

THE HIGH COURT

Record No.2013/11363P

Between:-

RYANAIR LIMITED AND RYANAIR HOLDINGS PLC

Plaintiffs

– and –

EVERT VAN ZWOL, JOHN GOSS, TED MURPHY,

CARL KUWITZKY AND SAMUEL GIEZENDANNER

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Overview

1. It is claimed that in a document entitled "Pilot Update", dated 12th September, 2013, and published on the headed notepaper of the Ryanair Pilot Group under the heading "What the markets are saying about Ryanair", the defendants and each of them published or caused to be published the following text concerning Ryanair and Ryanair Holdings:

"The company's share price fell sharply last week (down 11.54%) as markets reacted to a negative statement issued by the company management. It has been indicated that profit targets for 2013-2014 may need to be revised downwards as the autumn-winter outlook remains weak. This is in spite of positive indications to investors in June which encouraged a share price increase and a sell off of shares by managers in late June, ahead of the winter period."

2. The plaintiffs claim that (a) this text was defamatory of them, and (b) in its natural and ordinary meaning and/or by way of innuendo can be construed as meaning that (i) Ryanair is guilty of market manipulation, (ii) Ryanair misled investors, (iii) Ryanair knowingly facilitated insider dealing, and (iv) Ryanair conspired with its managers to abuse the market for its shares.

3. Whether the plaintiffs are correct or wrong in their various claims is for another court on another day to decide. This Court is concerned solely with a strike-out and discovery-related application that has taken an unexpected turn.

Part 2

Background

4. By letter dated 3rd June, 2014, the defendants agreed to make discovery in the terms sought in the plaintiffs' request for voluntary discovery dated 9th May, 2014. Table 1 below summarises the sequence of affidavits that issued thereafter:

Party	Document	Date	Deponent
Defendant	Affidavit of Discovery	21.08.14	Mr Van Zwol
Plaintiff	Affidavit (grounding motion)	05.11.14	Ms Moynihan
Defendant	Supplemental Affidavit of Discovery	16.04.15	Mr Van Zwol
Defendant	Replying Affidavit	16.04.15	Mr Van Zwol
Plaintiff	Second Affidavit	14.05.15	Ms Moynihan
Defendant	Replying Affidavit	18.05.15	Mr Goss
Plaintiff	Third Affidavit	01.07.15	Ms Moynihan
Defendant	Replying Affidavit	23.07.15	Mr Goss
Defendant	Second Supplemental Affidavit of Discovery	26.02.16	Mr Murphy

Table 1: Sequence of Affidavits.

5. As can be seen from Table 1, the defendants have made three attempts through two different deponents, Mr Van Zwol and Mr Murphy to comply with their discovery obligations. In each supplemental affidavit the relevant deponent has admitted errors and omissions in previous discovery and made discovery of new documents to the plaintiffs.

6. By 11th November last, the plaintiffs were sufficiently vexed by how matters were progressing discovery-wise that they issued a notice of motion seeking (i) an order striking out the defendants' defence for want of discovery, (ii) an order directing the defendants

to make further discovery, and (iii) an order requiring inspection of certain documents of which discovery had been made in redacted form.

7. That strike-out, etc. motion came on for hearing before this Court on 9th February last. Problems soon emerged at the hearing. The plaintiffs, through their counsel, and for the first time in the proceedings, identified certain references within documents already discovered which, it was contended, suggested that there might be further documentation not discovered by the defendants. The contention aforesaid not having previously been raised by way of inter partes correspondence or on affidavit, the balance of the motion was adjourned on consent to facilitate the swearing of a further affidavit by the defendants. This further affidavit was sworn on 26th February.

Part 3

The Plaintiffs' Concerns

A. Some General Concerns.

8. The plaintiffs come to court claiming that the third affidavit presents some general concerns. These general concerns are five-fold:

[1] that the defendants appear to be of the view that documents which are viewed online but never printed or downloaded are not documents in their power, possession or procurement and thus are not discoverable;

[2] that the defendants appear to rely on the fact that certain documents are publicly available to suggest that they are not obliged to discover it;

[3] that the third affidavit has yielded the discovery of documentation which the defendants admit ought to have been discovered in the first affidavit;

[4] that, convinced it seems that 'attack is the best form of defence', the defendants contend that the plaintiffs bear some responsibility for lapses in the defendants' discovery to this point;

[5] that, by way of catch-all contention, the manner in which the defendants have dealt with discovery to this point, including the fact that three affidavits of discovery have to this point been sworn, suggests that the defendants do not understand their discovery obligations and that they cannot therefore be believed to have made adequate discovery to this time.

