Neutral Citation [2016] IEHC 616

THE HIGH COURT

[2013 No. 11363P]

BETWEEN

RYANAIR LIMITED AND RYANAIR HOLDINGS PLC

PLAINTIFFS

– AND –

EWERT VAN ZWOL, JOHN GOSS, TED MURPHY, CARL KUWITZKY

AND SAMUEL GIEZENDANNER

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Overview.

1. The factual background to this judgment has previously been identified by the court in its judgment in *Ryanair v. Van Zwol and ors* [2016] IEHC 264 and is not repeated here. At this time Ryanair comes to court pursuant to a notice of motion seeking, *inter alia,* the following reliefs: (1) an order striking out the defence of the defendants for failing to make discovery in accordance with the Rules of the Superior Courts 1986, as amended; (2) an order directing the defendants to make discovery in accordance with the terms of an agreement of 9th May, 2014, to make voluntary discovery; and (3) an order for inspection of certain documents contained in the First Part of Schedule One of the affidavit of discovery.

II. Striking Out of Defence.

2. It does not appear to the court that an order striking out the defence of defendants is now being sought with especial rigour. It is in any event a relief that must be refused. The substantive issues raised by the plaintiffs in relation to redaction, and the suggestion that further documents may exist that fall within the agreed categories, are insufficient to ground a strike-out application.

3. In *Mercantile Credit Company of Ireland Ltd. v. Heelan* [1998] 1 I.R. 81, Hamilton C.J., having set out the substance of O.31, r.21 of the Rules of the Superior Courts, observed as follows, at 85:

> *"The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.*
>
> *It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.*
>
> *The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."*

4. There has not been any wilful default or negligence on the part of the defendants in this case. They have sought to comply fully with their discovery obligations, not least by arranging for the filing of a supplemental affidavit of discovery to address such issues as were raised by the plaintiffs. Errors have arisen in the process, it is true, but, as the court noted at para. 11 of its judgment of last May "*In any human endeavour, error is to be expected. Even the most scrupulous of discovery processes – and no little scruple is required…in the discovery process –likely involve some element of in-built error. Discovery is a means to an end, not an exercise in perfection."* Certainly the court sees nothing in what has occurred in the within proceedings that would justify its striking out the defendants' defence at this time.

5. In *Campion v. Wat* [2013] IEHC 45, Ryan J. observed as follows, at 4:

> *"The requirement under O.31, r.12 is for the party to make an affidavit detailing documents that are or were in his possession or power relating to any matter in question in the case. An order may not be made if the Court is of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. The jurisdiction to strike out a claim or a defence for failure to make discovery exists for the purpose of enforcing and ensuring compliance with the court's orders. Discovery is ordered when it is necessary to do so for the fair disposal of the action.*
>
> *But once discovery has actually been made, it is not generally the function of this Court to make determinations of fact in order to decide whether the claim should be struck out. It would not be possible on the basis of the affidavits alone for this Court to do that. It would obviously be necessary to have a hearing at which the plaintiff was cross-examined….*
>
> *Since the plaintiff has now made discovery in an appropriate form, I do not think that it is for me to determine on the basis of probability or improbably whether his explanations are correct or not. Neither am I able to contrast the pleadings to date with the contents of the discovery affidavit or affidavits in order to determine the truth. In the circumstances, it is not appropriate for me to make an order dismissing the plaintiff's case and it would not be just to do so."*

6. As the defendants in this case have now addressed the various issues raised by the plaintiffs in relation to discovery, *i.e.* since the defendants have now made discovery in an adequate form, it is not appropriate for the court to make an order dismissing the defendants' defence and it would not be just to do so. There is simply no basis on the facts of these proceedings for the court to invoke what is, in any event, itsquite limited jurisdiction to strike out pleadings for failure to make discovery.

