THE HIGH COURT

[2013/11363 P]

BETWEEN

RYANAIR LTD AND RYANAIR HOLDINGS PLC

PLAINTIFFS

AND

EVERT VAN ZWOL, JOHN GOSS, TED MURPHY,

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 13th day of December, 2017.

1. This is an application brought by the Plaintiffs to have the jury discharged in the following circumstances. On the 19th day of the trial, Mr. Martin Duffy, a witness called on behalf of the Defendants, was cross examined by Mr. Hayden S.C. in relation to discussions which took place on the 4th September, 2013, between a number of individuals, including the witness and the Defendants, concerning the preparation of a "pilot update", published on the 12th September, which incorporated the statement which is the subject matter of these proceedings.

2. During his examination in chief Mr Duffy had been questioned about the origins of the 'pilot update' discussions and recalled having received an email from an unidentified pilot colleague which had drawn his attention to a drop in the price of Ryanair shares. The existence of the email was unknown to the Plaintiff's up to that point in the trial.

3. The question of discovery has been extremely contentious in the course of these proceedings and resulted in a number of applications on foot of which written judgments of the Court were handed down. See *Ryanair Ltd, and another v. Van Zwol and Others* [2016] IEHC 264 and [2016] IEHC 616. Four affidavits of discovery have been sworn on behalf of the Defendants, the most recent of which was on the 6th November, 2017, shortly before the commencement of the trial. It is not in issue that the email which Mr Duffy received from his pilot colleague came within one of the categories of documents to be discovered but was not included in the documents discovered on affidavit.

4. When asked in the course of cross-examination by Mr. Hayden S.C. why the email had not been included with the other emails which he had produced for discovery, Mr Duffy said he believed it had been included. After the Court rose, the Defendants solicitor (with the permission of the Plaintiff as the witness was under cross-examination), asked Mr Duffy to carry out a search for the email over night which he located and produced to the Court, in the absence of the jury, the following morning.

5. The name of the author of the email had been redacted. It was sent on the 4th September, 2013, at 13:12 to Mr. Duffy. The subject of the mail is stated as: 'Ryanair profit warning/sale of stock by O'Leary'. Given the nature of the application and the content of the mail, I consider it pertinent to set out the text in full:

> *"Hi Martin,*
>
> *Just been reading about the unexpected profit warning from Ryanair. Seems like the city wasn't expecting it as O'Leary had been upbeat at the investor's presentation in June and never hinted at any problems. I noted from a link on the REPA website that O'Leary sold 500,000 shares on the 27th July when the price was a lot higher (14% drop today!). David Bonderman sold over one million shares in mid June too.*
>
> > *There was a big case earlier this year where a director of Tesco sold stock ahead of a profits warning. From what I can gather from the FSA guidelines:*
> >
> > *"Directors should not buy or sell shares in their company while in possession of unpublished, price sensitive information"*
>
> *The regulations, policed by the Financial Services Authority also directors and senior managers to obtain board-level approval before selling shares and forbid trading in shares during so called "close periods" between the end of a financial period and the reporting of its results.*
>
> *I don't know much about finance but could this be seen as some sort of insider dealing based on knowledge he had?*
>
> *Also, a different perspective on it from the Telegraph.*
>
> *HTTP://www.telegraph.co.uk/finance/newsbysector/transport/1028594/ryanairs-oleary-should-focus-on-the-main-job.html.*
>
> *Best regards"*

6. In the absence of the jury, Mr. Duffy gave evidence concerning his knowledge of the email, the requests made by the Defendants solicitor that he furnish all documentation in his possession relating to the process of discussion and preparation involved in the writing of the 'pilot update' as well as the subsequent requests made in the context of supplemental affidavits of discovery having to be sworn. Mr. McAleese, Solicitor for the Defendants, also gave evidence concerning his first knowledge of the missing email and the requests which he had made to Mr. Duffy.

