Neutral Citation: [2015] IEHC 776

THE HIGH COURT

[2013/5867P]

BETWEEN

RYANAIR LTD

PLAINTIFF

AND

RAY QUIGLEY

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 9th day of December, 2015.

1. This is an application for discovery brought by the defendant in proceedings issued by the plaintiff against the defendant whereby the plaintiff claims, *inter alia*, damages from the defendant for defamation. The proceedings arise out of the publication of a statement on a website known as "The Professional Pilots Rumour Network." The plaintiff claims that the statement was published by the defendant, the text of which is as follows:

> "FFS…….IAA wake up! Do we need to have an actual crash before you react? Lives will be lost here. Just to be sure you realise what's going on here, all the worlds' press monitors this site and your complicity in Ryanairs' inadequacies.
>
> And why do RYR go to these back of beyond places with limited infrastructure? Because they are cheap to go to. Does the lack of facilities increase or decrease the safety? You know the answer already. Do the travelling public have the slightest inkling that their safety is compromised by the cheap airfares? Of course not. Now some RYR hero will try to defend the fact that levels of protection are not compromised. Safety costs money and that money comes from paying an appropriate price for the flight. Fairly simple. As in everything else, you get what you pay for.
>
> Tomkins, you'll have to quantify "safely". As I said substandard infrastructure at an airfield affects the safety levels. So to answer your question, I would guess in the last ten years, many hundreds of thousands, maybe millions. No deaths so far, but very many close calls.
>
> Airfrance have the same standard of pilot as Ryanair or any other JAR operator, we are all checked to the same stringent levels. What I am saying is, it is the cheap, underequipped (compared to other) airfields that RYR operate to that (sic) reduce the safety in RYR's operation".

2. In his defence, the defendant has denied publication to any person other than the plaintiff. The defendant has not pleaded the defence of truth in respect of the contents of the publication, but he has pleaded, at paras. 10 and 11 of his defence as follows:

> "10. If the said words were published by the defendant to any person other than the plaintiff within the State same were comment and opinion, protected by s. 20 of the Defamation Act, 2009, on matters of public interest, and hence not defamatory of the plaintiff, nor actionable nearly upon its say so, viz that the well known and established pursuit by Ryanair of remoter airports, away from larger cities and more established larger airports, and where the management or operation of those remoter airports, commonly with smaller or less or more limited infrastructure, could have an impact on consequential ground control and general airport backup risk management and takeoff and landing supports, and the defendant adopts the further particulars set out in para. 14 below.
>
> 11. If the said words were published by the defendant to any person other than the plaintiff within the State then same constituted fair and reasonable publication on a matter of public interest protected by s. 26 of the Defamation Act, 2009, and hence not defamatory of the plaintiff, nor actionable merely upon its say so, viz that the well known and established pursuit by Ryanair of remoter airports, away from larger cities and more established larger airports, and where the management or operation of those remoter airports, commonly with smaller or less or more limited infrastructure, could have an impact on consequential ground control and general airport backup risk management and takeoff and landing supports, and the defendant adopts the further particulars set out in para. 14 below."

3. Paragraph 14 of the defence of the defendant states:

> "Paragraph 9 of the Statement of Claim is denied; if the defendant published any such words in the State to any person other than the plaintiff, same was comment or opinion protected by s. 20 or fair and reasonable publication protected by s. 26 of the Defamation Act, 2009 and hence not defamatory of the plaintiff, nor actionable merely upon its say so, and the defendant declined to furnish the undertaking so sought because he was exercising protected rights, and not otherwise."