III. Further and Better Discovery.

7. The second requested relief is a form of further and better discovery, the order sought being an order to require the defendants to comply with their previous agreement to make voluntary discovery. The principal authority in this regard remains the now long-ago decision of the Supreme Court in *Sterling-Winthrop Group Ltd. v. Farbenfabriken Bayer A.G.* [1967] I.R. 97, in which Kenny J. giving

judgment on the circumstances in which a court will make an order requiring a party who/which has previously sworn an affidavit of discovery to swear a further such affidavit, indicated as follows, at 100:

> *"Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit. The Court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The Court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it."*

8. In short, it does not suffice for an order for further and better discovery to issue that a plaintiff comes to court and says 'I don't believe that my opponents have given me all the documents'. Rather, it is necessary to identify from the pleadings, or from documents which are discovered, or from the affidavit of discovery, something which suggests that there is further documentation which has been withheld. That type of circumstance does not present here. There have been a number of rounds of discovery, it is true, but such issues as have been raised have been dealt with by subsequent affidavits. And yet again, in this regard, the court would refer to the above-quoted observation in its judgment of last May. The fact that a mistake has been made or a further document has come to light does not of itself(a) give grounds to make a further order requiring the process to start again, or (b) suggest that there has been some wilful default.

9. What has happened in this case is that a number of issues have been raised over time. So, in the correspondence between the parties certain issues were raised, they were dealt with, and the motion now before the court issued. Further complaints were made and were dealt with by supplemental affidavit. Then, in the hearing of this motion, still further issues were raised, the defendants sought an opportunity to deal with those issues, and deal with them they did. So within and between the various affidavits of discovery that have been sworn, there has been a scrupulous effort by the defendants to deal with the issues that have been raised. So much so that even documents that are not acknowledged by the defendants to be discoverable, *e.g.,* web-pages, have been run off and, in effect, discovered.

10. In some of the documents provided, there are, it is true, references to other documents. However, there must come a point when a party, here the plaintiffs, cannot continue to 'pull at threads' and suggest that a throw-away line in a given discovery document might suggest the existence of another document. Such an approach does not meet the *Sterling-Winthrop* standard; it is more similar to coming to court and simply saying 'I don't believe you've given us everything'. To merely say that is but to assert the existence of another document, rather than offering any cogent or reasoned explanation as to why a party complained of has failed to meet its discovery obligations.

IV. Inspection.

(i) Overview.

11. The plaintiffs have sought an order for inspection of the documents contained in the First Part of Schedule One of an affidavit of discovery sworn by Mr Van Zwol on 21st August, 2014. Before considering the substance of this application, it is helpful to briefly recount certain aspects of the relevant rule of court, being O.31 ("*Interrogatories, Discovery and Inspection*").

12. Order 31, rule 18(1) provides that:

> *"If the party served with [an inspection] notice under rule 15 omits to give…notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit".*

13. Order 31, rule 18(2) further provides that:

> *"An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs".*

14. There is not any argument being made in the within application as to costs. Ryanair has not contended, for example, that inspection now will save time at trial later. This being so, this aspect of the within application comes down to whether the inspection being sought is necessary "for disposing fairly of the cause or matter".

(ii) Denial of meanings alleged.

15. The Statement of Claim in the within proceedings is relatively short, dealing with a publication that is likewise short. Thus 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."*

16. This last-quoted text, it is alleged by the plaintiffs, (a) 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.

17. The defendants' defence, *inter alia*, denies all the meanings alleged. So it may be that the case will go no further than that. The defendants also maintain that the pilot update is a dry financial statement that does not state any of the things alleged by the plaintiffs and that it cannot bear any of the alleged meanings. All of the foregoing presents issues for the court of trial to decide. But

what is of note in the context of the within application is that (a) issue is squarely joined on meaning, and (b) the redacted names appear to the court to have no relevance whatsoever to meaning – it does not matter who the defendants spoke to before publication of the impugned article if the article does not mean what the plaintiffs allege it to mean.

(iii) Truth.

18. The defendants say that what they published was true. This is not a case where the defendants are saying 'If you consider this, that and the other, maybe what we published meant only that X, Y and Z pertains'. Instead the defendants have taken on the burden of pleading and proving precisely what their article says. Malice is irrelevant to this defence of truth. So even if, as the plaintiffs suggest, the defendants, prior to or at the time of publishing the impugned statement, were dealing with people who had some form of animus towards Ryanair, it does not matter if the statements were true.