7. Having considered the evidence of these witnesses in relation to this aspect of the matter, I am satisfied that at the time when discovery was being made, and subsequently, Mr. Duffy was aware that he had received an email from a pilot colleague upon which he had relied in drawing up Draft No. 2 of the 'pilot update'. I also accept the evidence of Mr. McAleese concerning the requests he made of Mr Duffy for the purposes of making discovery, who, to be fair to him, now accepts that he did not produce the email, that it ought to have been produced and that he was mistaken in his belief that he had done so.

8. It is not intended to set forth the submissions made on behalf of the parties which are, in any event, apparent from the transcript. Suffice it to say that the principal grounds and submissions maybe summarised as follows.

Plaintiff's Submissions
9. The email contains information which the Plaintiffs contend was crucial to their case since it goes to the very heart of the complaints made by the Plaintiffs in relation to the impugned statement. Firstly, it is said the email encapsulates the whole essence of the case. Secondly, it was the very genesis of the subject statement about which the Plaintiffs complain and, finally, it was cogent evidence of the state of mind of both the author and Mr Duffy at the time.

10. Asserting that Mr Duffy was the servant or agent of the Defendants the Plaintiffs say that the email was thus in the power and possession of the Defendants. Accordingly, they were bound to make discovery of the email and had to take the consequences for their failure to do so, consequences which are serious. The Plaintiffs say they have been deprived of an opportunity to join Mr. Duffy into the proceedings and/or to plead, in the context of the plea of malice, that the Defendants are vicariously liable for his malice as their servant or agent, a plea which, if successful, would effectively deprive the Defendants of the defence of qualified privilege.

11. In the event the Plaintiffs also contend that the omission has created an unfairness and prejudice in the prosecution of the claim that cannot now be rectified. Accepting that a plea of malice against someone is a plea that should not lightly be made, it was submitted that without the email the Plaintiffs could never have made such a plea against Mr. Duffy. The content of the email was crucial to his state of mind when he inserted the extract from the email into Draft No. 2 which was part of the chain which led to the pilot update.

12. Additionally, the email referred to "closed periods", a matter upon which the Court had made a ruling earlier in the trial which may have led to further enquiry as to whether that was a complaint which the Plaintiffs should have or could have made and pleaded.

13. It was also submitted that the Plaintiffs had been prejudiced by the way in which they had approached the trial, particularly the way in which they had approached the cross examination of Captains Van Zwol and Goss and the issue of the credibility of the Defendants which could have been called into question, especially in relation to the discussions which they may or may not have had or might have had and what they knew in relation to the contents of the email leading up to and at the time of the publication of the 'pilot update'. It is said that the resulting mischief cannot be undone by permitting these witnesses to be re-examined.

14. Finally, the Plaintiffs contend that they had also been deprived of the opportunity to deploy the email in the conduct of the litigation both before and after the commencement of the trial. Accepting that the discharge of the jury was something that should occur only in exceptional circumstances, it was submitted that what had happened in this case warranted precisely that course of action since a fair trial could not now be achieved.

The Defendants Submissions.
15. In response, it was submitted on behalf of the Defendants that the omission of the email from the discovered documents and any consequences as might be said to flow from it could not be laid at the Defendants door. Firstly, there was no evidence that they had any knowledge of it nor was it ever in their power and possession. Secondly, while it was undoubtedly the case that Mr Duffy was assisting the Interim Council of the RPG, there was no evidence to support the Plaintiffs assertion that he was their servant or agent. Accordingly, the Defendants had no legal entitlement to possession of any document in his possession let alone the missing email. The fact that Mr Duffy cooperated in the production of the documents in his power and possession, and would likely have included the missing mail had he adverted to it, did not alter that position.

