

THE HIGH COURT

Record No. 2012 10160 P

Between/

RYANAIR LIMITED

Plaintiff

-and-

IRISH MUNICIPAL, PUBLIC AND CIVIC TRADE UNION (IMPACT), IRISH AIRLINE PILOTS ASSOCIATION (IALPA) AND EVAN CULLEN

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered the 9th December 2014**Introduction**

This judgement deals with a discovery motion brought by the plaintiff against the defendants. In the substantive proceedings the plaintiff claims damages, including aggravated and/or exemplary damages, for defamation and malicious falsehood. The claim arises on foot of an interview given on RTE radio by the third named defendant on the 16th August, 2012 and on statements alleged to have been made by him which were published in the Irish edition of the Sunday Times on the 23rd September, 2012. This defendant is an airline pilot and is the President of the second named defendant, which in turn is a member of the first named defendant. The plaintiff asserts that in making the allegedly defamatory statements he was acting as a representative of and on behalf of the first and second named defendants.

RTE conducted the interview by way of reporting on the fact that three of the plaintiff's aircraft made "low fuel emergency landings" at Valencia Airport in Spain on the 26th July 2012, after each of the three pilots had issued "mayday" calls and asked for permission to land immediately. Each had been diverted to that airport because of bad weather and had to hold over the airport for some time.

It appears that the case will turn on questions to do with the plaintiff's policy in relation to certain safety issues and in particular the amount of reserve fuel that should be or is carried by aircraft operated by the plaintiff.

As far as the issues dealt with in this judgment are concerned, it is relevant to note that the third named defendant was introduced in the interview as being from the Irish Airline Pilots Association. A spokesperson for Ryanair also took part in the broadcast.

Issues arising from the pleadings

The statement of claim asserts that in participating in the radio interview the third named defendant was acting "as a representative of the first named defendant and in his capacity as a pilot and President of the second named defendant." It is alleged that the words used by him in the interview "meant and were understood to mean in their natural and ordinary meaning or by way of innuendo" the following:

1. that the plaintiff's aircraft were on a number of occasions while carrying crew and passengers in imminent danger because the aircraft in question did not have enough fuel.
2. That pilots of the plaintiff airline were not allowed to take extra fuel when "*expecting to hold.*"
3. That the plaintiff operated fuel league tables based on how much fuel pilots were taking with them.
4. That the plaintiff drove pilots to do things that they were not comfortable with.
5. That the plaintiff operated and maintained fuel league tables which were "a disgrace".
6. That the plaintiff put its pilots under pressure regarding the fuel they took on any given day thereby compromising the safety of the aircraft and by extension its crew and passengers.
7. That pilots of the plaintiff airline who were not performing with regard to how much fuel they took were at the bottom of the Ryanair fuel league tables and received letters telling them that their performance was being watched.
8. That any captain not adhering to the alleged procedures would be invited to a face to face interview with the plaintiff's chief executive officer.

The defendants have pleaded that the broadcast complained of was true in substance and represented the honest opinion of the third named defendant. It is denied that he was acting in a representative capacity. It is also pleaded that the Sunday Times article was based on the radio interview and that the defendants did not provide quotations to that organ or agree to participate in the publication.

Categories of discovery in dispute

The original discovery motion sought 28 categories of document. Those still in dispute at the hearing are set out here, with a summary of the arguments made by the parties.

Category 1: "Records or notes of any correspondence and/or interview with any Sunday Times (or any other) journalist from January 2012 to October 2012."

The plaintiff says that the defendants have not denied giving interviews or making statements to journalists other than the RTE interview in question. It wants to know whether they have expressed different views on the fuel issue on different occasions and

argues that if they have it would be relevant to the pleas made in the defence.

The defendants say that what is being sought is documentation relating to any contact with a journalist in relation to any issue arising over a 10 month period and amounts to "an entirely unfocused trawl." An offer was made to discover

"Records or notes of any correspondence and/or interview with any Sunday Times journalist in connection with the article written by Chris Haslam and published in the Sunday Times on the 23rd September 2012 the subject matter of these proceedings."

Ruling: The plaintiff's formulation is far too broad and unfocused – the defendants may well have reason to interact with journalists on a broad range of issues. The order will limit this category to records or notes relating to interviews given, within the time period sought, on the topic of fuel safety.

Category 2: "Documents, records and/or investigations (whether in physical or electronic medium) concerning the third named defendant calling a fuel emergency, "pan pan" or "mayday" in his career."

