[2017] IEHC 425

THE HIGH COURT

RECORD NO: 2012/10160P

Ryanair Ltd.

Plaintiff

AND

Irish Municipal, Public and Civil Trade Union (IMPACT), Irish Airline Pilots Association (IALPA) and Evan Cullen

Defendant

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on 20th February, 2017

The nature of the case

1.These proceedings involve a motion in which the applicant Ryanair, who is the plaintiff in the substantive defamation proceedings to which this application relates, seeks (1) an order pursuant to Order 31, Rule 21 of the Rules of the Superior Courts striking out the defence of the three defendants for failure to make adequate discovery; or, in the alternative, (2) an order "requiring the defendants to search for and identify electronic documents and other electronically stored information falling under the categories of discovery that have been deleted by the defendants and which may be reconstituted together with an order directing that the defendants reconstitute and make discovery of such electronically-stored information". The orders sought were refused by the Master of the High Court and the applicant seeks an order pursuant to Order 63, Rule 9 of the Rules of the Superior Courts setting aside the order of the Master, together with orders for the reliefs identified above.

Relevant Background

2.The Statement of Claim alleges that the three defendants were responsible for defamatory statements made during a radio interview on the 16th August, 2012, on the 'News at One' programme on RTE Radio One and in a subsequent article in the Irish edition of the Sunday Times. The third defendant, Mr. Cullen, is an airline pilot and President of the second defendant union, which is a member of the first defendant. The statements complained of were made by Mr. Cullen during the radio interview in question, which were subsequently reported in the Sunday Times. Numerous defamatory meanings have been pleaded in the Statement of Claim, but for present purposes it probably suffices to say, in broad terms, that the interview related to Ryanair's policy in relation to certain safety issues, and in particular, the amount of reserve fuel that should be or is carried by aircraft operated by the company. The defendants have pleaded, *inter alia*, the defences of truth and honest opinion.

3.On the 12th December, 2011, the High Court (O'Malley J.) delivered judgment on a discovery motion, in which a large number of categories of discovery were sought. The parties were to agree the wording of the order of discovery and, following an exchange of correspondence in March, 2015, this was done. This agreement post-dated the 12-week period within which discovery was to have been completed according to the judgment of O'Malley J. (which period expired on the 6th March, 2015). Subsequently, a total of four affidavits of discovery were sworn by the third defendant, Mr. Cullen. These were dated, respectively: the 19th March, 2015; 1st April 2015; 22nd June, 2015; and the 28th October, 2015. The present motion issued before the fourth affidavit was sworn.

4.The reliefs sought in the present motion, which are outlined above, were refused by the Master and the matter came on for hearing in this Court on the 4th October, 2016. While counsel on behalf of the plaintiff opened the correspondence which flowed between the parties during the entirety of the period March -October 2015, which contained numerous complaints by the plaintiff about the defendant's discovery both as regards electronic and non-electronic documents, it is fair to say that counsel directed his complaints at the hearing primarily towards the discovery of electronic material which, he argued, was inadequate.

5.On the 26th October, 2016, the Court delivered an interim ruling requesting further details to be set out on affidavit on behalf of the defendants, concerning the electronic searches that had been carried out to date, including any searches for 'deleted' electronic material in particular. In response to the interim ruling, a number of additional affidavits were sworn, which are detailed below. As a result, the Court has a much clearer picture of the facts and is now in a position rule on the motion as a whole.

The history of discovery as disclosed by the affidavits

6.In order to contextualise the relief sought in respect of electronic material, and the deleted material in particular, it is unfortunately necessary to have regard to the affidavits sworn on behalf of the defendants and the correspondence between the parties in some detail. The first affidavit of discovery was sworn by Mr. Evan Cullen, the third name defendant, on the 19th March, 2015. The Second Schedule to that affidavit contained the following description of documents no longer in the defendants' possession power or procurement:

> All documents given by Ryanair Pilots from time to time to IALPA for the purpose of receiving advice and/or assistance from IALPA in cases where there have been issues or disputes with their employer Ryanair and as agreed and desired by such pilots IALPA have destroyed such documents or returned them to the relevant pilots. The time frame of receipt and return to pilots or destruction of such documents varies in respect of the categories of documents."

7.On the 23rd March, 2015, the solicitors on behalf of the defendants wrote to the solicitors on behalf of the plaintiff, enclosing two further documents; a memo dated the 4th January, 2012, from a base captain, and a portion of a Ryanair operations manual, both of which, it was said, had been omitted in error from the affidavit of discovery.

8.This was responded to by the solicitors on behalf of the plaintiff by letter dated the 24th March, 2015, complaining that the enclosure of additional documents was 'highly irregular and unsatisfactory', and calling for a new affidavit of discovery to be sworn.

9.Another letter from solicitors on behalf of the plaintiff, dated the 25th March, 2015, stated: "*In relation to the documents listed under the Second Schedule….we ask that you confirm now by return that you shall reconstitute the documents (including emails) listed under this Schedule."* This request obviously presupposed that the 'deleted' material had existed in electronic form.

10.An amended affidavit of discovery was duly sworn by Mr. Cullen on the 1st April, 2015, accounting for the two additional documents referred to above. However, before this was furnished to the plaintiff, solicitors for the plaintiff wrote to the solicitors for the defendants by letter dated 9th April, 2015. They raised a number of concerns with regard to the Second Schedule. Among the concerns raised were (1) that there had been no attempt to list the missing documents; (2) that there had been no indication as to

when the documents had been destroyed or returned and whether this had taken place before or after the proceedings had been instituted; (3) that there was no indication whether any emails or other electronic documents were or were not still available through 'reconstitution'. They continued as follows:

> We have now identified other serious deficiencies with the discovery purportedly made by Mr. Cullen in his Affidavit, including that Mr. Cullen has failed to discover documents which Ryanair knows to exist and/or which credibly must exist, and which fall within the relevant categories of discovery. The extent of the deficiencies is such that it casts doubt on the veracity of the Affidavit as a whole. We set out further details below, by reference to the categories of discovery and by reference to the schedules to Mr. Cullen's Affidavit."