(iv) Honest opinion.

19. The next defence pleaded is honest opinion, a defence arising under s.20 of the Defamation Act 2009. Section 20 provides as follows:

> *"(1) It shall be a defence (to be known, and in this section referred to, as the 'defence of honest opinion') to a defamation action for the defendant to prove that, in the case of a statement consisting of an opinion, the opinion was honestly held.*
>
> *(2) Subject to subsection (3), an opinion is honestly held, for the purposes of this section, if–*
>
> *(a) at the time of the publication of the statement, the defendant believed in the truth of the opinion or, where the defendant is not the author of the opinion, believed that the author believed it to be true,*
>
> *(b) (i) the opinion was based on allegations of fact–*
>
> *(I) specified in the statement containing the opinion, or*
>
> *(II) referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published,*
>
> *or*
>
> *(ii) the opinion was based on allegations of fact to which–*
>
> *(I) the defence of absolute privilege, or*
>
> *(II) the defence of qualified privilege,*
>
> *would apply if a defamation action were brought in respect of such allegations,*
> *and*
>
> *(c) the opinion related to a matter of public interest.*
>
> *(3) (a) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which subsection (2)(b)(i) applies, unless–*
>
> *(i) the defendant proves the truth of those allegations, or*
>
> *(ii) where the defendant does not prove the truth of all of those allegations, the opinion is honestly held having regard to the allegations of fact the truth of which are proved.*
>
> *(b) The defence of honest opinion shall fail, if the opinion concerned is based on allegations of fact to which subsection (2)(b)(ii) applies, unless–*
>
> *(i) the defendant proves the truth of those allegations, or*
>
> *(ii) where the defendant does not prove the truth of those allegations–*
>
> *(I) the opinion could not reasonably be understood as implying that those allegations were true, and*
>
> *(II) at the time of the publication of the opinion, the defendant did not know or could not reasonably have been expected to know that those allegations were untrue.*
>
> *(4) Where a defamatory statement consisting of an opinion is published jointly by a person ('first-mentioned person') and another person ('joint publisher'), the first-mentioned person shall not fail in pleading the defence of honest opinion in a subsequent defamation action brought in respect of that statement by reason only of that opinion not being honestly held by the joint publisher, unless the first-mentioned person was at the time of publication vicariously liable for the acts or omissions, from which the cause of action in respect of that statement accrued, of the joint publisher."*

20. Having regard to the defence of honest opinion as amplified upon in the above-quoted text, there seems only a very marginal context in which the issue of associating with persons ill-disposed towards Ryanair could ever affect honest opinion, this being

whether the defendants honestly believed the statement published. Even if the plaintiffs could show that the defendants associated with people of ill-will towards Ryanair, this could not impact upon whether or not the defendants believed the truth of what they themselves were publishing.

21. Turning specifically to s.20(4) of the Act of 2009 (as quoted above), that provision has the result that Person A, in pleading honest opinion, is not to fail in that defence solely by reason of the fact that the opinion in question was not honestly held by person B, unless person A was vicariously liable for B. If that is true amongst co-defendants and co-publishers, then a *fortiori* it must be true in relation to third parties. Hence if the defendants were associating with somebody who did not believe in the truth of the impugned statements or was out to 'get' Ryanair, that cannot impact upon the defendants' entitlement as defendants to rely on the defence of honest opinion. In short, even if the plaintiffs were to be given the redacted names, even if it were established that those redacted personages are people of ill-will towards Ryanair, even if the plaintiffs were to establish that these people with whom the plaintiffs were corresponding did not believe in the truth of what the defendants published, that would not assist in relation to the defence of honest opinion. It would not defeat it.

(v) Qualified privilege.

