THE HIGH COURT

[2013 No. 8837 P.]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

CHANNEL 4 TELEVISION CORPORATION AND

BLAKEWAY PRODUCTIONS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 9th day of November, 2017

Background

1. On 12th August, 2013, the first named defendant broadcast a programme as part of its "Dispatches" series, entitled "Secrets from the Cockpit". The programme was produced by the second named defendant (for ease of reference I refer to both defendants collectively as "Channel 4"). The first half of the programme concentrated on events that took place in July 2012 when, as a result of adverse weather conditions, some twelve flights including three plaintiff (Ryanair) flights bound for Madrid, Spain were diverted to Valencia. The airport at Valencia had only one runway which limited the facilities for the landing of the various aircraft.

2. As a result of this diversion and delays in landing each of the Ryanair flights issued a "fuel Mayday". A "fuel Mayday" is issued when an aircraft is going into its fuel reserve. In the event, all three Ryanair flights landed safety.

3. The programme stated that the "fuel Maydays" over Valencia that night were not the first emergencies at Ryanair. Channel 4 referred to an internal Ryanair memo dated from 2010, in which it was claimed that there had been three prior investigations into fuel emergencies on Ryanair flights.

4. Channel 4 stated that it had examined a number of safety reports into, what it described, as being serious incidents involving Ryanair. It stated that it found evidence that Ryanair had repeatedly failed to save Cockpit Voice Recordings, often referred to as the Blackbox or CVR.

5. The programme also dealt with the terms under which Ryanair employed its pilots. It was claimed that almost 75% of Ryanair pilots were on so called "zero hour contracts". Under these contracts, pilots only work for Ryanair but have no guaranteed hours of work. This, the programme contended, resulted in additional pressure on Ryanair pilots, as they could only make a living when they were actually flying. It was suggested that this had adverse safety implications.

6. The programme broadcast interviews with four pilots who Channel 4 said had some 44 years of experience of flying with Ryanair between them. They were said to be serving officers, three being captains and the other, a first officer. It was claimed that the "fuel Mayday" events over Valencia prompted these pilots to speak out. The pilots gave their interviews anonymously and were broadcast in silhouette.

7. Another pilot, Captain John Goss, who had been with Ryanair for some 27 years, was interviewed in person by Channel 4. He spoke of his experience with Ryanair and of his, and other pilots', lack of confidence in the Irish Aviation Authority who are charged with maintaining safety in air travel.

8. The broadcast interviews with the Ryanair pilots gave details of the fuel policy followed by Ryanair which involved a "fuel league table" involving all Ryanair pilots.

9. In simple terms, the programme broadcast by Channel 4 was alleging that Ryanair, or that there were reasonable ground for believing that Ryanair, compromised the safety of passengers, crew and those living under the flight paths of Ryanair flights, particularly in the vicinity of airports, in pursuit of financial gain. Channel 4 were further alleging that by failing to maintain Blackbox or CVR recordings, Ryanair were impeding the proper investigation of incidents involving its aircraft.

10. For any airline, in particular an airline such as Ryanair which, on its pleadings, has some 1,600 flights a day carrying more than 80 million passengers, these are extremely serious allegations.

Proceedings

11. Some four days after the broadcast of the programme, Ryanair issued a plenary summons claiming damages, including aggravated and/or exemplary damages for defamation. The subsequent statement of claim, claimed that Channel 4 "falsely and maliciously broadcast and published or caused to be broadcast and published" the said programme. Paragraph 7 of the statement of claim stated that the words complained of meant, and were understood to mean, both in their natural and ordinary meaning and/or by way of innuendo, that Ryanair did not adhere to the appropriate safety standards and thereby jeopardised people's lives.

12. In its defence, delivered 16th December, 2013, Channel 4 vigorously defends its position. In particular, para. 6 of the defence pleads:-

> "6. And in so far as the said words in their natural and original meaning meant that there were reasonable grounds to investigate whether some of the practises and operating policies of Ryanair, which were outlined in the program, have consequences for passenger safety, they were true in substance and in fact …"

Channel 4 then set out, under the heading material facts, matters concerning "fuel policy", "cockpit voice recordings (CVRs)" and "employment policies and other issues".

13. Channel 4 also pleaded that the words which consisted of opinion in the broadcast were honestly held, and that Channel 4 was entitled to the defence of "honest opinion" as is provided for in s. 20 of the Defamation Act 2009 ("the 2009 Act"). Channel 4 further stated that it was entitled to the defence of fair and reasonable publication on a matter of public interest as is provided for in s. 26 of

the 2009 Act.

14. Ryanair delivered a detailed reply in 2015. I refer, in particular, to: -

> "5. The plaintiff pleads specifically that contrary to the contention of the defendant at particulars 6(a)-(d), the Irish Aviation Authority (IAA), who oversee the standards of Ryanair in accordance with Europe wide regulations set by the European Aviation Safety Agency (EASA), investigated the Valencia incidents and disproved the contents of the CIAIAC report."

and

> "11. In response to paragraph 6 (i) of the defence, the plaintiff specifically pleads investigators were able to investigate the three diversions using crew voyage reports, Ryanair's in flight telemetry and the voice recording provided to investigators by air traffic control in Valencia. Specifically, it is pleaded that the IAA makes no reference whatsoever to CVR's in its official report, since it would have added nothing to the investigation."

Order for Discovery
15. By order of the 12th December, 2014 the plaintiff was directed to make discovery of some eight categories of documents within a period of eight weeks. This order was appealed to the Court of Appeal, but only in so far as it was it related to three categories of documents. There was a cross-appeal in respect of certain temporal restrictions in respect of three categories. By order of the 29th July, 2015 the Court of Appeal amended the three categories. I will set out the categories relevant to this application later in the judgment.

16. The affidavit of discovery on behalf of Ryanair was to be sworn by Mr. Juliusz Komorek. In the event, the affidavit of discovery, on behalf of Ryanair, was sworn by Ms. Yvonne Moynihan on 3rd November, 2015. A further affidavit by Ms. Moynihan was sworn the on the 30th November, 2016. In all some 7,500 documents where discovered.