They then outlined details of same, stating that "we require a full explanation as to why the above-identified documents have not been discovered, and production of same." They went on to raise issues in relation to "deleted/destroyed" documents, stating, "The description of missing, "returned", destroyed or deleted documents given by Mr. Cullen in the Second Schedule to his Affidavit is unacceptable" and requesting that the defendants "have Mr. Cullen specifically identify all documents that he asserts fall within this Second Schedule"; "identify precisely when the documents allegedly falling within this Second Schedule have been "returned" or destroyed as averred"; "respond to our letter dated 25 March 2015 regarding reconstitution and/or recovery of deleted/destroyed documents"; and "provide a full and proper explanation" in relation to the following issues raised by them:-

> it is simply not credible that Mr. Cullen would aver that documents provided by Ryanair pilots to IALPA have been destroyed or returned to the relevant pilots in circumstances where IALPA has clearly obtained from pilots and retained certain documents which Mr. Cullen lists elsewhere in his Affidavit of Discovery: no explanation is given by him as to why certain documents (for example, internal Ryanair memos and pilot communications) were retained by IALPA and (for example) the emails which attached these documents were not retained".

and

> it is questionable that no internal correspondence between IALPA members has been disclosed, specifically correspondence between the President and the Director of Safety & Technical and former Director of Safety & Technical".

11.The solicitors for the defendants responded by letter dated the 14th April, 2015, acknowledging the letter and indicating that a substantive response would be provided to the issues raised in "about two weeks time". The letter also included the amended affidavit of discovery of Mr Cullen, dealing with the additional two documents, sworn on the 1st of April 2015.

12.A substantive response was provided by solicitors for the defendants on the 19th April, 2015. This letter responded to the individual complaints raised in relation to each category of discovery. The defendants' solicitors noted the request in connection with the second schedule and said 'We take it that your request in this regard is related to the issues which you raise in your letter of 9th April 2015 in relation to the second schedule and we address same below'. They went on to provide as follows:-

> The defendants are, unfortunately, not in a position, at this remove, to specifically identify and list every document which might fall within one or more of the categories of discovery which have been returned, deleted or destroyed. We are instructed that the documents in question would have been likely to have been of relevance only to categories 6, 13, 15, 19.
>
> …] to the best of the Defendant's recollection they have been shown or briefly viewed additional documents beyond those listed in the first part of schedule 1 of the affidavit of the 19th March 2015 […]."

They noted that such documents included those, "which the Plaintiff has issued to its pilots saying that there are reasons which the Plaintiff will not accept for taking extra fuel", and those "which go to show the Plaintiff's corporate culture with regard to fuel and pressure being brought to bear on the Plaintiff's pilots." They went on to provide:-

> To the best of the Defendant's recollection any such documents which they have been made aware of […] have been simply shown to the Defendants by third parties briefly and then taken away by the said parties on the same date as they were viewed by the Defendants and accordingly have not been in the possession, power or procurement of the Defendants.
>
> […] the Defendant's confirm that no such documents have been returned to pilots, deleted or destroyed since the within Proceedings were served in October 2012."

In relation to documents "which are relevant to the fuel usage by the Plaintiff's pilots for the period of 12 months prior to 16th August, 2012", they stated that "the Defendants do not have access to the Plaintiff's pilots' personnel files and cannot confirm if any such documents also appeared on these files" and went on to say that "the Defendants believe that any such documents would have been returned or possibly destroyed prior to 16th August 2012. The Defendants confirm that no such documents have been returned to pilots, deleted or destroyed since the within proceedings were served in October 2012."

They also said:

> "[…] we are instructed that no documents in the possession of IALPA have been destroyed since the within proceedings were served in October 2012 for the purpose of avoiding discovery.
>
> We confirm that the Defendants have conducted a thorough review of their records, including their emails and computerised records and do not believe that same contain any additional discoverable material or versions of any returned or destroyed materials. Notwithstanding the foregoing, the Defendants will undertake a further IT search for any deleted drafts etc. which may still be assessable on the Defendant's IT system and will include any relevant documentation located in the proposed supplemental affidavit of discovery. Please confirm that this is a satisfactory means of meeting your request for 'reconstitution of documents.'"

13.The plaintiff further alleged deficiencies in discovery in respect of documents which they claimed were not discovered, but which were within the power, possession or procurement of the defendants and which fell within the categories of discovery ordered by Judge O'Malley. These were outlined the letter from solicitors for Ryanair of the 9th April, 2015 in which it was stated that it was "not credible" and "highly implausible" that documents of specified kinds were not discovered, and referring to other documents "clearly being in the possession of IALPA" which were not discovered.

14.The solicitors for the defendants responded by way of a letter dated 29th April, 2015. The letter rejected the contention that there had been a failure to meet discovery obligations, and said that the allegations made were based on "supposition and guesswork" and "speculation" and constituted an attempt to access documentation falling outside the scope of discovery ordered, or to demand documentation simply assumed to exist. They did accept that there were two instances where documents which could be relevant to certain categories of discovery were not discovered within those categories, although the documents had been discovered in relation to other categories. An offer was made to remedy this by swearing a supplemental affidavit of discovery to confirm the relevance of the documents at issue to those additional categories.

15.By letter dated 11th May, 2015, the plaintiff's solicitor wrote as follows:

> "We note that you also propose to address our concerns regarding the Second Schedule of your client's affidavit of discovery and in particular in relation to our 'reconstruction' of documents request. In addition this supplemental affidavit should set out in clear and precise terms your client's documentation retention policy and should confirm that complete discovery has been made in accordance with the categories of discovery ordered."