4. On 1st April, 2014, the solicitors for the defendant sent to the solicitors for the plaintiff a letter requesting the plaintiff to make voluntary discovery of documentation. This letter sets forth all of the categories of documentation discovery of which is sought pursuant to the notice of motion herein and sets out the reasons in support of each category as follows:-

> "1. The corporate policy of the plaintiff, referred to para. 14 of the Reply, in not operating category C airports (or in Ryanair terminology while it designates that some airfields as "Captain Only").
>
> Reason A: paragraph 14 of the Reply asserts "… the plaintiff has a corporate policy of not operating to category C airports" which addresses the plea and particulars in para. 9 of the defence *inter alia* pursuant to s. 26 (fair and reasonable publication). The second statement which the plaintiff asserts is defamatory starts by stating "and why do RYR go to these back of beyond places with a limited infrastructure. Because they are cheap to go to. Does this lack of

facilities increase or decrease the safety? You know the answer already ….” Paragraph 14 of the Reply denies that the plaintiff operates to category C airports at all but asserts that the “… categorisation is determined by each individual operator on assessment of operational considerations at the individual airport and the limitations of the aircraft type …” [operator in this sense refers to airline operator including the plaintiff]. Regardless of the terminology used, the documents are directly material to the respective cases put forward by the plaintiff and the defendant. See also the reasons cited below as been general to all categories.

2. The airfield specific briefings to pilots of all category B and category C airfields (or Captain Only) used by the plaintiff between the 1st January, 2007 to 1st January, 2012.

Reason A above is repeated.

Reason B: these briefings are relevant and necessary for the purpose, *inter alia*, of establishing the varying challenges in respect of each airfield to which the plaintiff operates. The plaintiff asserts in para. 14 of the Reply that “there is no reduction in safety levels and statistically no more risk of a serious incident or accident when operating two category C airports”. It is pleaded, *inter alia*, in paras. 10 and 14 of the Defence that “the well known and established pursuit by Ryanair of remote airports, away from larger cities and more established larger airports, and where the management or operation of those remote airports, commonly with a smaller or less or more limited infrastructure, could have an impact on consequential ground to control and general airport backup risk management and takeoff and landing supports” and the particulars under para. 14 of the Defence elaborate on the infrastructural deficits.

3. Reports, communications, advice or warnings from Aviation Authorities, governments or European Union bodies or other relevant international bodies related to air-safety in respect of category B and C (or Captain Only) airfields used by the plaintiff between the 1st January, 2007 to 1st January, 2012.

Reasons A and B are repeated.

Reasons C: the fact that the plaintiff operates to remote airfields has been put in issue in these proceedings and the effect same has on safety is addressed in the pleadings. These documents will address this material issue.

4. Reports, either internal (including but not limited to mandatory occurrence reports from pilots) or external, detailing “near-misses” attributed in whole or in part to infrastructural deficits or airfields operated by the plaintiff between the 1st January, 2007 to 1st January, 2012.

Reasons A, B and C are repeated.

5. All documents, communications or statements which the plaintiff has in its possession, power or procurement, which it has received or produced in response (or in anticipation) of (sic.) the survey by the Ryanair Pilots’ Group.

Reason D: particular 12(v) of the Reply make criticism of the defendant for not making an attempt prior to publication to a list a response from the plaintiff. The plaintiff has asserted in another context that it does not recognise the Ryanair Pilot Group and on its own website has exhibited a selection of documents which, *inter alia*, comments on the “… fabricated survey which claims to be based upon replies from less than one third of Ryanair’s over three thousand serving pilots are a crude attempt to use baseless safety “concerns” as a cover for its failed trade union agenda”. The provocative value of the documents will be that they address the plea in para. 16 of the Reply that the defendant was actuated by malice and particular (iv) the defendant’s “dominant motive and improper purpose” was to “undermine the plaintiff’s industry-leading safety record.” The attitude of the plaintiff to legitimate safety concerns as expressed by its pilots will be evident from the said documents.

5. In addition to the reasons given for each individual category, the following reasons where advanced by the defendant as being applicable to all categories of documentation in respect of which discovery is sought:-

1. The said discovery will have the effect of limiting the trial of the action, reducing the number of witnesses which may have to be called and thereby reduce costs;

2. To ensure that all matters in issue can be fully dealt with at the hearing of the action and irrelevant matters can be excluded;

3. The defendant does not have access to same, other than by means of an order for discovery as against the plaintiff and the plaintiff would have an litigious (sic.) advantage in not disclosing the same;

4. The defendant contends that discovery of the above category (sic.) sought is necessary for disposing fairly of the cause or matter herein and for saving costs pursuant to order 31, rule 12 as inserted by the Rules of the Superior Court (No. 2) (Discovery) 1999 Statutory Instrument No. 233 of 1999, and ensure (sic.) that this honourable Court may properly determine the issues between the parties and to limit the number of witnesses required to be called for the hearing and to limit the court time required for the hearing and thereby limit costs;

5. The categories of documents sought to be discovered have a direct bearing on the matters at issue and are wholly necessary and relevant and are proper matters for discovery as envisaged by order 31, rule 12(1)(b) as inserted by Rules of the Superior Court (No. 2) (Discovery) 1999 Statutory Instrument No. 233 of 1999.