17. Channel 4 were dissatisfied with the discovery and two motions issued.

Motions
18. The first of the Channel 4 motions was referred to in the course of the hearing as being the "adequacy" motion. Amongst the reliefs sought in this motion were :-

> "(a) An order pursuant to O. 31, r. 21 of the Rules of the Superior Courts dismissing the plaintiff's claim, the plaintiff having failed to comply with an order for discovery or part thereof made by the High Court on 12th December, 2014, as amended by the Court of Appeal.
>
> (b) Further, or in the alternative, an order requiring the plaintiff to state by way of affidavit whether or not there exist any emails to or from the plaintiff's Chief Executive Officer, otherwise than through his personal assistant, pertaining to the categories of discovery ordered.
>
> (c) Further, or in the alternative, an order directing the plaintiff to provide explanations to the queries raised by the defendant's solicitor's letter 14th June, 2016."

19. Though the order for discovery stated that the affidavit of discovery was to be sworn by Mr. Juliusz Komorek, Ryanair's Chief Legal and Regulatory Officer, in fact the affidavit of discovery was sworn by Ms. Yvonne Moynihan. Channel 4 took issue with this and required that the affidavit of discovery be sworn by the said Juliusz Komorek.

20. The second notice of motion issued by Channel 4 was referred to in the course of the hearing as being the "redactions motion". This motion arose as the documentation discovered in the first schedule of the first part of the affidavit of discovery of Ms. Yvonne Moynihan was, for the most part, redacted. Much of this documentation referred to incidents or events reported to the relevant aviation authorities pursuant to EU and Irish aviation legislation.

21. The reliefs sought in the "redactions motion" were :-

> (a) An order pursuant to O. 31 of the Rules of the Superior Courts directing Ryanair to make available for inspection in un-redacted form all documents listed in the first schedule, first part to the affidavit of the discovery of Yvonne Moynihan sworn 3rd November, 2015.
>
> (b) If necessary, an order pursuant to Regulation 20 of Statutory Instrument 460 of 2009 (SI 460/2009) and Article 14 (3) of EU Regulation 996/210 that Ryanair make available for inspection in un-redacted formed, all documents listed in the first schedule, first part of the said affidavit of Yvonne Moynihan.

22. There was also a third motion before the Court which was a motion for third party discovery by Channel 4 against the Irish Aviation Authority. This motion was heard in the course of hearing the "adequacy motion" and the "redactions motion". This motion is dealt with in a separate judgment.

23. Before considering these motions, the issue of the deponent needs to be addressed.

The Deponent
24. The order of the Court which directed discovery stated that the deponent was to be Mr. Juliusz Komorek, the Chief Legal and Regulatory Affairs Officer at Ryanair. Mr. Komorek held this position at the time of the broadcast of the programme in August 2013. In a replying affidavit, sworn 30th November 2016, Ms. Moynihan states at para. 26:-

> "26. As the defendants are aware from previous correspondence, I am responsible for defamation litigation within the plaintiff. It is irrelevant that I only joined the company in July 2014, as I am the most knowledgeable person within the plaintiff vis-à-vis this litigation and the documents, having supervised the collation and review of the documents."

25. In the various affidavits which Ms. Moynihan has sworn dealing with the motions before the court she, on numerous occasions, makes it expressly clear that she is fully aware of the duties and obligations imposed on her as a deponent swearing affidavits of

discovery. Further, as a qualified barrister of some ten years standing, is fully aware of the consequences of failing to make proper discovery. It would have been appropriate for Ryanair to amend the order to substitute Ms. Moynihan as the deponent in place of Mr. Komorek before the affidavits of discovery were sworn; however, I am satisfied that such amendment can be made at this stage.

"Adequacy motion"

26. The "adequacy motion" is grounded on an affidavit sworn by Channel 4's former solicitor Mr. Simon McAleese. Said affidavit exhibits a letter dated 14th June, 2016, addressed to Johnsons Solicitors, the solicitors acting on behalf of Ryanair.

27. In the course of this lengthy letter, Channel 4 criticised the discovery made by Ryanair under a number of headings including "inadequate listing", "documents not recovered", "missing documents" and the absence of any emails to and from Ryanair's Chief Executive, Michael O'Leary, otherwise than through his personal assistant. In addition, the letter lists some 77 documents which were discovered in respect of which specific queries are raised.

28. In a replying affidavit, Ms. Moynihan initially sets out "the colossal task" which she was faced with in making discovery in respect of the various categories. In order to meet the situation, Ms. Moynihan sought additional resources which were, to a limited extent, provided. Ultimately, some 7,500 documents were discovered which had to be "filtered down" from in excess of 20,000 documents.

29. On receiving Channel 4's letter of 14th June, 2016, Ms. Moynihan deposed that the only way she felt that the various queries could be comprehensively addressed was by conducting "a route and branch review" of the discovery process which she had overseen since November 2015. Subsequently, Ms. Moynihan swore a further affidavit of discovery in which some 1,000 further documents were discovered.

30. In the course of her affidavit of 30th November, 2016 Ms. Moynihan dealt with the various points as raised by Mr. McAleese in respect of particular documents.

31. Ms. Moynihan swore another affidavit on 31st May, 2017. Much of this affidavit answers issues raised in the "redactions motion" but insofar as she deals with the "adequacy motion" Ms. Moynihan states that in dealing with discovery she consulted with Ryanair's solicitors and, when required, Senior Counsel. This affidavit was replied to by an affidavit of Ms. Karyn Harty, Solicitor of McCann Fitzgerald, who had been instructed to take over the defence of the proceedings on behalf of Channel 4.

32. In the course of her affidavit, Ms. Harty was trenchant in her criticisms of the discovery process as described by Ms. Moynihan. By way of example, she states in her affidavit at para.5:-

> "… I believe based on Ms. Moynihan's averments that these deficiencies arise from a fundamentally flawed approach to making discovery, apparently partly due to insufficient resources being made available for that purpose. The approach by the plaintiff to the discovery has resulted in what appears to be an extraordinary dereliction of the plaintiff's discovery obligations …"

33. Further, Ms. Harty states that she is the author of the Discovery Chapter in the Law Society of Ireland's Civil Litigation Manual 3rd Ed. and forthcoming 4th Ed. and also co-author of the Commercial Law Association of Ireland's Good Practice Discovery guide V2.0.

34. The fact that a large volume of documents were produced by way of supplemental discovery on 30th November, 2016 is, according to Ms. Harty, indicative of the deficiencies in Ryanair's discovery process. With this in mind, Ms. Harty exhibits two schedules, "schedule A" and "schedule B", which set out queries in respect of documentation discovered in the first and second affidavit respectively. Also, Ms. Harty queries the absence of "handwritten notes" and the absence of emails directly to or from Mr. Michael O'Leary, CEO of Ryanair.