The plaintiff says that the third named defendant, speaking as the head of IALPA, has asserted that use of the term "mayday" is extremely rare and not used unless the pilot is in serious and imminent danger. Any documentation in this category would, it is submitted, go to the veracity of the defence.

The defendants say that there is no allegation in the pleadings that the third named defendant has ever called an emergency and no allegation that he was dishonest in this respect. The issue between the parties is whether such calls are rare or not.

Ruling: The honesty of the third named defendant's opinion is in issue and his own record in respect of such matters is relevant to that issue. The court will however limit the category to such documents as are in his possession, power or procurement that relate to his calling a fuel emergency, "pan pan" or "mayday" within a period of three years before the 16th August, 2012.

Category 3: "All documents/correspondence between the three Defendants, their spokespersons and their servants or agents and other parties whether they are Government Ministers, Departments, statutory authorities, safety agencies, journalists or any other persons, both within and outside the jurisdiction connected with the aviation industry where the Defendants make allegations or complaints about the plaintiff in particular in relation to the plaintiff's "corporate culture" and/or fuel or safety policy and/or employment policy, but not limited to those three specific areas."

Counsel for the plaintiff has characterised the behaviour of the defendants as involving a "campaign of untruth" against the plaintiff. He has offered to narrow this category down to the period of 12 months before the interview and to restrict it to the three specific areas mentioned.

Counsel for the defendants notes that the Reply to the defence has alleged that the third named defendant had a "long-running agenda" against the plaintiff but that no such allegation is made against the other defendants. He has offered to discover all documents relevant to the issue of honest belief.

Ruling: The court will order discovery, as against the three defendants, their spokespersons or agents, of documents relating to allegations or complaints about the plaintiff's fuel or safety policy made by them to any other party connected with the aviation industry within the 12 months prior to the 16th August, 2012.

Category 4: It is pleaded in the Defence that on the 26th July, 2012 three captains working for the plaintiff airline, on three separate flights, came to the conclusion that they must issue mayday calls. The plaintiff seeks discovery of documents "which show how the third named defendant is aware that the three captains in question came to the conclusion that they must issue mayday calls".

The plaintiff says it is entitled to documents which the defendants intend to rely on to prove that the allegations were true or which formed the basis of their honest opinion.

The defendants say that while this category may be considered relevant, it is not necessary in circumstances where it is accepted that the calls were made.

Ruling: The necessity for this category has not been made out and it is refused. I do not accept that the plaintiff is thereby "deprived of access" to the documents such that it would be placed at an evidential deficit.

Category 5: Agreed

Category 6: " Documentation which the plaintiff has issued to its pilots saying that there are reasons which the Plaintiff will not accept for taking extra fuel".

The plaintiff says that the third named defendant has indicated in his defence that the plaintiff has issued documents to its pilots which identify reasons which are not acceptable for taking extra fuel. The plaintiff asserts that as this is said to be an honestly held opinion it must be based on facts and any documents in this category are relevant to the matters at issue between the parties. It further states that it is a stranger to such documents.

While initially resisting this category, given that it related to the plaintiff's internal documentation, the defendants said in the course of submissions that they are prepared to discover this document.

Ruling: This category is relevant and discovery in its terms is ordered.

Category 7: "Copies of documentation which the plaintiff has issued to its pilots specifying that the plaintiff does not consider "expected holding" to be a valid reason for taking extra fuel."

The defendants say that this is an internal document, created by the plaintiff. They are prepared to consent to inspection.

The plaintiff says that the defendant has specifically asserted that such documentation exists and that they have had sight of it. The plaintiff has said in its reply to the defence that the only letter that exists, that it is aware of, states that expected holding fuel is already calculated into the Flight Plan Fuel and that this cannot be interpreted in the manner contended for by the defendants.

The plaintiff further submits that it is entitled to seek discovery of documents notwithstanding that it may have them in its own possession. It wishes to ascertain whether or not the defendants had them in their possession at the time when the allegedly defamatory words were published and/or at the time when the defence was drafted, on the basis that this is relevant to the questions of truth and honest opinion. Further, it is said that the defence has referred to documents without naming them and that it would be unfair if the plaintiff could be taken by surprise by its own documents.

Ruling: The necessity for this category has not been made out, given that it deals with documents which were issued by the plaintiff itself and which must therefore already be in its possession. In the view of the court discovery is not appropriate as a mechanism for establishing the date on which such letters, if any, came into the possession of the defendants. If the plaintiff takes up the opportunity for inspection there can be no complaint of being taken by surprise.

