely to give rise to the possibility of irreconcilable judgments. It was on the basis of this letter that this application has been brought.

The Plaintiff’s Submissions

51. Mr. Hayden SC, for the plaintiff, opened his submission by pointing out what Ryanair was not trying to do. It was not trying to stop a competition claim being brought in this jurisdiction or a competition defence and/or claim by the defendant being advanced here. The plaintiff accepts that a competition defence can be pleaded and, indeed, it would seem clear from correspondence as long ago as the 15th of October 2010, that the defendants would mount such a defence, that the plaintiff was abusing a dominant position. Further, the plaintiff is not denying that alternative pleas which could be inconsistent cannot be made.

52. What the plaintiff objects to, however, is a defence with a second full claim annexed to it. However, the defendant has not gone so far as to counterclaim and has specifically

stated that it will not do so. It is the view of the plaintiff that they cannot counterclaim because that would completely undermine their position before the UK court. Mr. Hayden believes that this is an exercise in trying to circumvent the obvious, namely that the two cases are inextricably linked. The plaintiff wishes to have the Competition Act claim adjudicated in this jurisdiction. The reason why the defendant is not issuing a counterclaim in this jurisdiction is because it would damage the logic which prompted the UK proceedings.

53. The evil which the plaintiff wishes to avoid is that of inconsistent judgments on the same issue in two jurisdictions.

54. The status of an appendix was raised by Butler J. in the Court of Appeal following the decision of Stack J. in an associated motion on the 23rd of June 2022. But there was no argument or decision made on the subject.

55. There are no provisions under the Rules to plead in the fashion adapted in the defence which references the appendix. Further, the plaintiff alleges that the appendix are not particulars but, in essence, a further statement of claim.

56. In its written submissions, Ryanair alleges that the defendant is forum shopping. However, that suggestion was not elaborated upon further by counsel before me.

57. In summary, it is the case of the plaintiff that the appendix is a counterclaim masquerading as a defence, all of which is contrary to the Rules. It further pleads that the defence is unsatisfactory, wasteful and prejudicial in that it creates an unacceptable and unnecessary risk of irreconcilable judgments on matters of English law as well as EU law, in a post-Brexit era. The defence will disproportionately increase the resources and costs to the dispute which creates a risk that the proceedings will become unmanageable so as to amount to an abuse of process.

The Defendant's Submissions

58. In response, Mr. Howard SC, for the defendant, disputes the relevance of the comments made by Butler J. in the Court of Appeal, on the grounds that the issue was not argued. Further, he points out that the use of an appendix is not unusual and points to the fact that the plaintiff itself has appended a number of appendices to its pleadings.

59. The use of an appendix routinely happens in, for example, defamation cases, where articles are often appended. There is nothing in the rules to prohibit the use of an appendix. Mr. Howard emphasises that his client would not be counterclaiming and nor could they be forced to. Turning to the change in attitude by the plaintiff in relation to the pleadings as set out in the correspondence referred to above, he argues that there was no confusion, and, indeed, the plaintiff was able to raise a notice for particulars and make a request for discovery on foot of the defence served.

60. Mr. Howard believes that the plaintiff is attempting to put the defendant in to an invidious position, attempting to prejudice his ability to defend the proceedings.

61. In its written submissions, the defendant points out that the plaintiff had its defence for a period of over two months without raising any issues. It could not be surprised about the nature of the defence given that Nugee L.J., in his judgment of the 13th of April 2022, specifically pointed out the nature of the case against Ryanair. Further the defendant has set out the nature of its defence in its letter responding to the threat of proceedings in October 2010. The submissions emphasised what it believed was the ulterior motive of the plaintiff, namely, to force the defendant to issue a counterclaim.

62. It emphasised that it was entirely legitimate to raise breaches of competition law as part of its defence and that there are many examples of this, both in the UK and in this jurisdiction.

63. In essence, the defendant says that the use of the appendix is simply an addition to its defence. It argues that there was nothing unusual in the nature of the defence filed, and that the plaintiff itself is a litigant which is in pursuit of irreconcilable judgments. There was no merit to the suggestion that the proceedings would be unmanageable or an abuse of process and that, in essence, allegations of contradictory pleadings, was something which the plaintiff itself has engaged in.

64. In reply Mr. Hayden pointed out that the reason for the change in attitude in the correspondence arose from his own assessment of the correspondence.

Pleadings and the Rules

65. *“The term ‘pleading’ is a generic one applied to a variety of documents which set out the contents of a claim, a defence of a party to proceedings and, thus, identify the issues between the parties”*. Thus, Delaney and McGrath on Civil Procedure 4th ed. opens Chapter 5 of their book on Practice and Procedure. The matter was neatly summarised by Fitzgerald J. in *Mahon v. Celbridge Spinning Co. Ltd* [1967] IR 1 where he said:-

“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 at 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.”

66. Many judges since have adopted that characterisation of what a pleading should be without necessarily knowing the quotation. The need for pleadings to be convenient and concise, in a language which is easily understood by litigants, is crucial.

67. Under Order 19 rule 3, every proceeding shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to provide, and shall, when necessary, be divided into paragraphs, numbered consecutively.

68. This judgement relates to what has been identified as the appendix. The Rules do not define what an appendix is. Indeed, it does not seem to be a creature of the Rules at all.