35. Under the heading "local air safety group minutes", Ms. Harty questions the absence of the minutes, in particular, the minutes of the Sevilla Local Air Safety group. Such documents were clearly relevant issues raised in the proceedings.

36. In reply, Ms. Moynihan swore a further affidavit on 3rd July, 2017. There were a number of matters in this affidavit which I will set out in some detail.

37. At para. 10 of the affidavit, Ms. Moynihan states that she is a qualified barrister of ten years and has always observed the highest professional standards; further, she takes the obligations of the profession very seriously. She states that she carried out the discovery and supplemental discovery with "utmost good faith and diligence". In this respect she apologies for deficiencies which occurred. Ms. Moynihan states:-

> "11. The errors were not deliberate. By way of explanation, not excuse, I believe that any errors which have arisen are a direct result of the enormous amount of documentation which had to be discovered (approx 20,000 potential documents, eventually filtered down to an approximately 7,500)"

Further, Ms. Moynihan states:-

> "12. I reviewed every single one of the 7,500 discovered documents. Even where people assisted me I reviewed their work and therefore, the documents on which they worked…"

38. Ms. Moynihan confirms that she is familiar with the Commercial Law Association of Ireland's Good Practice Discovery Guide V.1 as the second version had not been published at the time. Ms. Moynihan sets out the various stages in the process of discovery:-

> (a) retrieval
>
> (b) processing
>
> (c) initial review
>
> (d) manual review
>
> (e) redactions

(f) swearing of affidavit of discovery and production

In respect of each of these steps Ms. Moynihan sets out, in detail, the various actions which she took.

39. Ms. Moynihan gives explanations for what were described as "missing documents"; namely, the absence of handwritten notes and the absence of emails either directly to or from Michael O'Leary, CEO of Ryanair.

40. Of particular importance Ms. Moynihan addresses Ms. Harty's criticism of the absence of certain documentation under the heading "local air safety group minutes". In particular, Ms. Harty had made reference to minutes in respect of Seville, Spain. Ms. Moynihan accepts that these minutes were overlooked in error and apologies for such error.

41. Finally, Ms. Moynihan gave explanations in respect of the issues raised in "**schedule A**" and "**schedule B**".

42. In its submissions to the court, Mr. Oisin Quinn S.C., on behalf of Channel 4 relied, to a significant extent, firstly, on the fact that following objections, Ryanair made discovery of some 1,000 further documents, secondly, the deficiencies highlighted in "schedule A" and "schedule B" and the very late discovery of the "local air safety group minutes" in respect of Seville, Spain 12th July, 2013. Counsel for the defendant, also highlighted the lack of resources devoted by Ryanair to discovery and the failure to follow the contents of the Commercial Law Association of Ireland's Good Practice Discovery Guide (V. 2.0 or V. 1.0).

43. Counsel for Channel 4, correctly, did not pursue the reliefs sought in the notice of motion to strike out Ryanair's defence on the grounds of failure to make proper discovery but rather requested the court to direct that Ryanair make further and better discovery and/or that an independent expert be appointed pursuant to the Rules of the Superior Courts for the purposes of overseeing such exercise.

44. In response, Mr. Martin Hayden S.C. and Mr. Tom Hogan S.C. on behalf of Ryanair resisted the application. They submitted that, though there were certain deficiencies in the discovery of Ryanair such deficiencies were understandable and were not of an order that the court should accept Channel 4's application.

45. In the course of submissions, the Court was referred to a number of authorities. Before reviewing these authorities it must be noted that in a number of these cases the Court was being asked to strike out a defence for failure to make discovery which is not the application in the instant case.

46. Firstly, in *Dunnes Stores v. Irish Life Assurance Plc & Ors.* [2010] 4 I.R. 1. At p. 7 Clarke J. (as he then was) stated:-

> "18. It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. The buck then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable, to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been a deliberate failure to disclose material information…"

47. In *Thema International Funds Plc. v. HSBC Institutional Trust Services (Ireland) & Ano.* [2011] IEHC 496 Clarke J. (as he then was) stated:-

> "2.10 It is important to recall that the obligation on a party making discovery is to disclose, insofar as it may be reasonably possible, all documents which come within the categories agreed or directed by the court. However, the courts have always accepted that there is some risk, particularly in large discovery, that there will be an innocent failure to disclose documents which may be relevant. Clearly, where documents emerge which should have been, but were not, disclosed, the court needs to assess the reason for the failure to disclose. It seems to me that where a party adopts a reasonable approach to the search of a large universe of documents by means of key words and the like, then it is unlikely that that party would suffer any adverse consequences if it were to transpire that, notwithstanding its best efforts, some documents fell through the net. It should, of course, be noted that the assumption in that last statement is that the party acted reasonably and used its best efforts…"

48. More recently, Baker J. in *Go 2 Cape Verde Ltd v. Balwrek IX LDA and Paradise Beach Aldmento Turistico Algodoeiro SA & Anor* [2014] IEHC 531:-

> "18. It is equally clear, and has been accepted implicitly by counsel for both parties to this application, that the courts recognise that the nature of a failure or omission by a party to comply with a discovery obligation may fall at various points on a spectrum, on one end of which one finds cases where a party innocently omits or fails to disclose a document, and on the other end of the scale, where the failure or omission is wilful and deliberate."

49. In *Sterling-Winthrop Group Ltd v. Farbenfabriken Bayer Aktiengesellschaft* [1967] I.R. 97 Kenny J. stated at p.105:-

> "The authorities which I have mentioned establish that the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong. None of these matters has been established and I must therefore, refuse to make the order sought."

50. Finally, I refer to the "Good Practice Discovery Guide" published by the Commercial Litigation Association of Ireland. (V. 1.0 - March 2014). In the forward to this guide Clarke J. (as he then was) states:-

> "So far as the courts are concerned, it seems to me that the advantage of a good practice guide is that it less rigid than Rules of Court, can more easily be adjusted as circumstances and experience dictates, but none the less provides a benchmark by reference to which the nuts and bolts of the conduct of a discovery process can be judged. The court will, of course, be always willing to consider a submission that a particular case requires to be dealt with in a particular way. However, I believe that, in time, the recommendations in this guide will come to be seen as the norm which the court will expect parties to comply with in the absence of a good reason for deviation…"

This guide is invaluable for persons involved in making discovery and, in particular, set outs processes for the review and production

of documents for discovery.