Category 8: "Copies of the Plaintiff's personalised fuel league tables based on how much fuel its pilots take and burn."

The plaintiff says that the defendant has stated as a fact that the plaintiff operates such tables. It is said that it is therefore entitled to the documents upon which this assertion of fact is made. The plaintiff has denied "the categorisation and reason for the existence of tables" as pleaded by the defendants and says that such documents as exist are not "fuel league tables".

The defendants accept the relevance of the category but say that interrogatories would be more appropriate for dealing with this issue. On the argument that it is accepted that such tables exist, no dispute having been raised on the issue, it is said that the documents are already in the plaintiff's possession.

It is also argued that this relates to the question of honest belief, and that the third named defendant has particularised in the defence the facts upon which he will rely. The plaintiff is not entitled to discovery to see if the information available to the defendants was deficient, or whether inferences drawn were faulty.

In any event the defendants say that the category is covered by what they are prepared to discover in category 3.

Ruling: The issue here appears to be a matter of interpretation of the significance of documents already in the plaintiff's possession, rather than a matter for discovery. This category is refused.

Category 9: "Documents which show that the amount of fuel burned by aircraft is closely linked to the amount of fuel which it is carrying." This category is agreed.

Category 10: "Copies of letters sent to pilots at the bottom and top of the Plaintiff's personalised fuel league tables."

The plaintiffs say that this is a matter at issue between the parties.

The defendants say that it is internal documentation, with the additional consideration that the documents are personalised in a way that the fuel tables are not. The defendants were given these documents in confidence. It is suggested that the court might consider tailoring any order made having regard to the issue of materiality.

Ruling: Again, discovery does not appear to be necessary and there is no question of the plaintiff being deprived of access to the documents.

Category 11: "Copies of memos which invite pilots to a "face a face" interview with "management in Ryanair" and specifically memos which reference the CEO."

The plaintiff says that the defendants have admitted in their defence that the third named defendant stated that pilots might be invited to a face to face interview with management at Ryanair. The plaintiff wishes to see the documents which form the basis of this assertion.

The defendants note that the reply to the defence refers to a three-year old memo issued to pilots (not, the plaintiff says, by management) telling them that any captain not adhering to procedures would be invited to a face to face interview. The defendants say that in the circumstances it is clear that the plaintiff already has the document.

Ruling: This category is refused for the same reasons as in categories 7 and 10.

Category 12: "Documents which show the number of "mayday" calls made by the pilot members of the First and Second named defendants."

The defendants have pleaded that "mayday" calls are made by pilots very infrequently. The plaintiffs say that they are incorrect in this assertion and require discovery to establish the actual position of the defendants in relation to this assertion.

The defendants say that the plaintiff can give evidence of calls made by its own pilots. They accept that there will be a dispute about the issue but argue that it does not arise from the pleadings.

Ruling: This category is relevant, as going to the question of the frequency of such calls and the honest belief of the defendants. However, it is too broad as it stands. The court will order discovery of such documents as are within the defendants' possession, power or procurement relating to "mayday" calls by its pilot members during the three years prior to the 16th August, 2012.

Category 13: Documents which go to show the plaintiff's policy and corporate culture. This category is agreed, **subject to an issue as to redaction.**

Category 14: "Copies of regulations governing aircraft fuel levels."

The plaintiff says that the defendants, in their defence, have brought into issue regulatory fuel levels and the amount of fuel they allege is required to ensure mayday calls on fuel do not occur. It claims that it may be at an evidential disadvantage if discovery is refused.

Ruling: These are publicly available documents and are undoubtedly in the possession of the plaintiff. This category is refused.

Category 15: "All documents which show pressure being brought to bear on the plaintiff's pilots." This category is agreed.

Category 16: "Copies of Spanish consumer association accusations as against the plaintiff." This category is agreed.

Category 17: "Documents relating to the IAA or Spanish investigation, touching on aircraft in danger and/or emergencies investigated by the IAA or Spanish authorities."

The defendants say that an investigation took place following the diversions and "mayday" calls in question. The plaintiffs say that this allegation of fact must be based on documents which the defendants has sight of prior to making such an allegation. However counsel for the plaintiff has said that he is "not pressing" this category.

Ruling: It appears from the correspondence that the plaintiff is in possession of the IAA report on the incidents of the 26th July, 2012. The necessity of discovery has not been shown and this category is refused.