16. Furthermore, although Order 31 of the Rules of the Superior Courts had been amended to include 'procurement' of documents, there remained nonetheless a distinction between documents which were in the power and possession of someone and documents which might be procured. See *Thema International Fund Plc v. HBSC Institutional Trust Services (Ireland) Ltd* [2013] 1 I. R. 274. The former involves an enforceable legal right whereas the latter arises only where it is likely that the document in question would be furnished voluntarily if sought. As to the circumstances in which a court would make a discovery order in such circumstances, these are rare and in this regard the Court was referred to decision in *Thema* and *to Northern Bank Finance v. Charlton & Others* [1979] IR 149.

17. There was no evidence of any contract between the Defendants and Mr. Duffy nor was the relationship, such as it was, one which would have entitled the Defendants to obtain possession of any documents. Even if there was a contract made for their benefit, they were not parties and could not rely upon it. In this regard, reliance was placed on the decision in *Jackson v. Horizon Holidays* [1975] 1 WLR 1468. In order to comply with the discovery to which they had agreed, the Defendants did what was required of them, they had made all appropriate enquiries as to the availability of documentation in advance of the affidavits of discovery being sworn. The suggestion that they had the power to compel the production of anything which came into Mr. Duffy's private email address was nothing short of fantastic and had no basis in law.

18. The contention that the missing email prevented proceedings being pursued against Mr Duffy was also baseless. The omission did not prevent the Defendants from being sued, moreover, Mr Duffy's involvement in the preparation and authorship of the pilot update became well known to the Plaintiffs in time but they chose not to join him as a party. The Plaintiffs could also have sued the Stichting once they became aware of its existence but again chose not to do so, nor did they pursue third party discovery.

19. Even if the Plaintiffs had pleaded vicarious liability, the missing email is not evidence of any relationship between the Defendants and Mr. Duffy and if malice was established on his part that was not something for which the Defendants could be made responsible since Mr. Duffy was neither their servant nor their agent. Legal malice in the sense understood in the context of a plea of qualified privilege was not infectious; it was not capable of rendering the Defendants liable in the absence of a legal relationship which made the Defendants vicariously liable for Mr Duffy's tortious acts or omissions. In the circumstances, to plead and pursue a claim of vicarious liability on the part of the Defendants for any malice that might be established on the part of Mr. Duffy would have been entirely futile.

20. It was also contended that the email is neither crucial to nor does it encapsulate the case made by the Plaintiffs. What was relevant was the statement about which complaint is made and not the genesis of the statement. The jury are concerned with the meaning of the statement not with the meaning of some other document the content of which was, in any event, largely expunged from the 'pilot update' that was ultimately published.

21. Neither the content of the email nor the delay in its production until a late stage in the case warranted the drastic step of discharging the jury, a result which would be altogether disproportionate to any mischief which might reasonably be said to arise as a result of the omission from discovery. The Plaintiffs were still in a position to cross-examine Mr. Duffy, moreover, the third Defendant

had yet to give evidence and be cross-examined. Furthermore, the Court had discretion in the interests of justice to permit Captain Van Zwol and Captain Goss to be recalled and cross examined on what, if anything, they knew of the existence or subject matter of the email.

22. It was contended that no prejudice, inability to make enquiry or plead any innuendo meaning that late June was outside the permitted period for dealing, arose from the omission of the email. The knowledge of the person which gives rise to a defamation by innuendo meaning is knowledge of the person to whom the defamation was published, not the knowledge on the part of the publisher or on the part of someone who said something to the publisher.

23. The attention of the Court was also drawn to the fact that the disadvantage arising from the omission to make discovery of the email was not one sided but was also disadvantageous to the Defendants. The advantages or disadvantages which might be said to arise in one way or the other or flow from late discovery were not such as to make a fair trial impossible; the jury will still get to know everything that they need to know about the email.

24. Finally, the discharge of the jury in the circumstances would not materially alter the case to be tried before a new jury and would thus be completely futile. Furthermore, the costs and time involved would work oppression on ordinary litigants such as the defendants who were not before the Court of their own choosing.