22. Turning to the next defence pleaded by the defendants, being the defence of qualified privilege, this is a defence arising under s.19 of the Defamation Act 2009. Thus s.19(1) provides that "*In a defamation action, the defence of a qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice."* When it comes to the meaning of 'malice' in this last regard, the court has been referred to the following helpful extract from the learned text of Dr Cox and Mr McCullough, Defamation Law and Practice (Dublin, 2014), para. 8-106:

> *"As far as qualified privilege is concerned, the meaning of malice relates back to the reason why the privilege exists in the first place. Thus it will be remembered that what is privileged is the occasion of communication, and that the occasion is privileged because of the public interest in its protection. So, for example, because of the public interest in ensuring that prospective employers have some knowledge of the character of a job applicant before offering him or her a job, the law deems the occasion of writing a character reference to be privileged. The parameters of the defence are constructed by reference to the public policy considerations that underpin it, and malice therefore (as far as qualified privilege is concerned) arises whenever a person uses the occasion of privilege for some indirect or wrong motive unconnected to the public policy justification for the privilege – as, for example, where one uses the occasion of writing a character reference about a person as a way to exact revenge on that person for something s/he had done in the past, or when one uses the privileged occasion of publishing a rebuttal to an earlier attack, not as a means of clarifying the situation, but exclusively for retaliatory purposes. The key consideration is not whether one is hurting another person or is behaving in a nasty fashion, but rather whether one is abusing the occasion of privilege. Thus it would appear that even if one publishes a statement in the knowledge that another person will be injured, or even perhaps with the intention of injuring that person, this will not amount to malice, provided that one is using the occasion for its proper purposes."*

23. Various academic commentaries and decided cases are cited by the learned authors in support of their assertions, and the court accepts the above-quoted text as a correct statement of the relevant law.

24. In the present case, the impugned text is a pilot update that references share price movement and particular sales of shares by Ryanair executives. Even assuming for moment that the defendants had a duty to provide an update to Ryanair pilots on issues relevant to Ryanair and that the Ryanair pilots had a corresponding interest in receiving that information – and that is quite an assumption – could that occasion be rendered abused, or could the content of the publication be rendered inappropriate, by the fact that the defendants had been in correspondence with persons who did not like Ryanair? The short answer to this question is 'no'. If the defendants enjoyed qualified privilege in providing a pilot update to persons on their e-mail list, that privilege does not fall away merely by dint of the defendants having previously liaised with someone else before sending the publication. Any such liaison does not change the nature of the occasion. And the fact that the persons liaised with by the defendants may bear ill-will towards the plaintiffs does not change the motivation of the authors. Neither, the court notes, can the impugned article be viewed as malicious by reference to the form or tone of the language used. The language used is that of dry financial analysis and is entirely unsensational. The end-result of the foregoing is that, even with the redacted names, Ryanair would be an awfully long way from getting towards a successful plea of malice, so much so that the release of the names is, to the court's mind, clearly outweighed by the issue of confidentiality, an aspect of matters to which the court turns later below. One final point remains, however, in relation to malice and the loss of qualified privilege. The point arises under s.19(3) of the Act of 2009. Because that provision cross-references into s.19(1), both provisions are quoted hereafter:

> *"(1) In a defamation action, the defence of qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice….*
>
> *(3) Where a defamation action is brought against more than one defendant, the failure of the defence of qualified privilege in relation to one of the defendants by virtue of the application of subsection (1) shall not cause the failure of the defence in relation to another of the defendants unless that other defendant was vicariously liable for such acts or omissions of the first-mentioned defendant as gave rise to the cause of action concerned."*

25. In summary, to borrow again from the learned text of Dr Cox and Mr McCullough, para. 8-117, the effect of s.19(3) is that "[W]*here there are joint defendants, A and B, in a defamation action, the malice of A will not infect B, nor will it hinder B's capacity to plead the defence of qualified privilege save where B is vicariously liable for the actions of A."*

26. What is being argued in the within application is that the persons whose names have been redacted may be motivated by ill-will towards the plaintiffs, and that this could be relevant to the context in which the publication was made, and so assist the plaintiff in proving malice. However, as the above analysis shows, malice is not infectious, it does not transfer from one defendant to another, and it most certainly does not transfer from a non-party to a defendant. Malice by association is a concept unknown to our modern law of defamation. But beyond that, it almost seems as if the malice that is being alleged by the plaintiffs is malice in the everyday sense, rather than legal malice. What is being alleged by the plaintiffs is that 'These people bear us ill-will'. That is not malice in the context of qualified privilege. Malice in the context of qualified privilege involves mis-using an occasion for some purpose that is irrelevant to the privilege. If the defendants establish that it was a privileged occasion for them to write to the pilots with an update, the court does not see how associating with a certain individual could transform that into an inappropriate use of that occasion.