Category 18: "Documents which show that aircraft are required to land with thirty minutes final reserve fuel remaining."

The plaintiff has denied that any such regulation exists, since reserve fuel is included in the pre-flight calculations. Further, it says that the defendants must show that they had such documents in their possession at the time the defence was pleaded.

The defendants say that these are publicly available regulations, but are prepared to discover them under their proposals for category 3 (i.e. as documents supporting the defendant's honest opinion).

Ruling: Given the attitude of the parties as expressed in the hearing of the application, it appears that this may turn out to be a question of interpretation of the relevant regulations. Again, discovery does not seem to be the appropriate way to establish whether or not the defendants were aware of the regulations at particular times. This category involves publicly available documents and is refused.

Category 19: "All documents in the possession of the Defendants and/or copies of any documents from the plaintiff's pilots' personnel files."

The plaintiff says that this is necessary because the defendants have pleaded that any pilot in the plaintiff's airline has to justify carrying more than 300 kg of extra fuel. It is prepared to limit this category on the basis of relevance to the issues of corporate culture and disciplinary matters, and to restrict it to a period beginning in the year 2010.

The defendants criticise this category as being excessively broad and disproportionate. The question is asked as to why the plaintiff seeks discovery of its own files.

Ruling: This category as drafted does not make a great deal of sense and is in any event too broad. Discovery will be ordered of any documents from the plaintiff's pilots' personnel files in the possession, power or procurement of the defendants relevant to fuel usage for the period of 12 months prior to the 16th August, 2012.

Category 20: "All documents and internal/external correspondence relating to the three emergency landings in question in Valencia."

This category was agreed, subject to inclusion of the word "procurement".

Category 21: "Documents which evidence the function of the Second Named defendant, specifically, their legal status and relationship with the first and third named defendants."

The plaintiff accepts that this is not in issue. No ruling is required.

Category 22: "Documents which outline the third named defendant's terms of engagement with the first and second named defendants, his remuneration (if any) from same, his authority to speak on behalf and/or as a representative of either or both bodies."

Again, the plaintiff accepts that this category is not in issue. No ruling is required.

Category 23: "Documents governing fuel uptake for the pilot members of the first and second named defendants."

The plaintiff says that it is entitled to seek this category in order to make comparisons with other airlines that members of IALPA work for.

The defendants say that the opinion of the third named defendant relates to the plaintiff's airline and that the facts upon which the opinion is based relate to the plaintiff. There is, it is argued, no justification for expanding into an examination of other airlines.

Ruling: This seems to amount to non-party discovery and is refused.

Category 24: "Documentary evidence of the number and nature of fuel emergency calls (pursuant to 1.375 EU-OPS) made by all pilots in Aer Lingus, the employer of the third named defendant, in the past 10 years."

The plaintiff says that this is relevant because of the allegation that "mayday" calls are rare. It argues that this allegation must be based either on the third named defendant's individual view or that of the second named defendant.

The defendants say that this amounts to non-party discovery.

Ruling: This is tantamount to non-party discovery and is refused.

Category 25: "The articles of association and financial accounts of the first and second named defendants."

The plaintiff says that it is "not pressing" this category. These documents do not appear to relate to the issues raised in the pleadings and this category is refused.

Category 26: "Documents relating to the employment (including disciplinary history) and flying history of the third named defendant"

with regard to fuel uptake and declarations of "mayday", "pan-pan" and/or emergencies generally."

The plaintiff says that this is necessary because the third named defendant has asserted that "mayday" calls are rare and he has never made one in his career, and has also asserted that a "fuel emergency" call is the same as an "imminent danger" call.

The defendants say that this is a trawl, that it overlaps with category 2 and that no issue justifying it arises from either the pleadings or the interview.

Ruling: For similar reasons as in category 2, discovery should be made of this category for the period of three years prior to the 16th August, 2012.

Category 27: "Documents instructing or permitting the third named defendant to give an interview to RTE on the date in question."

The plaintiff says that it is "not pressing" this category.

Ruling: This category is refused.

Category 28: "Copies of all personal professional diary entries by pilot members of the first and second named defendants which relate to personal pressure, occurrences which made the pilot feel uncomfortable, 'inappropriate' communications from Ryanair or Brookfield and /or occurrences of concern from a flight safety perspective."

The defendants are prepared to discover documents within this category that are within their procurement.

Ruling: The defendants are to make discovery of such documents within this category as are within their procurement.