25. In reply, Mr. Hogan submitted that Mr. Duffy was working for the Interim Council on the RPG project and not some third entity, such as the Stichting, about which no mention had been made in the context of the contractual relationships involving the Defendants. As a servant or agent of the Defendants, the email in Mr. Duffy's possession was in the power and possession of the Defendants and thus fell to be discovered. The consequences of Mr. Duffy's failure to furnish the email had to be borne by them. The suggestion that Mr. Duffy was not a servant or agent of the Defendants was contrary to the evidence; he was employed on the project by the RPG Interim Council, of which the Defendants were members. Finally, third party discovery was irrelevant in circumstances where the Defendants were obliged to make the discovery themselves.

Decision

26. Every order of the Court is a constituent part in the administration of justice the object of which is the effective and efficient disposition of litigation in accordance with the law. Discovery, where relevant, is an important and integral part of that process, described by O'Flaherty J. in *Allied Irish Banks Plc & Anor v. Ernst & Whinney (a firm) & Anor* [1993] 1 I.R. 375 at 396 as "*an instrument to advance the cause of justice*". The purpose of discovery is to aid a party in the progress of litigation by advancing the cause of action or the defence or any issue raised in the pleadings.

27. The documents sought on discovery must be relevant, directly or indirectly, to the matters in issue between the parties. Using the process to create and establish a cause of action which a party is not otherwise in a position to plead is an abuse of process and will not be permitted, per McKechnie J. in *Keating v. RTE & Anor* [2013] IESC 22 at p. 30 and 31. Although the parties differ on the consequences which flow from the discovery of the missing email on the 20th day of the trial, there is no suggestion that the email is not relevant to the issues in the case.

28. First and foremost, of the matters to be considered by the Court on an application to discharge a jury must be whether or not, having regard to the circumstances in which the application arises, a fair trial can be had and concluded.

29. In the circumstances of the application under consideration a number of observations fall to be made in relation to the missing email. Firstly, although part of the content was incorporated into Draft No. 2 by Mr Duffy, the email was not authored by him but by an individual whom he described as a 'pilot colleague'. Secondly, later the same day the author corrected the information contained in the first mail relating to the sale of shares by Mr. O'Leary. Thirdly, on receipt of the subsequent email, Mr Duffy acted on the content and largely expunged from Draft No. 3 the information from the initial email which he had incorporated into Draft No. 2, something which goes to the state of Mr. Duffy's mind in the preparation of the third draft on which the published update was based, albeit that it is the idea represented by what was expressed in the email which the Plaintiffs say still found its way into that draft. Finally, the content of the missing email is devoid of any material relevant to the relationship between the Defendants and Mr. Duffy, in particular, the assertion that Mr. Duffy was the servant or agent of the Defendants.

30. With regard to the question as to whether Mr. Duffy was the servant or agent of the Defendants, the evidence, so far as it goes at this time, is that although Mr Duffy and Mr Kelly were undoubtedly providing services to the Interim Council of the RPG as well as to other pilot associations of the European Cockpit Association, the invoices for those services were issued to IALPA, (Irish Airlines Pilots Association) which discharged to cost.

31. In so far as the nature of the contractual relationship for the provision of the services is concerned, such appears to me to be one of a contract for services; accordingly, Mr Duffy was an independent contractor. Furthermore, there is no cogent evidence to found a conclusion that Mr Duffy was employed and paid by the Defendants. In my judgement, the fact that he provided services directly to and for the benefit of the Interim Council of the RPG on foot of a contract for services rendered which were invoiced to and paid by IALPA does not make Mr Duffy a servant or agent of the Defendants.

32. It follows that for the purposes of complying with discovery, the Defendants had no legal entitlement to obtain the missing email from Mr Duffy; the email was not in their power and possession. Moreover, there is nothing in the evidence given so far in the trial which suggests that Captain Goss and Captain Van Zwol were aware of the first or second draft pilot updates or of the missing email or any emails relating to those drafts at the time when the Defendants became involved in the preparation of what has been designated 'pilot update' Draft No. 3 or indeed, subsequently, up to and including publication of the pilot update and beyond.