V. Confidentiality.

27. Confidentiality can be a relevant consideration in deciding whether to order inspection of particular documents. In *Science Research Council v. Nassé* [1980] A.C. 1028, 1065, Lord Wilberforce, speaking in the House of Lords, expressed the following general principle in the context of an argument to the effect that confidentiality could operate as a defence to an application for discovery before an employment tribunal:

> *"There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence. In the employment field, the tribunal may have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties (including their employees on whom confidential reports have been made, as well as persons reporting) may be affected by disclosure, to the interest which both employees and employers may have in preserving the confidentiality of personal reports, and to any wider interest which may be seen to exist in preserving the confidentiality of systems of personal assessments."*

28. In *O'Callaghan v. Mahon* [2006] 2 I.R. 32, Hardiman J. expressed a similar view in the Supreme Court, in the context of the judicial review of a decision of the respondent tribunal of inquiry to refuse disclosure of certain prior statements by a notice-party where those statements had been furnished to the tribunal in confidence. Per Hardiman J., at 71:

> *"In the present case one must first look closely at the precise scope and nature of the claim to confidentiality advanced, and determine whether the disputed material is indeed confidential. One must then consider whether such degree of confidentiality as may be found to exist is or is not outweighed by the public interest, based fundamentally on constitutional considerations, in according fair procedures to the applicant in the circumstances in which they are claimed."*

29. In the present case, the information that has been redacted consists of the names and e-mail addresses of non-parties to the litigation at hand. And it is well to recall why the documentation has been so redacted. In his affidavit of 16th April, 2015, Mr Van Zwol avers as follows in this regard:

> *"14. I say and believe that it is important to note at the outset that the information which has been redacted consists solely of the names and email addresses of certain persons who are not party to this litigation. The Defendants have not sought to redact any of the substantive content of any of the discoverable documents, but have been obliged by obligations of confidence to remove the personal details of certain third parties from a number of emails.*
>
> *15. I say and believe that the Defendants, on behalf of the Interim Council Ryanair Pilot Group ('ICRPG') have given firm commitments of confidentiality to each of the said individuals and accordingly I say and believe that the Defendants owe a duty of confidence to the people whose names and email addresses have been redacted in the instant case. I say and believe that the ICRPG could not function without being in a position to give assurances and commitments of confidentiality to persons contacting it with issues of concern. I say and believe that if pilots or other persons contacting the ICRPG believed that their identities would not be kept confidential by ICRPG, such persons would simply not be willing to bring issues of concern to ICRPG for fear of suffering disciplinary/punitive action.*
>
> *16. I say and believe that the Plaintiff's chief pilot has, on more than one occasion, issued memos to all pilots working for the Plaintiffs, threatening pilots with disciplinary action up to and including dismissal for engaging with external representative bodies. I say and believe that in light of the foregoing, the Defendants apprehend that producing unredacted versions of the emails in question identifying non-parties to this litigation who have corresponded with the ICRPG could result in prejudice to those non-parties.*
>
> *17. I say and believe irrespective of any action which the Plaintiffs might choose to take in relation to any of these individuals in the instant case, were their personal details to be produced in unredacted form, I say and believe that the very fact of the ICRPG being obliged to hand over such details would be likely to have a severe chilling effect on the information being made available to ICRPG as the ability of the ICRPG to give commitments of confidence would be seen as having been compromised.*
>
> *18. I say and believe that providing the Plaintiffs with unredacted versions of the emails in question will not confer any bona fide litigious advantage on the Plaintiffs in these proceedings. I say and believe that the primary reason identified in the affidavit of Ms Moynihan [the plaintiffs' legal and regulatory advisor] for seeking the production of such unredacted emails is to 'assist the plaintiffs in proving malice against the defendants'.*
>
> *19. I say and believe that in so far as the Plaintiffs wish to make a case in malice against the Defendants, they can do so on the basis of the materials which have been discovered and produced already unredacted. While the Defendants entirely reject the Plaintiffs' claim that the publication in question was made maliciously, in so far as the Plaintiffs wish to argue that this was the case, it is clear on their own evidence, that they can make this case on the basis of what has been discovered and do not need the names or email addresses of non-parties to the litigation to advance their argument in this regard.*
>
> *20. I say and believe that the Plaintiffs also seek to rely upon the fact that these third parties were motivated by malice against the Plaintiffs. I do not accept that this is so and, in any event, do not see how the attitude of a non-party to the litigation towards the Plaintiffs, whether positive or negative, could be relevant to the Defendants' motivation in publishing the document the subject matter of these proceedings.*
>
> *21. I say and believe and am advised that the Plaintiffs have also sought to argue that they are entitled to unredacted versions of the emails in question to identify all those responsible for preparing the publication complained of in these proceedings. I say and believe that the manner in which the publication was prepared is quite plain from the documents which have been discovered, which include unredacted emails to which drafts of the document are attached* [examples given]…."