69. However, as counsel for the defendant has pointed out it is often used in many types of action. For example, in defamation proceedings the offending article is often appended as an appendix. Indeed, it seems to me that the word “*appended*” characterises what an appendix is, in the context of litigation. The new Collins Dictionary defines appendix as an “*addendum, addition, adjunct, appendage, codicil, postscript or supplement*”. It is something which is added to the pleadings for the purposes of information and convenience.

70. Other examples of the use of an appendix would include terms and conditions such as the “*terms of use*” which were appended to the plaintiff’s statement of claim, and in cases of repossession, were a list of properties would often be appended to the pleadings. If they have one thing in common, it is to add furnish further information for the convenience of the parties and the court.

71. As the defendant in its submissions noted, Mr. Justice Peart in *Window and Roofing Concepts Ltd v. Tolmac Construction Ltd* [2004] 1 ILRM 554, at 559, said as follows:

“I have always believed that the Rules of the Superior Courts should, as far as possible, be construed so as to enable things to be done, rather than to prevent things from being done. They are a framework within which litigation is to be conducted, and they are an enabling set of rules rather than a disabling set of rules.”

72. I fully endorse that observation.

73. However, in the context of this case, it seems to me that Order 19 rule 19 has a role to play. It reads as follows: -

“When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.”

I have my doubts as to whether that has occurred in this case.

The Appendix

74. As noted above, the use of appendices is not unusual. However, it is done generally for the purposes of information and convenience. In this case, the appendix is unusual. Indeed, in 38 years of practice I have never come across a case where another set of pleadings have been appended to a set of pleadings, without amendment. The added complexity in this case, is that the other set of pleadings or proceedings are in a different jurisdiction but on the same issue. The appendix must be seen in the light of the complex history of the litigation between the parties. That history is made more complicated by its chronology. Whilst it started in 2010, it lay moribund for years until steps were taken in the last eighteen months to move the matter forward. That in turn was linked to the withdrawal of the United Kingdom from the European Union. That withdrawal allowed the defendant to issue the UK proceedings and to take steps to stay these proceedings, which it could never have done had the UK remained part of the European Union. That in turn gave rise to the decision of Nugee L. J..

75. At the heart of the dispute is the allegation made by the plaintiff that the defendant is utilising its website in an unlawful manner, so as to deprive it of its access to customers and

to sell ancillary products. The defendant's defence to that is, as set out in correspondence thirteen years ago, namely that the actions of the plaintiff are an abuse of a dominant position and are themselves unlawful.

76. The appendix is not a list of anti-competitive actions taken by the plaintiff. It is simply a cut and paste of critical parts the defendant's pleadings in its action in the UK.

77. Whilst the Rules do not prohibit the use of an appendix, in my view its use can only be for information and convenience.

78. In this case the content of the appendix goes far beyond the mere provision of information or convenience. It is a pleading. It sets out not only a list of alleged anti-competitive behaviour but does so in a very precise, detailed, and purposeful form and narrative, as one would expect from any detailed pleading, as indeed it is. It seems to me that there is a reason why the defendant has chosen to use some parts of the UK proceedings in its appendix as opposed to other parts. This potentially gives rise to confusion. It does not lead to clarity or precision of the issues, nor does it provide further information which could not be furnished by way replies or simply handing into court a book of the UK proceedings, which I suspect will happen anyway as a matter of course. It certainly is not convenient.

79. In the case of *Hanley v. Newsgroup Newspapers Ltd* [2004] 1 IR 471, Smyth J. striking out part of a plaintiff's statement of claim which referred to unrelated sets of proceedings involving a different party. He said as follows:-

"The function of pleadings is to ascertain with precision the matters upon which the parties differ and the points on which they agree, and thus to arrive at certain clear issues on which both parties require a judicial decision: (see Odgers on 'Pleadings'). Only the material facts and not the evidence on which they are to be proved should be pleaded. Notices for particulars and replies thereto are not pleadings in the strict

sense of the word but merely information exchanged between the parties for their own information.”

80. In this case, however, the appendix goes far beyond that. Therefore, I have concluded that the use of the appendix in the context of this case is inappropriate. It is not specifically precluded by the Rules, nor is it authorised.

81. It seems to me that there is a greater potential for the risk of irreconcilable judgements arising by appending substantial portions of the UK proceedings, which no doubt was carefully drafted by UK counsel, to these proceedings as an appendix. The fact remains that this litigation, when it ultimately is concluded, may well give rise to that possibility. That risk will be made greater by allowing the appendix to remain in its present form.

82. There is nothing to stop the defendant properly pleading matters, which it alleges are anticompetitive and give rise to an abuse of a dominant position. No doubt the allegations contained in the appendix will assist in that drafting. Indeed, the plaintiff says that that’s what it is expecting.

83. In those circumstances it is far preferable that the matter be pleaded in the traditional way. If one were to allow an appendix to be used as an alternative form of pleading, it has the potential of giving rise to confusion, as well as creating the potential of matters falling outside the parameters of the Rules.

84. If the appendix is a pleading, and I believe it is, then it should be pleaded in the proper way with specific reference to those matters which the defendant says amount to an abuse of a dominant position.

85. Accordingly, I direct that the appendix should be struck out. However, the defendant should be given the opportunity to amend their defence to plead the matters in the appendix. I will, therefore, hear the parties in relation to the nature of the order which should be made.