Decision on "adequacy motion"
51. Ms. Moynihan, as already stated, is a barrister of some ten years standing and thus can be taken to be fully conversant with the obligation to make proper discovery and the consequences of failing to do so. Ms. Moynihan deposed that at all stages she has acted professionally and in accordance with the appropriate standards. I fully accept this. Ms Moynihan has, fairly, admitted that errors occurred in the discovery process and has taken responsibility for it. In my view, such mistakes were understandable given the large volume of documentation involved, documentation which initially amounted to some 20,000 documents. I attached particular weight to the fact that Ms. Moynihan deposed that she was the reviewer of the 7,500 documents discovered and that, although having a legal qualification herself, consulted both a solicitor and senior counsel when necessary.

52. Ms. Harty in her affidavit was critical of the resources that Ryanair had at its disposal for the purposes of discovery. It may well be the case that Ms. Moynihan ought to have been given greater assistance and resources but, to my mind, making discovery is not a matter of resources but rather one of responsibility. Ms. Moynihan has clearly taken responsibility for the accuracy of the discovery made by Ryanair.

53. Channel 4 relied, to an extent, on an apparent failure by Ryanair to follow the 'Good Practice Discovery Guide' referred to. However, in her affidavit Ms. Moynihan stated that she was familiar with the guide and outlined the various actions and steps which she took in following the procedures set out.

54. In the course of the hearing, copies of "schedule A" and "schedule B" were furnished to the court. "Schedule A" sets out the deficiencies identified by Channel 4 in respect of the documents discovered in Ryanair's first affidavit of discovery of November, 2015. "Schedule B" sets out deficiencies in relation to documents discovered in the supplemental affidavit of discovery of November, 2016. I have had an opportunity to examine both schedules. Firstly, the schedules list some 57 documents out of some 7,500 documents, a relatively small number of documents. Secondly, and of more significance, the schedule sets out Channel 4's issues in respect of each of the documents and Ryanair's response, then Channel 4's response to Ryanair's response and, finally, Ryanair's further response. In a number of cases, Channel 4 simply "notes" Ryanair's response; in other cases, the complaints and responses are of a somewhat technical nature. However, in my view, this does not undermine the integrity of the discovery by Ryanair.

55. The next criticism of Ryanair's discovery, as set out in the affidavit of Karyn Harty, is the "nature and volume of missing documents". In response, Ms. Moynihan relies upon the "root and branch" review of discovery which she oversaw following Channel 4's detailed letter of compliant of 14th June, 2016. As regards "non-recovery of documents" Ms. Moynihan relies upon the content of paras. 8-17 of her first affidavit of discovery of November, 2015. Ms. Moynihan, further, in her affidavits deals with specific queries raised by Ms. Harty in a respect of a number of documents.

56. As to the absence of "hand written notes" and personal emails to and from Michael O'Leary CEO the explanation given by Ms. Moynihan is simple, namely, that such documents do not exist. As Ms. Moynihan explains "Mr. O'Leary sends emails through his personal assistant's account. He does not himself have an email account. All relevant emails have been discovered and produced…" It seems to me that the Court is entitled to rely upon what Ms. Moynihan has deposed to in her various affidavits in circumstances where Ms. Moynihan has made it expressly clear that she is fully aware of the duties and obligations imposed upon her as the person who is swearing an affidavit of discovery. Further, although clearly mistakes and errors have been made by Ryanair in the discovery process given the actions which Ms. Moynihan had taken when these errors and mistakes came to her attention I cannot conclude, as Ms. Harty has contended, that the approach by Ryanair to the discovery has resulted in "an extraordinary dereliction of the plaintiff's discovery obligations…" Therefore, I am of the view that it has not been established that it is necessary for Ryanair to make further and better discovery. It follows that there is no basis for appointing an independent expert to review discovery as is provided for by the Rules of the Superior Courts.

57. Therefore, I am refusing the reliefs sought in the "adequacy motion".

"Redactions motion"
58. A large volume of documentation has been significantly redacted by Ryanair on the basis that to disclose such documentation would be in breach of the requirement for confidentially as required by Irish and EU aviation legislation ("Aviation Legislation").

59. The issues here, of particular concern, are four of the eight categories of documents directed to be discovered. I will set out in summary form the categories involved:-

Category 1:

All documents and records including all written communications, emails, notes and memoranda relating to in-flight fuel related incidents, including those where there is a declaration of an emergency by the pilot during the five years prior to 26th July, 2012, including 26th July, 2012 and since then.

Category 2:

In relation to the 26th July, 2012 fuel incidents, all correspondence between the plaintiff and :-

(a) The Irish and/or the Spanish Aviation Regulatory Authorities;

(b) The Irish and/or the Spanish Aviation Investigation Bodies;

(c) The Irish and/or the Spanish Aviation Ministries of Transport, and all documentation deriving from, and correspondence between the plaintiff and the above mentioned entities.

Category 3:

All documents and records including all written communications, emails and notes memoranda recording details of the plaintiff's flight fuel policy for five years up to the 26th July, 2012 and up to the date of making discovery to include fuel tables, instructions given and/or agreed with the chief pilot from time to time regarding fuel usage/planning policy and all communications between the plaintiff company/its management and its chief pilot/ base captains and pilots concerning

aircraft fuel policy and in particular all policies/changes to policies regarding the carriage of fuel in excess of flight plan fuel.

Category 6:

All documentation relating to the twelve incidents referred to during the course of the broadcast in respect of which cockpit voice recordings were not saved, to include all correspondence including communications between the plaintiff and its staff including pilots, whether directly employed or agency staff, and also between the plaintiff's employees and those employed on contract by the plaintiff together with:-

> • All correspondence with public relations and/or communications advices (both internal and external to the plaintiff) concerning the recording and investigation of all incidents to include the manner of presentation of and context of explanations for such incidents;
>
> • All correspondence with investigating bodies, aviation authorities and any of the plaintiff's internal correspondence relevant to same.

Aviation legislation:

60. A starting point in looking at the relevant aviation legislation is the Convention on International Civil Aviation 1944 the "Chicago Convention". In the tenth edition (2010) at para. 5.12. Annex 30, provision is made for non-disclosure of certain accident or incident investigation records. These records should not be made "available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that state determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations." This provision is reflected in both Irish and EU legislation.