16.Subsequently, an affidavit was sworn by Evan Cullen on 22nd June, 2015, but it did not deal with the second schedule issue or the additional proposed IT search referred to in the letter of the 19th April, 2015. The present motion was issued on the 8th July, 2015. A fourth affidavit of discovery was sworn by Evan Cullen on the 28th October, 2015, after the issue of this motion, and this affidavit addressed the Second Schedule and matters connected to it in considerably more detail. In this fourth affidavit, Mr. Cullen swore as follows at paragraph 10:

> "I note that the Plaintiff has requested the Defendants to retrieve and/or reconstitute any deleted emails or other electronic documents which might be relevant to the categories of discovery the subject matter of these proceedings. However, I say and believe that the Defendants have undertaken extensive searches of their electronic records and have also arranged for a deep data search to be carried out in the second named Defendant's server and archive. These searches have not uncovered any additional documents or electronic records or data or deleted drafts falling within the relevant categories of discovery other than that listed in the schedules to the present affidavit."

The second schedule to the same affidavit was now subsequently expanded and provided as follows:

> "Following a security breach at the second named Defendant's offices in October 2010 involving unauthorised access to confidential information (entirely unconnected to these proceedings or to the Plaintiff), the second named Defendant has adopted a very conservative policy with regard to data retention.
>
> In general, the second named Defendant does not hold personal information on members other than basic information for administration purposes. When a member contacts the second named Defendant to seek assistance, a file is ordinarily opened in relation to the issue. As soon as that issue is addressed or the request for assistance is withdrawn or otherwise resolved, the file which has been opened is given to the member in question or destroyed. The second named Defendant is particularly concerned to ensure that it does not retain personal data relating to and identifying specific individuals for any longer than is necessary for the resolution of any issue or request that has been raised by a given individual.
>
> Your deponent, the third named Defendant hereto, can recall 4 specific occasions upon which I was shown documents which might have fallen within the categories of discovery Ordered by the High Court in the present case. However, in none of these cases did your deponent or any of the other Defendants obtain a copy of the documents in question. I confirm that I saw the documents described below only on the dates that same were shown to me by pilots and I do not know the current whereabouts of the said documents:
>
> *(i) Captain John Goss (November 2011)*
>
> Captain John Goss received a letter of reprimand from the plaintiff for ordering approximately 400kg of extra fuel above the figure recommended by Ryanair flight planning. I recall being shown the letter of reprimand and remember that the letter in question had been copied to the Pilot's personnel file. I never took a copy of this letter and last saw same on the date in November 2011 when it was shown to me by Captain John Goss. I do not know where this letter is now but I anticipate that a copy may have been retained by the pilot in question. This letter, if in the power, possession or procurement of the Defendants would likely fall within categories 3, 6, 13, 15, 20 and 28.
>
> *(ii) Captain John Goss (2007-2009)*
>
> Captain John Goss was disciplined for making a safety decision with regard to passenger boarding during refuelling. On a particular day Captain John Goss decided to delay boarding of the passengers until the fuelling of the aircraft was complete. The reasons given by Captain John Goss for refusing to use the procedure was extreme weather. I recall being shown the letter of reprimand in or around 2007 when the issue first arose. I had further contact with the pilot in question from 2007 until 2009 when the matter was resolved. I never took a copy of this letter and last saw same on the date 2007 when it was shown to me by Captain John Goss. I do not know where this letter is now but I anticipate that a copy may have been retained by the pilot in question. This letter, if in the power, possession or procurement of the Defendants would likely fall within categories 3, 6, 13, 15, 20 and 28.
>
> *(iii) Captain Marcus Monczkowski (2008-2012)*
>
> Captain Marcus Monczkowski, at a series of meetings held between 2008 and 2012 showed me or made me aware of letters from his Base Captain. I can recall seeing a number of letters at these meetings which had been marked to indicate that they had been copied to Captain Marcus Monczkowski personnel file. These letters repeatedly questioned the decisions made by Captain Marcus Monczkowski to carry extra fuel and challenged the reasons given by Captain Marcus Monczkowski for carrying extra fuel. I recall that some of the letters end with an instruction to meet someone superior to discuss Pilot Marcus Monchzkowski's performance. I never took a copy of any of these letters and last saw same on the dates between 2008 and 2012 when same were shown to me by Captain Marcus Monchzkowski. I do not know where these letters are now but I anticipate that copies may have been retained by the pilot in question. These letters, if in the power, possession or procurement of the Defendants would likely fall within categories 3, 6, 13, 15, 20 and 28.

(iv) Captain Giles De Lichtervelde (2010 to 2012)

Captain Giles De Lichtervelde ordered 302kgs of fuel for a particular flight in 2010 to 2012 and received a letter of reprimand. In that period the Ryanair policy was that pilots who ordered more than 300kgs over the planned fuel load had to give a written explanation for this additional fuel. I recall being shown the letter of reprimand at a meeting in between 2010 and 2012. I never took a copy of this letter and last saw same on the date 2010 when it was shown to me by Captain Giles De Lichtervelde. I do not know where this letter is now but I anticipate that a copy may have been retained by the pilot in question. This letter, if in the power, possession or procurement of the Defendants would likely fall within categories 3, 6, 13, 15, 20 and 28.

Following receipt of the said reprimand, Captain Giles De Lichtervelde suffered ongoing rostering problems and was repeatedly rostered out of his home base to serve in other bases at his own expense. I also recall seeing some correspondence in relation to these issues in the period 2010 to 2012. I never took a copy of any of these letters and last saw same on the dates in 2010 when same were shown to me by Captain Giles De Lichtervelde. I do not know where these letters are now but I anticipate that copies may have been retained by the pilot in question. These letters, if in the power, possession or procurement of the Defendants would likely fall within categories 3, 6, 13, 15, 20 and 28.

(v) Captain Greg Duggan (during 2011 to 2012)

Captain Greg Duggan during the course of a flight encountered a number of technical and operational issues. He elected to stand down the crew as he believed they had experienced enough stress during the course of this abnormal day. Captain Greg Duggan was disciplined for his decision. He subsequently pursued redress in the Courts in the UK. He is subject to a confidentiality agreement with Ryanair. I recall being briefed on and seeing Captain Greg Duggan's file prior to the resolution of the said UK proceedings in 2011/2012.