9. As to [1], the court entertains considerable doubt as to whether a document viewed online but never printed or downloaded can properly be described as a document in the possession, power or procurement of the viewer. The mere act of having viewed the document does not mean that the viewer has the document or has an enforceable legal right to obtain it. Even if one gets over this hurdle, proportionality is an unfailingly relevant consideration when the court has to determine the way in which a party is to comply with its discovery obligations. It is perhaps conceivable that circumstances might arise in which discovery of what was seen online might be available and proportionate; those circumstances do not present here. Nor has any case-law been identified to the court that would suggest that some contrary proposition ought to apply.

10. As to [2], the fact that certain documents are publicly available does not mean that a person can escape discovery of same, provided they otherwise satisfy the pre-requisites for discovery.

11. As to [3], such is life. In any human endeavour, error is to be expected. Even the most scrupulous of discovery processes – and no little scruple is required[a] in the discovery process – likely involve some element of inbuilt error. Discovery is a means to an end, not an exercise in perfection.

[a] As Charleton J. notes in IBB Internet Services Limited v. Motorola Limited [2013] IEHC 541, para.2, "[T]he parties [to a case] are under a duty to the court to prepare a case for hearing through cooperating with each other in aid of the fundamental obligation of identifying the issues to be tried and making the case ready for hearing." Cooperation, not coyness, is the watchword of discovery.

12. As to [4], it is for the defendants to make proper discovery, not for the plaintiffs to prompt them as to what is required.

13. As to [5], this is the mainstay of the within application and the court returns to this aspect of matters below.

B. Redaction.

14. It would be fair to say that a central concern of the plaintiffs revolves around the fact that, in the documentation of which discovery has thus far been made by the defendants, the names of people who have provided information to the Ryanair Pilot Group Interim Council (of which the defendants are member) have been redacted. This, the defendants maintain, is because:

(a) each redacted person has been given firm commitments of confidentiality,

(b) the Pilot Group could not function if it did not give assurances of confidentiality to persons who volunteer information to it, and

(c) any obligation to hand over such details would have a severe chilling effect on such information as is made available to the Pilot Group.

15. Ryanair has invoked various arguments in correspondence with the defendants as to why the defendants should provide the redacted names, the principal contention being that it may assist them in proving malice. But the defendants are not for turning: they maintain that they have given assurances of confidentiality and will not disclose the redacted information.

Part 4

The Present Application

16. By the time of the second hearing-date on 4th May, the plaintiffs had served the defendants with two notices to cross-examine the deponents to the defendants' affidavits of discovery. Following the service of these notices, an argument broke out between the parties as to whether the leave of the court ought first to have been sought before the notices were served. It is clear, from the relatively recent decision of the Court of Appeal in *Bank of Ireland & anor v. O'Donnell & anor* [2015] IECA 73, para.82, itself drawing on the earlier authority of the Supreme Court in *Bula Limited v. Crowley* (No.4) [2003] 2 I.R. 430,459 that such leave is required. It is equally clear that in this case, nothing much turns on this fact. Any error arising, which seems to the court to be more technical than terrible, can be resolved by treating the within application to order attendance for cross-examination as an application for leave to serve the notices, with the court being free to make such related orders as it considers appropriate. In truth, it is not even clear that by serving the notices and then coming to court, any more costs will have been incurred than would have arisen by the plaintiffs coming to court first and getting leave to proceed. Either way, practically the same substantive arguments and counter-arguments would have been raised by the parties.

17. At the heart of the plaintiffs' application is their claimed concern that the manner in which the defendants have dealt with discovery thus far suggests that the defendants do not understand their discovery obligations and so cannot be believed to have made adequate discovery to this time. The defendants' reply, in essence, is that the application to cross-examine is premature, that such defects as the defendants purport to identify in the discovery process thus far may yet be resolved (if they require to be resolved) by way of the application to strike-out and for further discovery. In any event, the defendants claim, cross-examination on an affidavit of discovery is a rare occurrence and the facts here do not justify same.