33. These conclusions have further and other implications for the consequences of the mischief which the Plaintiffs contend arise from the omission of the email from the discovery. Absent the relationship of master and servant or of principal and agent, the establishment of malice on the part of Mr Duffy could not infect the Defendants and thus deprive any of them of the defence of qualified privilege on that ground.

34. I am also satisfied that no serious prejudice arises from the fact that the Plaintiffs did not join Mr Duffy or plead that the Defendants were vicariously liable for his tortious acts, if any, as a consequence of the late discovery of the missing email. Moreover, to pursue such a case in the circumstances would most likely be futile. In any event I am also satisfied on the evidence presently before the Court that the Plaintiffs were aware of Mr. Duffy's involvement in the discussions and preparation of the pilot update with the Defendants and that had they wished to join him into the proceedings or plead a case of vicarious liability they could have done so.

Conclusion; Principles to be applied
35. At the outset of his submissions on behalf of the Plaintiffs, Mr. Hogan very fairly observed that an application to discharge the jury should not and was not being made lightly. There is limited jurisprudence in this jurisdiction on the principles to be applied and in particular the approach which the Court should adopt on such an application. The attention of the Court was drawn to the case of *Dawson & Dawson t/a A.E. Dawson & Sons v. The Irish Brokers Association* [1998] IESC 39, in which the Supreme Court enunciated the approach to be taken in circumstances where something was said in the opening of a case or where some inadmissible evidence gets in. O'Flaherty J. observed at para. 16 that the discharge of the jury:

> *"…should be a remedy of the very last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant, or should not have been given before them, as well as in the face of adverse pre-trial publicity. See D v. Director of Public Prosecutions [1994] 2 I.R. 465; Z v. The Director Public Prosecution [1994] 2 I.R. 476 and Irish Times v. Murphy [1998] 2 ILRM 161".*

Although not opened to the Court on this application, the decision of the Supreme Court in *Mangan v. Independent Newspapers Ireland Ltd* [2003] IESC 5, is to the same effect.

36. Mr. Hogan submitted that the circumstances in this case were clearly altogether different and more serious than in Dawson, however, it seems to me, as the case enters its sixth week, that the view of the learned judge is equally apposite, if not more so, having regard to the matters which have given rise to the present application, particularly where, in my judgement, the object of achieving a fair trail can be satisfied. For the sake of completeness, I should add that where the hearing is well advanced, with all the attendant effort and costs involved, it is not the function of the Court to get the trial to the end no matter what; fairness, not factors such as cost, time and effort expended or convenience which must be the governing determinant.

37. That, in my judgement, is the primary and fundamental requirement which has to be satisfied irrespective of the stage of the trial when the application is made. The onus of establishing that a fair trial cannot be had and concluded falls on the moving party. Furthermore, such an application should be made only where a meritorious case can be properly advanced. Certainly, it should never be made lightly or for the purpose of gaining a real or perceived tactical advantage, a view consistent with the approach which should be taken by the Court to discharge the jury only as a remedy of last resort in exceptional circumstances and where to do otherwise would be unfair and unjust.

38. Accordingly, and having regard to the fact that everything about the email will undoubtedly be ventilated before the jury, that Mr. Duffy may now be further cross-examined, that the third named defendant has yet to give evidence and that the first and second Defendants may, if required, be recalled for cross-examination on the email, I am satisfied, insofar as there is any mischief remaining from the failure of Mr. Duffy to produce the email for discovery, that the discharge of the jury on that account would be a wholly disproportionate and unjustified response, particularly where, at this juncture , the object of a fair trail can be achieved. Accordingly, I refuse the application and the Court will so order.