I never took a copy of any this file and last saw same on the dates when same was shown to me by Captain Greg Duggan. I do not know where the file is now but I anticipate that copies of same may have been retained by the pilot in question or his UK solicitors. The file, if in the power, possession or procurement of the Defendants would likely fall within categories 3, 6, 13, 15, 20 and 28.

Other than the documents described above, I cannot recall previously having in my power, possession or procurement any document falling within the categories of discovery which have been ordered which I no longer have. I say and believe that the other Defendants have not had any documents which they or I no longer have falling within the categories of discovery which have been ordered."

17.Notwithstanding the detail provided in this fourth affidavit of Mr. Cullen, when the matter then came on for hearing before the Court in October, 2016, there was still a lack of clarity as to what precise steps had been taken to search for electronic materials, and as to how the defendant's data retention system operated and what kind of materials were stored electronically, sufficient to prohibit the Court from adjudicating at that time on the complaint that the discovery had been inadequate. In the circumstances, the Court made an interim ruling indicating that it required further information from the defendants before it would rule upon the motion. It sought information on a number of matters, which were consolidated into two net questions by the parties by agreement:

"(i) Did the Defendants' data retention system involve storage and subsequent deletion of electronic records which may have fallen within the categories of discovery?

(ii) What steps have the Defendants actually taken to date, in so far as electronic searches are concerned, in order to comply with their discovery obligations?"

Further affidavits were then filed as follows.

18.An affidavit was sworn on the 5th December, 2016, by Mr Kris Vansteenkiste, a pilot, employed as a Captain with Aer Lingus. Mr Vansteenkiste stated therein that he was a member of the second named defendant, IALPA, and was responsible for maintaining the IALPA server and the hardware used by IALPA since October, 2010. He has some technical qualifications in IT matters although it seems clear that this is not his main profession or occupation. In response to the first of the agreed questions he stated that,

"I say and believe that the Defendant's data retention system did not involve the storage and subsequent deletion of electronic records which may have fallen within the categories of discovery at issue in the present case. I say and believe that for the reasons articulated below, only a limited amount of electronic documents falling within the categories of discovery would have been stored on the IALPA server at any point. Furthermore, to the extent that documents falling within the categories of discovery have been stored on the IALPA server, I say and believe that such documents have not been deleted and remain on the IALPA server.

[…] I say and believe that most of the material contained on the IALPA Server is basic information in relation to members of IALPA which is retained for administrative purposes […]

I say and believe that IALPA does not typically keep detailed personnel files in relation to members in either hard copy or electronic form. In this regard, I say and believe that the second named Defendant is conscious of the obligations created by the Data Protection Acts in relation to personal data and it endeavours not to accumulate or retain more personal data from members than it needs to carry out its functions."

He also gave evidence on the treatment of hard copy documents, saying that "I say and believe that hard copy documents such as correspondence which is sent by or to IALPA is also uploaded to ZyIndex archives", which he clarified are folders wherein administrative information in relation to members is organised and can be reviewed and updated as required. He went on to provide that,

"As appears from the affidavit of Evan Cullen of 28 October 2015, in some instances pilots will show documents to IALPA representatives without IALPA ever making a physical or electronic copy of such documents. In other instances, particularly in the case of personal rather than collective issues, IALPA may open a physical, card copy file in relation to a particular issue which will be returned to the relevant member or disposed of once that particular issue have been concluded."

He then addressed the issues of retention and deletion of documents as follows,

> "In certain cases, I say and believe that members do authorise IALPA to retain copies of and upload documents relating to issues concerning the Plaintiffs and which personally identify the members in question, but this is relatively unusual and most members are concerned to ensure that they are not personally identifiable from documents furnished to IALPA in this context.
>
> I say and believe that IALPA was aware of the necessity of conducting a thorough search of the IALPA Server in order to comply with its discovery obligations in the present case […]
>
> I say and believe that the only documents routinely deleted from the IALPA Server are duplicates or drafts. […]
>
> Accordingly I say and believe that the day to day operation of the data retention system operated by the Defendants does not involve the storage and subsequent deletion of electronic records likely to have fallen within the categories of discovery in circumstances where relatively few documents falling within the relevant categories would have been uploaded to the IALPA Server, and where those that were uploaded would not be deleted unless they were duplicate or draft documents.
>
> Furthermore, I say and believe that I have conducted a specific search for any documents which have been deleted from the IALPA Server which does not suggest that any discoverable documents have been deleted. In light of the foregoing, I say and believe that the answer to the Court's first question is no, the Defendants' data retention system did not involve storage and subsequent deletion of electronic records which may have fallen within the categories of discovery."

In relation to the second question posed by the Court, referred to above, Mr Vansteenkiste gave evidence that most of the work was undertaken by himself, a Ms. Danni Hickey of IALPA and Captain Evan Cullen. He said that Ms Hickey and Mr Cullen undertook a review of documents to identify and assemble those of relevance and that Ms. Hickey conducted a manual review of the Defendants' hard copy records. In relation to his personal involvement in the discovery process he provided as follows:

> "I say and believe that my primary involvement was in connection with electronic searches undertaken in relation to the IALPA server. […]
>
> I determined that Windows Search and Libraries was the most appropriate software to use to search the Server. […] I concluded that Windows Search and Libraries was likely to provide quicker and more complete searches than alternative party software.
>
> I Confirm that I used Windows Search and Libraries to search the IALPA Server as a whole for documents which might be relevant to the categories of discovery the subject matter of this case."