Part 5

Applicable Law

A. Overview.

18. As ever counsel have laboured hard in the legal vineyard and gathered a rich crop of helpful precedents. The court has been referred to *Duncan v. Governor of Portlaoise Prison* [1997] 1 I.R. 558, *Bula*, op. cit., *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369, *IBB Internet Services Limited v. Motorola Limited* op. cit., (though a case concerned largely with interrogatories some of the more observations are nonetheless of interest and can be applied by analogy; plus IBB does, at para.12 contain a passing genuflection in the direction of *Duncan* and the "exceptional" jurisdiction identified therein), *XL Fuels Group Limited* (in receivership) & anor v. *Curran and ors* [2015] IEHC 715, *Bank of Ireland & anor v. O'Donnell and anor* [2015] IECA 73 and *Lehane* (as Official Assignee in Bankruptcy in the Estate of *Sean Dunne*) v. *Dunne* [2016] IEHC 96. What principles can be derived from these various cases?

B. An Attempted Synthesis of Applicable Principle.

19. It seems to the court that the following principles of relevance can be identified, inter alia, from the above-mentioned cases:

I

Cross-Examination on Affidavit (General)

1. Under O.40, r.1 of the Rules of the Superior Courts (1986), as amended, where evidence is given by affidavit, the court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

2. The extent of the entitlement to cross-examine depends on the nature of the proceedings or the application in which the affidavit has been sworn. (*Lehane*, para.10).

3. Where procedures are by way of summary summons or special summons or, in the case of proceedings commenced by plenary summons, a trial on affidavit has been directed, a party who wishes to cross-examine a deponent can serve a notice to cross-examine on the party who filed the affidavit requiring that the deponent be produced for cross-examination at trial. Leave to serve such notice is not required. (*Lehane*, para.10).

4. On interlocutory applications and proceedings commenced by petition or originating notice of motion, a notice to cross-examine may only be served with leave of the court. (*Lehane*, para.10).

5. There is no absolute right to cross-examine a deponent even if the relief sought is dismissal of the proceedings. (*Lehane*, para.11).

6. A trial judge has a discretion in relation to an application to cross-examine on an affidavit; in general, leave will only be granted if there is a conflict of fact upon the affidavit that it is necessary to resolve in order to determine the proceedings. (*Lehane*, para.11).

7. The party seeking the order directing cross-examination of a deponent must demonstrate (i) the probable presence of some conflict on the affidavits relevant to the issue to be determined, and (ii) that such issue cannot justly be decided in the absence of cross-examination. It is not necessary that the conflict be one of fact. (*Lehane*, para.12).

8. There is no general proposition that a deponent may be cross-examined to deal with factual matters which were not covered in his or her affidavit to fill an 'information deficit'. (*Lehane*, para.14).

9. When, in the course of applications to the court which are required to be heard and determined on affidavit, it becomes apparent from the affidavits sworn that there are material conflicts of fact between the affidavits, the court must (if requested to do so) consider whether to direct (a) a plenary hearing of the proceedings, or (b) that one or more deponents should be cross-examined on his or her affidavit. (*Seymour*, 5; *XL*, para.3).

10. Where it is debatable as to whether or not the cross-examination of a deponent on her or his affidavit is necessary or desirable, the court should tend towards permitting the cross-examination, provided that (i) ultimately the decision on cross-examination is a discretionary matter for the court, and (ii) the court considers it is necessary for the purpose of disposing of the issues which it has

to determine. (Seymour, 5).

II

Cross-examination on Affidavit of Discovery

11. The administration of justice, as vested by the Constitution in the courts, requires that the courts have the ability to adjudicate fully upon the adequacy and accuracy of an affidavit of discovery. (Duncan, 573)
12. There are circumstances in which it may be permissible to cross-examine on an affidavit of discovery. (Duncan, 574).
13. The court may exercise a judicial discretion as to whether there may be cross-examination on an affidavit, including an affidavit of discovery. (Bula, 459; Duncan, 574).
14. Because of the variety of other remedies available with a view to testing matter contained in an affidavit of discovery (e.g. further and better discovery, interrogatories, court inspection) the circumstances in which cross-examination on an affidavit of discovery will be allowed are very rare. (Duncan, 574).
15. It is wholly undesirable that, save in the most exceptional cases, the court should be called upon to deal with questions such as the existence or non-existence of a document in circumstances where such a question might impinge to a serious extent on the issues in the action. (Duncan, 574).
16. Cross-examination on an affidavit of discovery should only be permitted where it is necessary and other remedies (e.g. further and better discovery, interrogatories, court inspection) prove inadequate. (Duncan, 574; IBB, para.13).