61. S. I. 205 of the Air Navigation (Notification and Investigation of Accident and Incidents) Regulations 1997, provides for the requirement to report an accident or serious incident and for such to be investigated. Of relevance here is Regulation 24(i):-

> "(1) The Minister, the Chief Inspector, the investigator in charge, or any other person concerned with the conduct of an investigation into an occurrence, wherever it occurred, shall not make any of the following records available to any person for purposes other than such an investigation, unless the appropriate authority for the administration of justice in the state of occurrence determines that the benefits resulting from disclosure of the records outweighs the adverse domestic and international impact the disclosure may have on that or any future investigation:
>
> (a) statements taken from persons by the investigation authorities in the course of their investigation;
>
> (b) communications between persons involved in the operation of the aircraft;
>
> (c) medical or private information regarding persons involved in the occurrence;
>
> (d) voice recordings or transcript from such recordings;
>
> (e) data recordings or output from such recordings; and
>
> (f) opinions expressed in the analysis of information, including flight recorder information...."

62. Directive 2003/42/EC "Occurrence Reporting in Civil Aviation" was transposed into Irish law by S. I. 285 of 2007 "European Communities (Occurrence Reporting in Civil Aviation) Regulations 2007:-

> "occurrence" means an operational interruption, defect, fault or other irregular circumstance that has or may have influenced flight safety and that has not resulted in an accident or serious incident…"
>
> Regulation 5 provides for the mandatory reporting of occurrences.
>
> Regulation 9 provides:-
>
> "Confidentiality of information.
>
> 9(1) This Regulation shall apply without prejudice to the operation of any other law of the State relating to access to information by judicial authorities…
>
> (4) An employer shall not subject an employee of the employer to any prejudice because the employee has, for the purposes of these Regulations, made a report of an incident of which the employee may have knowledge."

63. S. I. 460 of 2009 is entitled Air Navigation (Notification and Investigation of Accidents, Serious Incidents and Incidents) Regulations 2009. Of relevance here, is Regulation 20. entitled "Disclosure of records." This provides:-

> "20.(1) The Minister, the Chief Inspector, the investigator in charge, or any other person concerned with the conduct of an investigation into an occurrence (wherever occurring) shall not make any of the following records available to any person for purposes other than such an investigation unless the High Court, on application to it, determines that the benefits resulting from disclosure of the records outweighs the adverse domestic and international impact that the disclosure may have on that or any future investigation:
>
> (a) statements taken from persons by the investigation authorities in the course of their investigation;
>
> (b) communications between persons involved in the operation of the aircraft;
>
> (c) medical or private information regarding persons involved in the occurrence;

(d) CVR recording or transcript from such recordings…"

64. EU Regulation 996/2010 (the 2010 Regulation) on the Investigation and Prevention of Accidents and Incidents, provides in Article 9:-

> "1. Any person involved who has knowledge of the occurrence of an accident or serious incident shall notify without delay the competent safety investigation authority of the State of Occurrence thereof…"

65. Article 14 provides for "Protection of sensitive safety information"

> "1. The following records shall not be made available or used for purposes other than safety investigation:
>
> (a) all statements taken from persons by the safety investigation authority in the course of the safety investigation;
>
> (b) records revealing the identity of persons who have given evidence in the context of the safety investigation;
>
> (c) information collected by the safety investigation authority which is of a particularly sensitive and personal nature, including information concerning the health of individuals….
>
> (g) cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units, ensuring also that information not relevant to the safety investigation… shall be appropriately protected, without prejudice to paragraph 3.

66. Article 14(3) is of particular relevance:-

> "3. Notwithstanding paragraphs 1 and 2, the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. Member States may decide to limit the cases in which such a decision of disclosure may be taken, while respecting the legal acts of the Union.
>
> The communication of records referred to in paragraphs 1 and 2 to another Member State for purposes other than safety investigation and, in addition as regards paragraph 2, for purposes other than those aiming at the improvement of aviation safety may be granted insofar as the national law of the communicating Member State permits. Processing or disclosure of records received through such communication by the authorities of the receiving Member State shall be permitted solely after prior consultation of the communicating Member State and subject to the national law of the receiving Member State.
>
> 4. Only the data strictly necessary for the purposes referred to in paragraph 3 may be disclosed."

67. Regulation (EU) No. 376/2014 represents the current reporting regime in respect of an "occurrence" which means any safety related event which endangers or which, if not corrected or addressed, could endanger an aircraft, its occupants or any other person and includes in particular an accident or serious incident.

68. This Regulation was not in force at the time of the events that are the subject matter of these proceedings. However, it is to be noted that Article 15 deals with confidentially and appropriate use of information. In particular, Article 14 of the 2010 Regulation (as referred to above) is carried forward as regards the issue of confidentially.

Affidavits:-

69. The basis upon which the documents in question were redacted or de-identified is set out in a number of affidavits. Firstly, in an affidavit sworn by Ms. Yvonne Moynihan dated the 30th September, 2016, she states that the redactions or de- identifications were carried out to ensure that Ryanair's discovery

> "does not run contrary to legislation relating to civil aviation which legislation is grounded on the over riding public interest of ensuring a high level of safety in civil aviation…"

Ms. Moynihan then goes on to apply the aviation legislation is respect of documentation discovered under categories 1, 2, 3 and 6 (I have summarised these categories above). More particularly, as regards category 1, Ms. Moynihan states that the relevant legislation is the 2010 Regulation or its predecessor the 1994 Accident Investigation Directive, SI 205 of 1997, SI 285 of 2007 and SI 460 of 2009. Ms. Moynihan states that, save in the case of de-identifications, Ryanair has not redacted documents which were subject only to an internal investigation but only those that were subject to an investigation by a national aviation authority.

70. In respect of category 2 documents, Ms. Moynihan maintains that the 2010 Regulation and Article 14 in particular applies. She also refers to Articles 15 and 16 of the 2010 Regulation which deal with the communication of information and a requirement to maintain "professional secrecy" to protect the anonymity of individuals involved in an accident or serious incident.

71. As regards category 3, Ms. Moynihan states that Ryanair discovered an "enormous amount of material", but that the redactions were to protect the identity of the pilots involved.

72. Category 6 covers incidents which were referred to during the programme where it was alleged that cockpit voice recordings were not saved. In respect of this documentation, Ms. Moynihan states that the applicable aviation legislation is the 2010 Regulation and, where incidents predated this, the 1994 Accident Investigation Directive, S.I. 205 of 1997 or S.I. 460 of 209. Further, she states that certain documents had been de-identified in accordance with the 2003 Directive on reporting and/or S.I. No. 285 of 2007.