He described conducting "specific in depth search[es]" for a range of file extensions and Open-Office extensions, as well as key word searches using the individual words: "Fuel"; "Ryanair"; "Mayday"; "Pan-pan"; and "Disciplinary". He then referred to a list of files produced by the searches and continued,

> "I say and believe that any file on the said list which was identified as a possible positive match with any category of discovery was printed and manually reviewed by Ms. Hickey and Capt. Cullen with a view to confirming its relevance to the categories of discovery ordered by the Court. […]
>
> I say and believe and am advised that once the range of discovery documents was appropriately narrowed by the above search and review process, the documents in question were furnished to the defendants' solicitors and counsel […]"

He then discussed steps taken in relation to deleted documents in October, 2015: "I say and believe that I also undertook a specific search for deleted documents and files on the IALPA Server which could be of relevance to the categories of discovery herein." He stated that he undertook research to determine the most appropriate programme and used that program to run a "deep scan/search" of the IALPA Server "seeking possible deleted files or documents", as a result of which 8341 deleted files and 4245 deleted documents were found. In relation to those he stated that "I say and believe that the vast majority of these files and documents were system files or other temporary files routinely created and deleted by the operating system on the IALPA Server […] or otherwise temporary in nature." He then provided a list of the file types identified by this process and stated,

> "I say and believe that the above system files did not contain information which fell within the categories of discovery at issue in the present case. Rather, I say and believe that these files are related to the technical operation of the IALPA Server and the software which it runs."

He also described "specific in depth search[es]" which he undertook for a range of file extensions, Open-Office extensions and key words, identical to those referred to above in the context of his initial search of the IALPA Server. He stated that in a similar manner to his initial search, he furnished the list of files produced by these searches to Ms. Hickey with whom Captain Cullen reviewed the files to confirm their relevance to discovery. He then stated that "I say and believe that this search for deleted documents on the IALPA Server did not identify any additional documents falling within the relevant categories of discovery." He concluded by saying:-

> "I say and believe that the searches which were carried out on the IALPA Server were conducted diligently and I believe that they were sufficient to identify any discoverable documents present on the IALPA Server.

If any discoverable documents had previously been on the IALPA Server and been deleted, I expect that same would have been located by the Recuva software and subsequent key word search which I undertook. In circumstances where the said search did not locate any discoverable documents, it does not seem to your deponent that electronic records which may have fallen within the categories of discovery having been deleted from the IALPA Server."

19.A replying affidavit was sworn by Simon Collins, a Director in the Cybersecurity Advisory practice of Ernst & Young, in Ireland, which stated as follows:-

> "By way of initial observation, the information contained in the Affidavit of Mr. Vansteenkiste appears largely related to one aspect of the discovery process, which is how one computer system was searched. Mr. Vansteenkiste does not detail how the overall discovery exercise was approached and the steps taken by the defendants during the discovery process.

> For example Mr. Vansteenkist does not describe how a list of custodians who may hold or have held relevant documents were identified or how sources of potentially relevant documents (such as email mailboxes) were identified and either included or excluded from the discovery process.
>
> One would normally expect this level of detail to be contained in a 'Discovery Plan' as recommended by the CLAI Good Practice Discovery Guide (v2.0 – November 2015) […]
>
> [T]he Discovery Plan sets out the approach and steps taken in the discovery process and governs all document sources, both electronic and hardcopy, which will be included in the discovery process and provides for how documents will be managed throughout the discovery process, consisting of the following eight phases:"

He set out the phases, including the identification, preservation, collection, processing, review, analysis, production and presentation of documents, and went on to say:

> "Accordingly in the absence of sufficient detail being provided in Mr Vansteenkiste's Affidavit as to how the overall discovery exercise was approached and the steps taken by the Defendants during the discovery process and without sight of the defendants' Discovery Plan, it is not possible for me to give a view as to the completeness or otherwise of the Defendants' discovery process and to assess whether the defendants have adequately addressed the two factual questions raised by the Court.
>
> I am advised by the Plaintiffs solicitors that the purpose of the Defendant's Affidavit was to address the two factual questions raised by the court. In the absence of the full details as to how the Defendants conducted their discovery exercise, it is difficult to understand how the Defendants have fully answered these questions."

20.A final, and fifth, affidavit was sworn by the third defendant, Mr. Evan Cullen, on the 27th January, 2017, in reply to the affidavit of Mr Collins. Mr Cullen explained that Mr Vansteenkiste was outside the jurisdiction at the time and unavailable to swear an affidavit. Mr Cullen's affidavit provided as follows:-

> "I note that Mr. Collins suggests at paragraph 4 of his affidavit that Capt. Vansteenkiste's affidavit largely relates to one aspect of the discovery process, namely "*how one computer system was searched*." I say and believe that this criticism is misplaced in circumstances where the second named Defendant, IALPA is a relatively small organisation and only has one computer system, namely the IALPA Server referred to in Capt. Vansteenkiste's affidavit.
>
> I say and believe that IALPA use 5 computers, all of which are connected to the IALPA Server and all of which have been searched in the manner described in Capt. Vansteenkiste's affidavit.
>
> At paragraph 23 of his affidavit, Capt. Vansteenkiste confirmed that the Windows Search which he conducted has instant search capabilities for a range of file types including e-mail. I confirm that I am aware, from my own involvement in the discovery process undertaken by the Defendants, that email attachments are saved on the IALPA server and were included in the searches which were undertaken and which are described in Capt. Vansteenkiste's affidavit.
>
> I do not accept that there was any obligation on the Defendants to adhere rigidly to the Good Practice Guide referred to by Mr. Collins. Notwithstanding the foregoing, I say and believe that Capt. Vansteenkiste's affidavit sets out the steps which were followed in the Defendant's discovery process in considerable detail and it is clear that, in substance, the steps recommended by Mr. Collins have been followed.
>
> I say and believe that a diligent and thorough electronic search has been conducted by the Defendants".