6. Counsel for the defendant submits that discovery of the documents sought may serve to advance the defendant’s case and/or to undermine the plaintiff’s case. As stated above, the notice of motion for discovery is in the same terms as the letter seeking voluntary discovery. At the outset of the hearing of this application, counsel for the plaintiff agreed that the plaintiff would make discovery in the terms of paragraph 1 of the notice of motion. As to the remaining categories, counsel for the plaintiff submits as the defendant has not entered a plea of truth in his defence, that it is presumed that matters of fact contained in the plaintiff’s publication are false, and that as a consequence the defendant is not entitled to seek discovery of any documentation tending to prove the truth of the facts in the publication.

7. Furthermore, it was submitted on behalf of the plaintiff that the defendant is not entitled to the discovery requested because he has not identified any facts upon which he claimed to have based his opinion. It was further submitted on behalf of the plaintiff that

in order to succeed with the defence of honest opinion under section 20 of the 2009 Act, the opinion held by the defendant must be based upon facts which were known to the defendant at the time of publication and that he cannot rely, for the purpose of a defence under section 20, on facts that may be discovered afterwards. In addition, counsel for the plaintiff argued that none of the categories of documentation sought arise out of the pleadings.

Relevant legislation:
8. Section 20 of the Defamation Act 2009 provides:

> 20.—(1) It shall be a defence (to be known, and in this section referred to, as the "defence of honest opinion") to a defamation action for the defendant to prove that, in the case of a statement consisting of an opinion, the opinion was honestly held.
>
> (2) Subject to subsection (3), an opinion is honestly held, for the purposes of this section, if—
>
> (a) at the time of the publication of the statement, the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion, believed that the author believed it to be true,
>
> (b) (i) the opinion was based on allegations of fact—
>
> (I) specified in the statement containing the opinion, or
>
> (II) referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published,
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> or
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> (ii) the opinion was based on allegations of fact to which—
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> (I) the defence of absolute privilege, or
>
> (II) the defence of qualified privilege,
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> would apply if a defamation action were brought in respect of such allegations,
>
> and
>
> (c) the opinion related to a matter of public interest.
>
> (3) (a) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which subsection (2)(b)(i) applies, unless—
>
> (i) the defendant proves the truth of those allegations, or
>
> (ii) where the defendant does not prove the truth of all of those allegations, the opinion is honestly held having regard to the allegations of fact the truth of which are proved.
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> (b) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which subsection (2)(b)(ii) applies, unless—
>
> (i) the defendant proves the truth of those allegations, or
>
> (ii) where the defendant does not prove the truth of those allegations—
>
> (I) the opinion could not reasonably be understood as implying that those allegations were true, and
>
> (II) at the time of the publication of the opinion, the defendant did not know or could not reasonably have been expected to know that those allegations were untrue.
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> Section 26 of the Act of 2009, insofar as is relevant, provides:
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> 26.— (1) It shall be a defence (to be known, and in this section referred to, as the "defence of fair and reasonable publication") to a defamation action for the defendant to prove that—
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> (a) the statement in respect of which the action was brought was published—
>
> (i) in good faith, and
>
> (ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,
>
> (b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and
>
> (c) in all of the circumstances of the case, it was fair and reasonable to publish the statement."

Applicable Principles:
9. In *The Law of Defamation*, (Roundhall, 2011) Maher at paragraph 6.08 comments:

> "In general the defendant pleading "honest opinion", as set out in the 2009 Act must prove:

(1) That the words were opinion, and not fact;

(2) That the opinion was on a matter of public interest;

(3) There was some factual basis for the opinion; and

(4) That the opinion was honestly held (by the defendant or by the author, if the defendant was not the author)."