30. In *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19, Clarke J. advocated the adoption of a balancing process by the court when it comes to deciding on issues of confidentiality. Thus, per Clarke J., at para. 4.5:

> *"[I]t has already come to be recognised that there must be some proportionality between the breadth of discovery sought and the likelihood of the discovered category of documents having some meaningful bearing on the proceedings. Likewise, similar considerations have led to the view that where documents which have a significant confidentiality attaching to them are sought, same should only be discovered (again on the basis of proportionality) where it is necessary that they be discovered..."*

31. Applying Clarke J.'s 'proportionality test' to the facts at hand, it appears to the court that the significant confidentiality presently attaching to the names and e-mail addresses that are the subject-matter of the within application outweighs any necessity for their disclosure. The plaintiffs do not need the names and e-mail addresses in question to advance a claim in malice. Even if the plaintiffs can establish that certain non-parties bore them ill-will, this is irrelevant to the issue of the presence or absence of malice on the part of the defendants.

32. On a separate note, the court cannot but observe that in their grounding affidavit the plaintiffs suggest that "*the redaction of… identities evinces*" that the words complained of by them were published maliciously. This formulation suggests that the plaintiffs intend to rely on the fact of redaction, rather than the substance of what was redacted, to support their case in malice. Obviously, to make such an argument there is no need to have access to the redacted information.

33. Redacting the documents to remove only the names and e-mail addresses of third parties appears to the court to be the most proportionate and appropriate solution to the present dispute, and a mechanism which has been recognised by the court in previous cases as a possible (and here appropriate) solution to potential breaches of confidentiality.

34. In *Cooper Flynn v. Radio Telefís Éireann* [2000] 3 I.R. 344, Kelly J. endorsed, at 352, the following principles articulated by Simon Brown L.J. in *Wallace Smith Trust Co. v. Deloitte* [1997] 1 W.L.R. 257:

> *"2. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action. I need not refer further to the question of 'saving costs', the other limb of r.13(1), that not being relevant here.*
>
> *3. If no element of confidentiality…is asserted in the documents, routinely they will be produced for inspection without the need for a r.13 hearing on the issue of necessity….*
>
> *4. If, however, confidentiality, is asserted or any other ground of objection arises, r.13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action. As Lord Scarman had earlier said in Science Research Council v. Nassé [1980] A.C. 1028 at p.1089:-*
>
> *'The only complicating factor is the confidential nature of relevant documents in the possession of the party from whom redress is sought. The production of some of these may be necessary for doing justice to the applicant's case. If production is necessary, they must be produced. The factor of confidence however mitigates against general orders for discovery and does impose upon the tribunal the duty of satisfying itself, by inspection if need be that justice requires disclosure.'*
>
> *5. Disclosure will be necessary if: (a) it will give litigious advantage to the party seeking inspection…and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source…and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents…*
>
> 6. *If a* prima facie *case is made out for disclosure, then as several of the speeches in Science Research Council…make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself making the court generally readier to accept that the threshold test for disclosure is satisfied) and (b) assuming it is, to see if the loss of confidentiality involved can be mitigated by: (i) blanking out parts of the documents, and/or (ii) limiting the disclosure to legal advisors only".*