The first relief sought: an order striking out the defence for failure to make adequate discovery

21.I was referred to a number of the leading authorities on the test to be applied by the Court on an application to strike out a defence for failure to make proper discovery: *Mercantile Credit Company of Ireland Ltd. and Anor v. Heelan and Ors* [1998] 1 I.R. 81; *Murphy v. Donohoe Ltd. And Ors* [1996] 1 I.R. 123 ("The Fiat case"); *Joseph O'Connor (Nenagh) Ltd v. E.S.B.* [2004] IEHC 154; *Johnston v. Church of Scientology and Ors* (Keane C.J., 7th November, 2001); *Go2capeverde Ltd and Anor v Paradise Beach Aldemento Turistico Algodoeiro S.A.* [2014] IEHC 531; *Quinn and Ors v. I.B.R.C. (in special liquidation) and Anor* [2014] IEHC 577; and *Ryanair Ltd. v The Revenue Commissioners and Ors* [2016] IEHC 48 (Barrett J.). I do not think it is necessary to summarise each of these cases as the principles established by those authorities are well known. It is well established that the test for striking out a defence establishes a high threshold for a plaintiff to overcome and that the power to strike out such a defence is a matter within the discretion of the Court. As Hamilton C.J. stated in *Mercantile Credit Company of Ireland Ltd. and Anor v Heelan and Ors:-*

> "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."

In the *Fiat Case*, Barrington J. relied on the dictum of Hamilton C.J. in finding,

> "Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court.
>
> Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases."

Baker J. more recently set out the applicable principles in her High Court decision in *Go2capeverde Limited and Anor v Paradise Beach Aldemento Turistico Algodoeiro S.A*, in which she described the test as a "three part process", and stated:-

> "I am satisfied, having regard to the authorities, that the purpose of O. 31, r. 21 is not to punish the defaulting party, but to secure the interests of justice, and that the true test I must apply is to ask whether there has been a failure to make discovery, and then to consider the reasons for the failure. At that point even in circumstances where that failure is deliberate and malicious, the proceedings should be struck out only if it satisfied that justice cannot be done between the parties. The failure to make discovery is not the determining factor and the fact that a party deliberately obscures documents is not sufficient, there must in addition be a substantial risk of injustice which cannot be remedied by the making of an order for further and better discovery and/or in costs. What this means in essence is that the court must be satisfied that the risk of injustice has been or can be ameliorated, and that the omitted documentation has or will be furnished before trial. Thus the court must take a view as to the degree of contrition shown by a party in default, as well as whether that party has shown a willingness to remedy the omission, and whether the omission can be dealt with in a way that furthers the interest of both parties."

Having regard to the affidavits of discovery on behalf of the defendants in this case, I am satisfied that bona fide attempts were made to locate both electronic and non-electronic documents and that there was no evidence of any attempt on the part of the defendants to avoid making discovery or of any culpable or wilful omission or neglect in this regard. Nor was I satisfied that there was a real risk of an unfair trial by reason of the manner in which the defendants had approached discovery. On the contrary, it seems to me that the plaintiff was making substantial attempts to comply with the discovery order and to remedy any errors that came to light in the course of the process, for example, by swearing additional affidavits to deal with matters such as additional documents which came to light and the re-categorisation of documents already discovered. As regards the non-electronic discovery, I have reviewed the complaints made on behalf of the plaintiff both in the letter of the 9th April and the affidavit of Ms Yvonne Moynihan, as well as the responses of the defendants, and it does not appear to me that the complaints have been substantiated, let alone that the defendants are somehow at a level of such default that the relief of striking out the proceedings would be justified. I therefore refuse the first relief sought.

The second relief sought: an order requiring the defendants to search for and identify electronic documents and other electronically stored information falling under the categories of discovery that have been deleted by the defendants and which may be reconstituted, together with an order directing that the defendants reconstitute and make discovery of such electronic documents and other electronically stored information.

22.It is argued on behalf of the plaintiff that the attempts to date to retrieve electronic material falling within the categories of discovery, and in particular 'deleted' electronic material, have been inadequate, and that the court should make orders setting this right. The notice of motion itself sought an order directing the defendants to take certain steps in terms of searching and 'reconstituting' the deleted material, but during the course of the hearing, it was additionally argued on behalf of the plaintiff that the Court should order that the plaintiff be permitted to send in an independent expert who would examine the defendant's database. It appears that there is little reported authority on the question of electronic searching of documents for the purpose of discovery. I was referred to the following authorities.

23.In *McGrath v. Trintech Technologies Ltd. and Anor* [2005] 4 I.R. 382, court orders were made for the examination of laptops for deleted material in the following circumstances. The plaintiff was employed by the first defendant which was a subsidiary of the second defendant, companies in the information technology sector. The plaintiff's contract of employment contained an express provision that his employment could be terminated on one months notice. During his employment with the first defendant, the plaintiff suffered bouts of ill-health of a physical nature. While on sick leave he was asked by the first defendant to go on an assignment to Uruguay. The plaintiff claimed that when he took up the assignment in Uruguay the terms of his contract of employment were varied, in that he was guaranteed that the defendant would retain him in employment for a period of one year following his return. He also claimed that there was an express or implied contractual term that the defendant would not dismiss him while he was on certified sick leave and reliant on the provision of permanent health insurance. The first defendant denied that any such terms were part of the contractual relationship between them. During the period of his assignment the plaintiff alleged that he was subjected to grave work related stress and pressure which resulted in injury to his psychological health and well being. On his return from Uruguay in June, 2003, the plaintiff was absent from work on certified sick leave. In August, 2003, he was informed by the first named defendant that he was being selected for redundancy. He brought proceedings in the High Court and ultimately received an award of damages for breach of contract. A number of legal issues arose, but for present purposes, what is relevant is that, when ruling on the conflict of fact in the case, Laffoy J. commented on the electronic searching of laptops that had taken place. Having referred to the factual conflict in the case, as to whether the plaintiff had been given any assurance as to his job tenure, and the absence of documentary evidence, Laffoy J went on to say: -