In paragraph 6-11 he states:

> "the significance in terms of the proof required is that a justification or "truth" defence requires proof by the defendant of the truth of the defamatory allegations, while the honest opinion defence can succeed even where the defendant cannot prove the truth of the allegations, although he will have to prove to a sufficient extent that the material on which those allegations were based was sufficiently true or was at least privileged".

10. It is clear from this passage and indeed from the wording of section 20(3)(i) of the Act itself, that the truth or accuracy of allegations the subject of defamation proceedings is very relevant to the consideration of the defence of honest opinion. That being the case, documents sought by a defendant to prove the truth of those allegations are relevant in the context of an application for discovery, in a case where the defence of honest opinion has been pleaded.

11. The plaintiff (the respondent to the motion) argues that, for the purpose of the defence of honest opinion, the only documents that could be relevant are those relating to allegations of fact specified in the statement containing the opinion, that were known, or might reasonably be expected to have been known by persons to whom the statement was published. The plaintiff submits that the defendant has not, either in the defence of the proceedings or in support of this motion, identified any facts upon which the defence of honest opinion is based. Cox and McCullough comment in *Defamation Law and Practice*, (Clarus Press, 2014) at paragraph 6-34, that section 20(2)(b)(i) of the 2009 Act requires that an opinion, in order to be an "honest opinion" for the purposes of the defence, must be based on allegations of fact that are specified in the relevant statement.

12. Cox and McCullough refer to the case of *McDonagh v. Sunday Newspapers Ltd.* [2005] 4 I.R. 528 where it was held that the Court must be satisfied that documents sought on discovery, in the case of a defamation action in which truth is pleaded, are sought for the purposes of advancing an existing plea and are actually relevant to the issues in the proceedings, whether or not particulars of truth have been given. Thus, the authors comment, *"if those particulars have not been given, it is necessary, in order to do justice between the parties, that the appropriate details as to the plea of truth are set out in the affidavit grounding the discovery application. The same principle would necessarily apply to any plea of which particulars have not been given, but where discovery is sought."* They also refer to the decision of the Supreme Court in the case of *Keating v. RTE* [2013] IESC 22 in which McKechnie J. stated that in order to obtain discovery to support a plea of justification or truth, the defendant must disclose some information on which the plea is based:

> "Whether such appears in the defence document or in the particulars matters not: nor does the means by which such information had (sic) been acquired. Provided that the Court is satisfied that some such evidence exists, that will be sufficient. The Court does not and should not evaluate its strength as a defence plea. This is not its role on such an application. Nor is it necessary for a defendant to disclose the full extent of what information he may have. He does not have to compromise his defence in this regard. Once it is shown that the plea can be supported, the discovery application cannot be regarded as a fishing exercise or as one whose sole purpose is to establish a justification plea: rather, its proper characterisation in such circumstance is one of aiding and supporting the material which already exists. This of course is the essence of what discovery is."

The authors comment that in principle, the same approach applies to all pleas, and not just to a plea of truth.

13. Counsel for the defendant has argued that discovery of the categories sought will help advance the defendant's case in relation to his evidence and damage the plaintiff's case. While that is a basis upon which discovery may be granted, there is a difference between seeking discovery in support of an existing plea and seeking discovery for making a case pleaded where no particulars of the plea have been given. In McDonagh Macken J. said:

> "that in a libel action in which a defendant pleaded justification simpliciter, there must be before the court, at least at the time discovery is sought, sufficient information, particulars or material facts, however phrased, upon which the Court can conclude that the application for discovery is firstly, intended to advance the plea of justification and not merely make such a case for the defendant [and], secondly, to establish that the documents sought are relevant to the issues arising between the parties, and thirdly, to establish that they are necessary for the purpose of disposing of the action."