73. In response to this Ms. Karyn Harty, solicitor, swore an affidavit on behalf of Channel 4. In the course of this affidavit Ms. Harty took issue with Ryanair's entitlement to rely upon the aviation legislation and contested the basis upon which the redactions or de-identifications were carried out in respect of each of the categories involved.

74. Ryanair relied upon an affidavit of Mr. Aidan Murray who is the Deputy Chief Pilot of line operations of Ryanair. Mr. Murray sought

to establish a possible "chilling effect" were this court to direct the production in un-redacted and de-identified form the numerous documents which Ryanair claims are covered by the confidentiality provisions of the aviation legislation. This is clear from the following paragraph of the affidavit which I set out in full:-

> "9. Third, I believe the confidentially requirements of the relevant legislation ensure that the pilots speak openly when reporting concerns or sharing information in the aftermath of accidents. I believe that the plaintiff's pilots would be extremely distressed if the confidentially of such information was not maintained. I must emphasise that I am not at all concerned with pilot's personal feelings on the issue, but, rather, the impact that the un-redacted disclosure of such information might have on their willingness to share information in the future. I would also be concerned that news of any courts order requiring un-redacted disclosures of this type of information would travel to pilots in other airlines, in other jurisdiction within the EU and would also influence their future behaviour. Once again, for my part I think it extremely important that the confidentially of information protected by the legislation is maintained…"

Preliminary issues:-
75. In the course of legal submissions and argument, Counsel for the defendant submitted that if Ryanair wished to rely upon the confidentially provisions of the aviation legislation they were obliged to cross-reference each redacted or de-identified document against the relevant provision of such legislation. This, Channel 4 contend, Ryanair have failed to do and thus have established no legal basis for the redactions and de-identifications.

76. There may be some merit in this objection. However, in light of the various matters stated in the affidavit of Ms. Yvonne Moynihan, where she stated that she has cross-referenced the various categories of documents discovered with the aviation legislation, I am not prepared to accept this objection. This is notwithstanding the fact that it would have been desirable for each redacted or de-identified document to have been cross-referenced to a specific provision in the aviation legislation.

77. Channel 4 also raised the issue as to whether the aviation legislation applies at all in the instant case. It was submitted that the confidentially provisions of the aviation legislation only apply to state agencies and not private companies such as Ryanair. The documentation in question, since it has been discovered by Ryanair, is clearly in its power, possession or procurement. Based on the affidavit of Ms. Moynihan it would appear to be the case that this documentation came into existence for the purpose of compliance with the requirements of the aviation legislation. As such, it seems to me that Ryanair are entitled to rely upon the confidentially provisions provided for in said legislation.

78. Finally, Channel 4 argued that the time for Ryanair to claim reliance on the confidentiality provisions of the aviation legislation was when discovery was being ordered by the High Court in 2014 and, on appeal, the Court of Appeal in 2015. At that point, it is submitted, Ryanair should have made submissions to the Court to limit discovery.

79. In my view, although Ryanair could have raised these issues at the time of the making the orders for discovery, it is still permissible for them to rely upon the provisions of the aviation legislation at this stage. In support of this I was referred to *Cooper Flynn v. Radio Telefis Eireann* [2000] 3 IR 344. Although the facts of the instant case are somewhat different it is nonetheless established that a court can deal with the issue of the redaction of documents, which have been discovered after the order for discovery has been made (see Kelly J.).

The test to be applied:-
80. In previous paragraphs I have set out the relevant provisions of the aviation legislation that deal with the issue of confidentially and in what circumstances such documentation may be ordered to be disclosed. I refer again to Regulation 24 of the S.I. 205 of 1997, Regulation 9 of S.I. 285 of 2007, Regulation 20 of S.I. 460 of 2009, Article 14 of the 2010 Regulation and Article 15 of Regulation (EU) No. 37/6 2014.

81. Though there are certain differences in wording concerning confidentiality in the aviation legislation it is clear that the disclosure of information requires the court to carry out a "balancing exercise" between, on the one hand, benefits resulting from the disclosure as against, on the other hand, the adverse domestic and international impact such disclosure may have on any future safety investigation. Further, as per Article 14(3) of the 2010 Regulation, only information that is strictly necessary should be disclosed.

Authorities:-
82. In the course of submissions to the court a number of authorities were referred to. These authorities fall into two categories. Firstly, authorities on the application of aviation legislation and, secondly, authorities that relate to the disclosure of information that is given in confidence.

83. In respect of authorities on the application of the aviation legislation, of particular importance is, *Stokes v Minister for Public Enterprise* (unreported, High Court, 3rd July, 2000) wherein Regulation 24 of S.I. 205 of 1997 was considered. In this case, the plaintiff was the widow of a person killed in a helicopter crash and sought production of documents so that she could put herself in a better position to make comments on a draft report that had been circulated to her by an inspector who had investigated the accident.

84. At p. 7 of the judgment Kelly J. states:-

> "In my view this question must be answered in the negative. The section provides that the authorities shall not make the relevant records available unless the court is of the view that the benefits resulting from disclosure outweigh the adverse domestic and international impact that disclosure may have on the instant or any future investigation. The negative way in which the wording is framed suggests to me that no right to these documents is created or established by s. 24. What it does is establish criteria which must be applied by the court in circumstances where the applicant is able to demonstrate a right to such information and seeks to exercise that right."

85. In my view, the facts of the instant case are clearly different. Firstly, unlike the *Stokes'* case, this is a claim that arises out of defamation proceedings which involves a right to a fair trial. Secondly, and in my view crucially, the documents which Ryanair have redacted were discovered so therefore it follows that such documentation is necessary and relevant for the purposes of a fair trial. Therefore, Channel 4 have a *prima facie* right to such documentation. This right, however, is subject to the "balancing test" referred to.

86. In *Lord Advocate*, re an Order in terms of Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 (2015) S. L. T. 450 the Lord Advocate sought an order requiring that the combined voice and flight data recorder

(CVFDR) be made available to him and the police for the purposes of an investigation into an air accident in which there were four fatalities. In the course of giving judgment, the Court applied the test set out in Article 14(3) of the 2010 Regulation which appears to have been reflected in Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996.

87. In carrying out the "balancing exercise", Lord Jones, stated that:-

> "57. In Mr. Conradi's affidavit, the assertion is made that 'if air accident investigators are routinely required to disclose relevant records such as the cockpit voice recorder, this will have a serious and adverse impact on our ability to investigate future accidents and incidents'".