> "The long hearing in this matter, which lasted twelve days, was frequently punctuated by complaints by each side in relation to compliance with the other of orders for discovery made in the matter. In relation to complaints made concerning compliance by the first defendant, in closing the case counsel for the plaintiff properly recognised that these matters had not been the subject of motions for further and better discovery prior to the hearing. However, he urged that the manner in which the first defendant dealt with the discovery went to the credibility of the first defendant.
>
> This submission has to be put in context. On the 13th January, 2004, this court (O'Sullivan J.) made an order for discovery against the plaintiff. An unusual feature of the order was that the court acceded to an application by the first defendant, on its undertaking to bear the costs of the expert, that the plaintiff deliver up to an independent expert nominated by the first defendant, two lap-top personal computers, which were the property of the first defendant but were in the possession of the plaintiff, for the purpose of reconstituting documents contained on the hard drives. This order was complied with. Subsequently, on the 9th February, 2004, on an application by the plaintiff, I made an order for discovery against the defendants which related to, *inter alia*, all deleted documents relating to matters in issue in the proceedings on the first defendant's computers in the possession of Mr. Downes, Mr. Cleary, Mr. Cahill, Paul Byrne, the finance director of the first defendant, John Doran, who took over as general manager in Uruguay when the plaintiff's posting was completed and Mr. McGuire.
>
> The manner in which that discovery order was complied with is of relevance. First, it was not until the eleventh day of the hearing that relevant data which had been archived on to the hard drive of Mr. McGuire's computer was discovered. Secondly, Mr. Byrne in the course of his evidence testified that in the summer of 2003 the hard drive of his laptop was damaged when it fell out of the baggage compartment in an aircraft, resulting in the loss of data. Mr. Byrne further testified that at the time the policy of the first defendant in relation to "backing-up" data did not apply to lap-tops. That relevant data had been lost in this manner was not deposed to in the affidavit of discovery filed on behalf of the first

> defendant and it only became apparent in the course of the hearing. The first defendant's final position on this was that, despite the best efforts of the M.I.S. department of the first defendant to reconstitute the hard drive of Mr. Byrne's lap-top, not all documents were restored. While these failures on the part of the first defendant have been explained on the basis that they were due to inadvertence, that explanation has to be viewed against the background of the measures to which the first defendant resorted to get discovery against the plaintiff. Further, in the context of the factual dispute between the plaintiff and Mr. Cahill, Mr. Cahill deposed to the fact that on leaving his employment with the first defendant, he wiped his lap-top computer of all files as a security measure. Finally, the discovery made by the first defendant revealed an extraordinary paucity of electronic or documentary records in relation to the selection process for the redundancies which were effected in the summer of 2003.
>
> The relevance of all of the foregoing factors, in my view, to the resolution of the factual conflict between the plaintiff and Mr. Cahill is that the absence of any electronic or documentary record corroborative of the plaintiff's account cannot be a significant consideration."

24.While there is no general discussion by Laffoy J. of the circumstances in which it is appropriate for a court to make an order for the examination of a computer or laptop for deleted material, certain points may nonetheless be noted with regard to the above passage. In the first place, Laffoy J. considered that the original order made by O'Sullivan J. in respect of examination of the plaintiff's laptop was 'unusual'. Secondly, the order she herself made for the examination of certain specific laptops used by certain officers or employees of the defendants arose in a very specific context where there had been clear evidence from witnesses that various particular events had taken place, which were indicative of potentially relevant material having been deleted from those laptops. Further, the individuals were actually working in the information technology sector and the question was as to the terms of a contract of employment between the plaintiff and the company. In all of those circumstances, it seems obvious that Laffoy J. considered the making of the order to have been likely to yield potentially relevant evidence to the issues in the case.

25.In *Atlantic Shellfish Ltd. and Anor v Cork County Council and Ors.* [2007] IEHC 215, Barr J. (at pages 5-6) described the duty "to search archive of records and files diligently for material documents including computer records" and the duty to make "a reasonable search for documents falling within the scope of the order." In the *Thema case (Thema International Fund plc v. HSBC Institutional Trust Services (Ireland)* [2012] 3 I.R. 528), Clarke J. described the four-stage method which had been adopted by HTIE to comply with their discovery obligations, which he described as (1) retrieval; (2) uploading and de-duplication; (3) search; and (4) review. He described each of the processes in some detail. However, he also went on to say that although the approach that had been adopted was entirely appropriate, it was not necessarily an approach that had to be adopted in every case. The affidavit of Simon Collins, on behalf of the plaintiff in the case before me, exhibited the 'Good Practice Discovery Guide' issued by the Commercial Litigation Association of Ireland in November, 2015. This is a lengthy document which was drafted, in its own words, "to provide assistance to practitioners in the form of good practice recommendations and guidance". The Guide "contains an overview of the typical steps undertaken in a discovery project" and the information and recommendations in the Guide are "partially drawn from, and are consistent with, recognised international standards". The plaintiff relies upon these authorities and the affidavit of Mr. Collins to argue that the steps taken by the defendants to date have been inadequate.

26.The defendant draws the Court's attention to authorities stressing that discovery must always be directed towards documents which are relevant and necessary for the disposal of the action, and that discovery should not be ordered on a speculative basis. Counsel relied in this regard on the *Sterling-Winthrop Group Ltd. v Farbenfabriken Bayer A.G. [*1967] I.R. 97 and *Green Pastures (Donegal) v Aurivo Co-Operative Society Ltd. & Anor* [2014] IEHC 209. The defendant relies upon the affidavits sworn to argue that: (a) there is little likelihood of deleted electronic material existing on the database in the particular circumstances described; and (b) the searches done to date are adequate in the circumstances.