14. The defendant relies on the decision of Peart J. in the case of *Ryanair Ltd. v. Ian Somner* [2014] IEHC 634 in which Peart J. granted discovery of certain categories of documentation to the same plaintiff in proceedings of a similar nature. However, a significant distinction between that case and the present case is that in the Somner case, the defendant pleaded truth as well as honest opinion and fair and reasonable comment and also gave particulars of the basis of each of those defences. Peart J. found that the categories of documentation requested in that case were relevant to the issues between the parties and were necessary for the full and proper determination of the issues arising from the pleadings in the case. He concluded that the documentation may either assist or damage either party's case but that they were clearly relevant and necessary for a proper determination and that the application could not be described as a fishing exercise.

15. The general thrust of the defendant's statement as published is that the plaintiff flies to regional airports with less infrastructure and that this compromises the safety of its passengers; and that the plaintiff does this in order to reduce costs thereby enabling it to charge lower fares than it would otherwise be able to do. It is specifically stated in the publication that "cheap underequipped (compared to other) airfields that RYR operate to that (sic) reduce the safety in RYR's operation," and that there have been "no deaths so far, but very many close calls." There can be no doubt that these are words of opinion and not of fact and that the opinion is on a matter of public interest. Insofar as the defendant has not set out any facts upon which his opinion is based, the defendant clearly states that the plaintiff flies to regional airports and it is a well known fact that the plaintiff does so. In paragraph 14 of the defence, the defendant particularises what he describes as "comparative deficits, cataloged by the FAA and the ICOA" at these airfields as including:

- Daylight landing only;

- Less or no radar facilities;
- Shorter runways;
- Lower runway pavement strength;
- Unusual characteristics or performance imitations;
- More difficult terrain generally;
- Non-standard approach aids and/or approach patterns;
- Less ample rescue fire-fighting backup;
- Unusual local weather conditions;
- Higher/more fluctuating winds.

16. These are the matters that the defendant relies upon to support his contention that "regional" airports present greater risk to passengers than "major" airports. These are also matters about which the persons to whom the statement was directed i.e. pilots, might reasonably be expected to have knowledge. Accordingly, any documentation sought by the defendant that may tend to shed more light on these or related matters must be relevant to the conduct of the proceedings, and may tend to advance the defendant's case and damage the plaintiff's case.

17. I turn now to address the categories of documentation sought.

Category 1
This has already been agreed.

Category 2
It is not unreasonable to assume that airfield specific briefings to pilots are likely to shed considerable light on the various allegations as to shortcomings at regional airports contained in the particulars to the defence. They may therefore be considered relevant to the matters at issue in the proceedings. They may assist in proving the truth of the particulars given at paragraph 14 of the defence and serve to advance the defence of the defendant that he held an honest opinion in relation to these matters. They are necessary because it is not unreasonable to expect that airport specific briefings given by the plaintiff to its pilots will identify any factors, shortcomings or hazards to be addressed by its pilots when landing aircraft at these destinations. Accordingly, I direct discovery of this category of documentation by the plaintiff. However, I think it should be sufficient for the purposes of the defendant to obtain discovery of documentation under this heading for a period of three years rather than five years prior to the date of publication i.e. the period of three years prior to 14th January, 2012.

Category 3
I consider that this category of documentation is relevant and necessary for the same reasons given in relation to category 2, and I order discovery of the documents described in this category for the same period as directed in relation to category 2 documentation i.e. 3 years prior to 14th January, 2012.

Category 4
The applicant/defendant has not put forward any facts relied upon by the defendant in relation to the allegation in the statement that there have been "very many close calls" by which I infer that the defendant is referring to near misses. Nor is there anything pleaded by the defendant in this regard and nor are there any facts or information in the affidavit grounding discovery to support the application for discovery of this category of documentation. It appears to me that the sole purpose of the defendant in seeking discovery of this category of documentation is to establish facts in support of an allegation in the statement made by the defendant as distinct from supporting a plea, not to mention a plea in respect of which facts relied upon have been given. In short, I consider the request for this category of documentation to be in the nature of a fishing exercise and I decline to make any order in respect of the same.

Category 5
No reason was advanced by the defendant to explain why documentation which the plaintiff has in its possession or which it has received or produced in response to the survey by the Ryanair Pilots Group is either relevant or necessary for the purpose of the proceedings and accordingly I refuse this category of documentation also