The view is expressed that if investigators were "routinely compelled" to disclose the contents of a cockpit voice recording it is likely that pilots would, on occasions, be tempted to disable the CVR. Mr. Conradi offers anecdotal evidence that when CVRs were first introduced in the UK in the early 1970s:-

> "pilots would routinely disable them, but this became less frequent as the protections surrounding their use improved and flight crews understanding of and trust in those protections increased."
>
> "(58) Accident investigators cannot be required "routinely" to disclose cockpit voice recordings. They can only be ordered to do so in a particular case if the tests laid down by the 1996 Regulations and the EU Regulation are met. Each case will turn on its own facts and circumstances. If these tests are met, it is the duty of the court to order disclosure. My decision in this case will create no precedent...
>
> (60) Nor do I accept that, in the event of a decision in this case that the CVFDR should be disclosed, it is likely that flight crews 'would on occasions be tempted to disable the CVR'. As I have said, that is inherently unlikely. Mr Conradi's anecdotal evidence on what flight crews may or may not have done 40 years ago when CVRs were introduced is unimpressive. In any event, I accept Mr Norman's evidence that, although it is not the purpose of an AAIB investigation to apportion blame, 'following the impartial analysis of events and publishing of the final report, any blame normally becomes apparent.' It appears that, during the past 40 years, the possibility of being blamed for having caused an accident has not tempted flight crews to disable the CVR."

In the course of his judgment, Lord Jones was analysing the so-called "chilling effect" of allowing disclosure of information provided confidentially under aviation legislation. He thought it highly improbable, to say the least, that pilots would be tempted to disable the CVR because of a fear of possible disclosure in the future.

88. The Court was referred to *Chief Constable of Sussex Police and another v. The Secretary of State for Transport and British Airline Pilots Association* [2016] EWHC 2280, QB. This case arose out of an incident where an aircraft crashed whilst performing a stunt at an air show at Shoreham, West Sussex, England. The aircraft struck a dual carriageway and eleven people were killed as a result. The pilot survived although he sustained injuries. The Chief Constable of Sussex made an application for disclosure of certain documents pursuant to Regulation 18 of the Aviation (Investigation of Air Accidents and Incidents) Regulations 1996, which reflects the wording of Article 14(3) of the 2010 Regulations. The Chief Constable sought disclosure of three categories of records, two of which are relevant. Firstly, statements made by the pilot and, secondly, film footage from two image recording cameras which were mounted within the cockpit of the aircraft. These cameras were installed on a voluntary basis but there was no cockpit voice and flight data recording.

89. In the course of this judgment the decision in the *Lord Advocate* case was briefly referred to. In carrying out the "balancing test", Singh J. stated in respect of the first category statements made by Andrew Hill (the pilot).

> "41. In my view it is also inconceivable that statements made to the AAIB could properly be the subject of an order for disclosure when the appropriate balancing exercise is done by this court. This is for two main reasons.
>
> 42. First, there would be a serious and obvious "chilling effect" which would tend to deter people from answering questions by the AAIB with the candour which is necessary when accidents of this sort have to be investigated by it. This would seriously hamper future accident investigations and the protection of public safety by the learning of lessons which may help to prevent similar accidents. As is clear from the text cited earlier from Annex 13 to the Chicago Convention, the EU Regulation and the 1996 Regulations, this would be contrary to one of the fundamental purposes of the regime in this area, which is carefully designed to encourage candour in the investigation of air accidents in order to learn lessons and prevent accidents in the future.
>
> 43. Secondly, it would be unfair to require such disclosure. This is because the powers of the AAIB, unlike the ordinary police, are such as to permit the compulsion of answers to questions: see Regulation 9 of the 1996 Regulations. Further, so far as I could discern from the hearing before this Court, there is no clear practice, to say the least, of giving a caution to the person interviewed. This is hardly surprising, since the purpose of such an interview is to obtain the fullest possible information in an accident investigation. This contrasts markedly with the purpose of a police interview, which is to elicit evidence which may be capable of being used at a subsequent criminal trial…"

90. However, Singh J. granted disclosure of the second category of material, namely film footage:-

> "49. Furthermore, in my judgment, what is significant in the present case is that the cameras concerned were installed not only on a voluntary basis but for leisure and private commercial reasons. Indeed, on the evidence before this Court, it would appear that the intention was to use the film footage obtained during the air show in this way as part of a broadcast. I am, therefore, not persuaded that pilots would be deterred in the future from installing such equipment on a voluntary basis, since they would do so for their own private, and potentially commercial, reasons.
>
> 50. In the circumstances of the present case, I am satisfied that the balance falls in favour of disclosure rather than against it. The film footage has significant potential value for the police investigation in this case, since it is a contemporaneous recording of what happened during the flight itself…"

91. The Court was referred to a number of authorities covering situations where information, given on a confidential basis, is sought to be disclosed. In *ex parte Coventry Newspapers Limited* [1993] QB 287, a newspaper, the applicant in the proceedings, was sued by two police officers in libel proceedings over an article suggesting that they had removed interview notes and tampered with files concerning the prosecution of an individual, referred to as B. The police officers had been suspended but were reinstated on the

grounds that the investigation by the Police Complaints Authority (the PCA) had produced no evidence that they had removed any documentation from the court file.

92. B's conviction was referred to the Court of Appeal which ordered disclosure, for use at the hearing of the referral, of all witness statements and documents in the possession of the PCA concerning the investigation of the two police officers on an undertaking not to use the disclosed documents otherwise than for referral. The disclosed documentation proved vital for B. His appeal was upheld and his conviction quashed. The applicants, who had been unable to plead justification as a defence in the libel proceedings, applied to the Court of Appeal to disclose to them the PCA documents. In deciding whether to release the documents to the applicants, the Court of Appeal had to consider the balance between, on the one hand, the public interest in maintaining the confidentially of documents made available to the PCA so as to ensure future informants would supply information and, on the other hand, that the applicant newspaper would be able to advance its defence of justification.