27.When considering the issue of searches of electronic data in the context of discovery, it seems to me that there can be no doubt the fundamental criteria of 'necessity' and 'relevance' in the area of discovery continue to apply. The question is what this means in practical terms when searching for electronic documents. The reasonableness or adequacy of the methods adopted to carry out the search of electronic data seems to me to depend upon a variety of matters which may vary from case to case, including but not limited to the following: (1) the nature of the case and the particular issues falling for decision in the case, as disclosed by the pleadings; (2) an assessment of the likelihood of electronic information relevant to those issues being found upon a search of the electronic database in question; (3) the size and nature of the electronic database to be searched; (4) the qualifications and experience of the person carrying out the electronic search, as well as the software used to do so; (5) the likelihood of the same information being located elsewhere, and (6) where a search of deleted material is sought, whether there is likely to be relevant material within 'deleted' material as distinct from non-deleted material . There is a broad spectrum of possible types of case. For example, at one end of the spectrum one can readily envisage a large commercial case involving many thousands of documents held in a large complex database of a company and accessed by multiple users, and where it is obvious from the pleadings that the documentary evidence will play an important role in assisting the Court to determine the issues in the case. At the other end of the spectrum might be a case involving a single person with a single personal computer or laptop, where the issues look likely to be primarily decided with reference to oral evidence. In between those possibilities lie many possible variations of the factors described.

28.The 'Good Practice Discovery Guide' (version 2.0-November 2015), issued by the Commercial Litigation Association of Ireland, is undoubtedly an excellent document setting out a roadmap for large commercial cases to which the issue of e-discovery is central. The detailed, rigorous, and indeed, costly, approach to discovery envisaged by that document is entirely appropriate in certain cases, but, in my view, is not necessarily required in all. Indeed, I note that in the *Thema* case, referred to above, Clarke J. pointed out that the four-stage approach that he had described would not be necessary in all cases.

29.In the present case, the following matters appear to me to be relevant. In the first instance, IALPA uses five computers operating off a single server. This is not, therefore, a situation involving a large and complex computer system as might be the case of the database of a large entity such as a commercial company or a bank, where there might be numerous custodians different kinds of data. Secondly, the evidence is that there is, for data protection reasons, a policy of maintaining as little information as possible on the IALPA electronic database. The primary objective of the database is to store administrative details about the individual pilots only. This is contrast to the situation of a company or bank, for example, where much or even most of the business is transacted in electronic form. By way of contrast, I note the affidavit of Evan Cullen, sworn on the 28th October, 2015, where he described how, when a member contacts IALPA for assistance, "a file is ordinarily opened in relation to this issue. As soon as that issue is addressed or the request for assistance is withdrawn or otherwise resolved, the file which has been opened is given to the member in question or destroyed." The affidavit further provides that in some instances, documents may be shown to IALPA, without a copy ever being retained by IALPA in either physical or electronic form. I also note the affidavit of Mr. Vansteenkiste, which explained:

> "I say and believe in the case of members contacting IALPA for assistance in relation to issues concerning the Plaintiffs, such members are often reluctant to furnish IALPA with documentation which would specifically identify the members in

> question. As a result, I say and believe that a relatively limited amount of documentation has been given to IALPA by members in relation to issues concerning the Plaintiffs or uploaded onto the IALPA Server. […]

In other cases, IALPA receives copies of documents relating to issues concerning the Plaintiffs from members, along with permission to upload same onto the IALPA Server. I say and believe that the documents which are given to IALPA in this way and uploaded to the ZyIndex archives on the IALPA Server will usually be Ryanair documents which are not addressed to and do not identify individual pilots, for example memos issued by base captains to all pilots, several of which have been included in the discovery which has been made by the Defendants in the instant case".

Thirdly, this is a defamation case in which the defences pleaded are "truth" and "honest opinion". The case will be fought on issues such as what the objective facts are concerning the Ryanair policy on aircraft fuel, and whether this policy was safe, as well as whether Mr. Cullen had an honest opinion based on those facts or whether he was actuated by malice. Fourthly, the evidence (as set out in Mr. Cullen's fourth affidavit) is that such documents (which were subsequently deleted) as did come to Mr. Cullen's attention through IALPA concerning the issue of Ryanair's fuel policy were, in the first instance, hard copy documents and not electronic documents, and secondly, emanated from Ryanair itself. Thus, when he referred to deleted documents, it appears that *all* of the deleted documents he was referring to were hard copy and not electronic documents. Finally, the person who conducted the electronic searches in this case was a pilot with reasonable qualifications in the IT area and who explained the particular software and methodology used to carry out the searches.

30.I note that the 'Good Practice Discovery Guide' says (at page 6) that "The costs of discovery should be proportionate to the value under dispute in commercial matters. In matters where a financial value is not in dispute, the costs of discovery should be proportionate to the value which any documents discovered would bring to the matter. Proportionality should take into account the accessibility of the data and the cost of retrieval, in addition to the cost of searching, reviewing, and production. *Parties should not be required to produce deleted or residual data absent a demonstrated need and relevance*". (emphasis added) In the present case, the bulk of the plaintiff's complaint in this motion related to the category of *deleted* electronic data. It seems to me that the initial affidavits sworn on behalf of the defendants may have given the plaintiff the impression that substantial amounts of information had been received electronically, or received in hard copy and rendered into electronic format (such as by scanning), and had subsequently been deleted. This does not now appear to be the true position, having regard to the totality of the evidence presented in the affidavits sworn on behalf of the defendants. On the contrary, it seems that very little information generally was put into, or maintained in, electronic form by IALPA; that such complaints by IALPA members as related to the matters in issue in this case were dealt with by IALPA by way of hard copy documents; and that there is little reason to believe that further searches of deleted electronic searches would yield anything relevant to the issues in this case.

31.In all of the circumstances, I am satisfied that the steps taken to search the IALPA database for electronic material were reasonable and adequate, and that to order further investigations of this database would be unlikely to yield further relevant material and would be disproportionate and unecessary. I therefore refuse the second relief sought. It also follows that it is not necessary to consider the further relief not pleaded but suggested on behalf of Ryanair during the course of the hearing, namely, the appointment of an independent expert to examine the IALPA database.