III

Unitary Trial and Other Guiding Factors

17. The unitary trial is in general the mode of disposal of a case, unless a preliminary issue of law or a modular issue will genuinely help in disposal and not cause irremediable prejudice. (IBB, para.12).
18. Departure from the basic rule of a unitary trial must be genuinely helpful in terms of saving court time, minimising costs and truly helping, not hindering, the ultimate trial. (IBB, para.12).
19. Examination of a party or of a witness prior to trial, should not become the trial itself. (IBB, para.12).
20. As with interrogatories, it is difficult to conceive of any circumstances where a party would be granted leave to engage in a general cross-examination on an affidavit of discovery in advance of a trial: any such procedure is properly to be confined to trial. (IBB, para.12).
21. As with interrogatories, any order allowing cross-examination on an affidavit of discovery should not only be directed rarely but should always be specifically directed to one or more particular issues. (IBB, para.13).
22. Interrogatories and discovery and replies to particulars are methods whereby a fair appraisal of opposing claims may be made prior to trial. Their existence depends on the probability of their being of assistance, relevance to the claim as pleaded and the requirement that oppression through use of pre-trial procedures is avoided. (IBB, para.12).
23. New procedures that are not of assistance should not be allowed to spring up whereby the courts' resources are used to split up trials unnecessarily or to impose burdens that do not help litigation. (IBB, para.12).

Part 6

Application of Principle

20. It seems to the court that the principles identified at II and III in Part 5 are most applicable to the within proceedings. The court turns now to apply those principles to the facts before it.
21. Re.11-13. Noted.
22. Re.14. Noted. None of these other remedies have been attempted, albeit that, in fairness to the plaintiffs, it does not appear that interrogatories or inspection would be of assistance. However, the adjourned hearing concerning strike-out and further discovery stands part-heard and should proceed to completion. If inadequate discovery is considered ultimately to have been made, the remedy of further and better discovery will be available to the plaintiffs. As to the fact that a certain number of affidavits of discovery have been sworn, this is not evidence per se that the process of discovery is flawed. It may just be evidence that, as here, certain objections or queries raised were considered by the recipient of such objections or queries to require the swearing of a further affidavit of discovery. To demand perfection in any affidavit of discovery is to demand too much.
23. Re.15. Not applicable.
24. Re.16. See comments re.14. It does not seem that necessity can be established unless the other remedies have proven inadequate and this has not yet been proven.
25. Re.17-18. The court considers that the within application may be unnecessarily protracting matters and is not truly helpful. The application for strike-out and further discovery stands part-heard and ought to proceed to completion, rather than the seeking of cross-examination of deponents where the unavailing nature of all other remedies has not yet been established.
26. Re.19-20. Noted. In fairness to the plaintiffs, this risk of a violation of an essentially unitary process could be curtailed by the

court constraining the extent of the cross-examination to occur.

27. Re.21. Noted; this buttresses the last point made by the court.

28. Re.22. See comments re.17-18.

29. Re.23. Noted. In a similar vein, a process that has hitherto been expressly contemplated as exceptional and rare must not be allowed to become regular or common, thereby giving rise (in effect) to a new standard stage in the process of discovery.

30. Finally, if one has regard to Principle 9 above, there is suggestion by the plaintiffs here that there are material conflicts of fact between the affidavits in terms of the justifications offered for the redaction of informants' names. But there is no such conflict. Instead there is, in truth, a difference as to the basis on which confidentiality is offered and enjoyed, depending on whether one has approached the Ryanair Pilot Group via its website or not. But that this difference exists is a matter of fact, not a conflict of fact. The consistent, non-conflicting testimony of the deponents is that firm commitments of confidentiality have been given to the individuals whose names were redacted from the documents. It is true, as the plaintiffs claim, that they have not been told where these assurances were given but that seems an irrelevance to the fact that they were given. The mere fact that the plaintiffs may not believe the deponents offers no basis for acceding to the present application in light of all the circumstances arising and the factors considered above.

Part 7

Conclusion

31. For the reasons stated above, the court declines: (1) to grant leave to the plaintiffs to serve the notices to cross-examine previously served; and (2) to order the attendance for cross-examination of the deponents who have sworn the affidavits of discovery to this time.