93. In allowing disclosure of the documentation to the applicant newspaper Lord Taylor C.J. stated:-

> "We summarise our reasoning thus. Given the central of objective of this category of public interest and immunity as the 'the maintenance of an honourable, disciplined, law abiding and uncorrupt police force' given the grave public disquiet understandably aroused by proved malpractice on the part of some at least of those who served in the now disbanded West Midlands Serious Crime Squad, given the extensive publicity already attaching to the documents here in question following the appellant's successful appeal, it seems to us nothing short of absurd to suppose that those who cooperated in this investigation - largely other police officers and court officials - will regret that cooperation, or that future generations of potential witnesses will withholded it, were this court now to release documents to CNL (the applicant newspaper) to enable them to defeat if they can an allegedly corrupt claim in damages…"

In this passage, the Court of Appeal was clearly considering a "chilling effect" on future investigations were the documentation to be released. It seems to me that the analysis here is very similar to that of Lord Jones in the *Lord Advocate* case already referred to.

94. The Court was further referred to *Waterford Credit Union Limited v J and E Davey*, (unreported High Court, Keane J., 13th January, 2017). In these proceedings the plaintiff was suing the defendant, its investment adviser, concerning investment advice given to the plaintiff. The plaintiff sought discovery of a number of categories of documents, in particular, reports furnished by the Irish Stock Exchange (ISE) to the defendant and all communications passing between the defendant and the ISE concerning an investigation into the defendant's conduct of its business particularly the sale by the defendant of certain bonds to credit unions.

95. The defendant resisted discovery of this documentation on the grounds of, *inter alia*, the protection of confidential communications which it made to the ISE, as it's regulatory body.

96. Although a "chilling effect" does not appear to have been relied upon by the defendant, nonetheless, the Court had to carry out a "balancing exercise" as per Keane J.:-

> "52. It is clear that there is balancing exercise to be performed. On the one hand, I must consider what, in his judgment in *Smurfit Paribas Bank Limited v. AAB Export Finance Limited* [1990] 1 IR 469, at 477, Finlay C.J., emphasised is 'the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice.' On the other hand, I must consider the confidentially interests in the regulatory review reports concerned asserted on behalf of the defendant.
>
> 53. As Clarke J. put the matter in *Telefonic 02 Ireland Limited* at. 3.3: 'The court is required to exercise some balance between the likely materially of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentially attaching to the relevant materials.'
>
> 54. For the reasons I gave in considering the question of relevance, I am satisfied that the contents of the two regulatory review reports at issue are very likely to be material to issues likely to arise in the proceedings, and that the degree of confidentially attaching to the relevant materials is not so significant as to outweigh the interest of the common good in their disclosure for the purpose of ascertaining the truth and rendering justice."

Application of the "balancing test":

97. The "balancing test" has to be carried out against the background of the claim being brought in the instant case. Of particular relevance here is that Ryanair in its reply to the defence of Channel 4 specifically relies upon the Irish Aviation Authority "overseeing the standards of Ryanair in accordance with Europe wide Regulations set by the European Aviation Safety Agency, (EASA), investigated the Valencia incidents and disproved the contents of the CIAIAC report…" (para. 5 of reply)

98. In maintaining the confidentially of the documentation, Ryanair maintains that were such documentation to be disclosed in unredacted or de-identified form it would have an adverse impact domestically and internationally on any future investigations. In support of this, Ryanair relied upon the affidavit of Mr. Aidan Murray, Deputy Chief Pilot Line Operations of Ryanair, which I have referred to at the para. 74 above. This affidavit underlines the importance of confidentially which pilots attach to the reporting process and which suggests that the unredacted disclosure of such information might impact on the willingness to share information in the future.

99. It has to be said that there was no suggestion that were disclosure of the information to be ordered pilots, or other relevant personnel, in the future might fail in their legal duty to provide information as required by aviation legislation.

100. On the other side of the balance, it cannot be disputed but that the documentation sought, as discovered by Ryanair, is relevant and, subject to the issue of confidentiality, necessary for the hearing of the action and thus required to enable a fair trial as is required by the Constitution and the European Convention on Human Rights.

101. Although information given under aviation legislation is confidential that confidentially, unlike legal advice/litigation privilege, is not absolute. This is a fact which must have been appreciated and understood by those persons supplying the information.

102. Even though, in the past, courts have directed that such information be disclosed there is no evidence that such has had the "chilling effect" feared by Ryanair. In the instant case, all the information is in the possession of Ryanair and there is no suggestion whatsoever of any adverse effects on pilots or other persons who have disclosed such information. Also, there is no on-going

investigation. Nor do I believe there is any serious prospect, arising out of disclosure, of pilots and other personnel failing in the future to comply with their reporting obligations under aviation legislation.

103. I have set out the relevant authorities in previous paragraphs in which the "balancing test" has been carried out. Clearly, the application of a "balancing test" depends upon the facts of each particular case. For the reasons set out in paras. 97 – 102, I am satisfied that, in this case, the balance lies in favour of disclosure of the documents being made without redactions.

104. In allowing such disclosure, I am mindful of the "chilling effect" which has been referred to. In order to alleviate possible concerns on this, I will further order that the names of those persons who either made reports or were named in reports, for the purposes of complying with the requirements of aviation legislation, be redacted. In this regard, I accept the redactions that were made as regards the category 3 documents to protect the identity of the pilots involved.

105. Further, it must be emphasised that any party who obtains production of documents by discovery is prohibited by law from making any use of those documents except for the purposes of the action. To go outside this prohibition is to commit contempt of court. See *Ambiorix Limited v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277)

EU Law

106. In the course of the hearing, the Court was referred to various affidavits concerning the law applicable on the disclosure of documents in various EU Member States. It was suggested that Ryanair may be subject to the legal constraints imposed upon them by such law as regards disclosure of the documentation sought. I am satisfied that as proceedings herein are subject to Irish law, there is no such constraint on Ryanair. Further, I believe this is consistent with the wording of Article 14(3) of the 2010 Regulation which states:-

> "….the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of disclosure…"

Commercial Sensitivity

107. In the course of the hearing reference was made to a limited number of documents which were redacted on the grounds of commercial sensitivity. The Court is prepared to accept what Ms. Moynihan stated in her affidavits in this regard. However, as the issue of "commercial sensitivity" was not canvassed to any great extent at the hearing of the motion, I will grant liberty to apply in respect of this.

108. In summary, on the "redactions" motion, I will grant the following orders:-

> (a) An order pursuant to O. 31 of the Rules of the Superior Courts directing Ryanair to make available for inspection by Channel 4 in unredacted form, all documents listed in the First Schedule, first part to the affidavits of discovery of Yvonne Moynihan sworn on 3rd November, 2015, and 30th November, 2016, subject to the redaction of the name or names of personnel mentioned in such documentation.
>
> (b) Liberty to apply in respect of documentation over which "commercial sensitivity" is being claimed.