35. Notably, *Cooper Flynn* was a case in which third-party discovery of certain bank client names was crucial to the defence of justification raised in that case. The position in the within proceedings is different. The defendants are not seeking witnesses to help prove a defence. And the plaintiffs do not need any help to prove publication, in the sense that they have the impugned document and they are aware that it has been published. What the plaintiffs maintain is that they need help in resisting certain of the defences that are pleaded by the defendants, in particular as regards making out the case in malice. All of the foregoing being so, it can be seen that *Cooper Flynn* and the case at hand represent something of an example of 'apples and oranges'. Even so, *Cooper Flynn* is of interest, principally because of Kelly J.'s approbation of the above-quoted principles.

36. It appears to the court that in circumstances where a clear claim of confidentiality has been advanced by the defendants on affidavit, that inspection in un-redacted form of those documents that are the subject-matter of the within application, should only be ordered if the plaintiffs can establish that this is necessary for the fair disposal of the action. And such inspection does not appear to the court to be necessary in a case such as that now presenting where, to borrow from the above-quoted wording of Simon Brown L.J. in *Wallace Smith Trust Co.*, as approved by Kelly J. in *Cooper Flynn*, it would not confer any *bona fide "litigious advantage"* on the plaintiffs and, in truth, would be oppressive to the defendants by compromising their ability to offer assurances of confidence to persons within whom they deal in the course of their work as members of the Interim Council of the Ryanair Pilots Group.

37. The court notes in this last regard the reliance that the plaintiffs have sought to place on the observation of Costello J. in *Buckley v. The Incorporated Law Society of Ireland* [1994] 2 I.R. 44, when considering the potential chilling effect of disclosure in relation to the defendant – though the 'chilling' point was something of a secondary point raised by the defendants – that "[I]*f inspection is allowed the risk that complainants will be deterred from approaching the defendant is not a very great one"*. However, *Buckley* is a very different case from that now presenting: the Law Society, at the time of writing, remains a body that a disappointed client is almost bound to approach in the case of a complaint of misconduct by a solicitor; by contrast there appears to be no like compunction on the part of Ryanair pilots, certainly there is no evidence before the court of any compunction that arises on their part, to approach the Ryanair Pilots Group when they have some form of concern about their employer, and the force of any (if any) such compunction seems likely to be radically dissipated if a pilot considers that, in approaching the Ryanair Pilots Group, which appears to be or purport to be some form of representative body, her or his job may be jeopardised if the fact of such approach becomes known.

VI. Conclusion

38. This is a relatively straightforward defamation action which appears to the court to have become ‘bogged down’ for over two years on the issue of discovery. (The first affidavit of discovery was sworn in August, 2014). It is a case where the defendants appear very keen to get on with the action and where the plaintiffs appear to the court to have everything they need to make their case. The publication in issue is short. The plaintiffs have identified their complaints in respect of same. Issue has been joined on the pleadings by the defendants. And it is very clear what the issues in the case are. The most the plaintiffs can say at this juncture is that they have an outstanding issue in relation to redacted names that they believe might feed into the context of the plea of malice that they hope to make. That, with every respect, is not a good enough reason to hold up the trial, and it is to be hoped that after this judgment is given, the parties will view the discovery issues as closed and ‘get on’ with the case. But regardless of how the parties proceed, it is clear to the court, having regard to all of the provisions, principles and precedents aforesaid, how it must proceed: all reliefs sought by the plaintiffs in the within application are respectfully refused.