

THE HIGH COURT

[2013 No. 8837 P.]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

CHANNEL FOUR TELEVISION CORPORATION AND BLAKEWAY PRODUCTIONS LIMITED

DEFENDANTS

IRISH AVIATION AUTHORITY

NON PARTY

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

1. On 12th August, 2013, the first named defendant broadcast a programme as part of its "Dispatches" series, entitled "Secrets from the Cockpit". The programme was produced by the second named defendant (for ease of reference I will refer to both defendants collectively as "Channel 4").
2. The programme broadcast by Channel 4 alleged, or there were reasonable grounds for alleging, that Ryanair compromised the safety of passengers, crew and those living under the flight paths of Ryanair flights, particularly in the vicinity of airports, in pursuit of financial gain. In support of this, Channel 4 listed a number of "fuel Maydays" issued by Ryanair flights which had been diverted from Madrid, Spain to Valencia in July, 2012.
3. There were further allegations concerning the fuel policies adopted by Ryanair, namely an alleged failure to preserve cockpit voice recordings and thereby impeding the investigation of incidents and work practices followed by Ryanair in dealing with pilots.
4. In the days following broadcast of the programme Ryanair issued proceedings seeking damages, including aggravated and exemplary damages, for defamation. A full defence was delivered on behalf of Channel 4 pleading, *inter alia*, the truth of the matters broadcast.
5. By notice of motion, dated 21st July, 2016, Channel 4 sought "non party" discovery against the Irish Aviation Authority ("the I.A.A."). The I.A.A. is a company and statutory body established pursuant to the Irish Aviation Authority Act, 1993 and has a general function to regulate Irish Civil Aviation.
6. The notice of motion sought four categories of documents which I set out hereunder:-

Category 1:

All documents relating to the I.A.A. "Ryanair weather diversions Madrid" report ("the I.A.A. report") which pertains to the "fuel Mayday" emergencies declared on three Ryanair flights to Valencia, Spain on 26th July, 2012 ("the Valencia incidents") to include:-

- all internal documents within the I.A.A. concerning the I.A.A. report, its creation and dissemination;
- all documents between the I.A.A. and other parties including the plaintiff and the Spanish Aviation Authorities concerning the I.A.A. reports and/or its creation and dissemination.

Category 2:

All I.A.A. documents, to include internal correspondence and all other documents regarding the creation and the dissemination of a press release by the I.A.A. on 12th August, 2013 concerning the broadcast of the defendants "Secrets from the Cockpit" programme on that date; and the formulation and publication of the reissued version of the same press release on 15th August, 2013;

Category 3:

All documents relating to the creation and dissemination of the document (on I.A.A. stationary) headed "response issued to Daily Mail 8th August, 2013 re Ryanair Plc" and signed by Tony Lane, Corporate Communications, Irish Aviation Authority.

Category 4:

All documents relating to:

- (a) the I.A.A.'s meeting on 18th September, 2012 with representatives of the Department of Transport, Tourism and Sport and the Spanish Ministry of Development and
- (b) the creation and dissemination of the document dated 18th September, 2012 entitled "Statement by the Department of Transport, Tourism and Sport and the Spanish Ministry of Development".

Order 31 r. 29 of the Rules of the Superior Courts:-

7. O. 31 r. 29 provides:-

"29. Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court ... to make discovery of such documents or to permit inspection of such documents..."

Issues arising in the action:-

8. The statement of claim states, *inter alia* the following:-

"12. The plaintiff shall rely on the following facts and matters to support a claim for aggravated and/or exemplary damages:-

(iv) the defendants failed to give any sufficient weight or prominence to the report of the Irish Aviation Authorities independent investigation into the three weather diversions to Valencia on 26th July, 2012 (said report was made available to the defendants by the plaintiff prior to the broadcast of the programme)

(vi) the defendants failed to inform viewers that, in respect of the three weather diversions to Valencia on 26th July, 2012, the official I.A.A. report confirmed that the three planes had taken extra fuel but had flown for one hour more than planned due to severe weather conditions over Madrid and the diversions to Valencia thereby explaining why they were running close to their final reserve fuel figures at the time they complied with the EU fuel emergency procedure. These facts were made clear by the Official I.A.A. report into these landings, but this report was excluded in its entirety from the programme..."

9. In reply to Channel 4's defence Ryanair pleaded the following:-

"4. The plaintiff pleads specifically that the CIAIAC report referred to in para. 6 (b) to (d) is manifestly inaccurate and factually untrue. Ryanair's fuel policy unambiguously confirms that final fuel entirely at the discretion of each captain.

5. The plaintiff pleads specifically that contrary to the contention of the defendants at particular 6 docket (A) – (d), the Irish Aviation Authority (I.A.A.), who oversee the standards of Ryanair in accordance with Europe wide regulations set by the European Aviation Safety Agency (EASA), investigated the Valencia incidents and disproved the contents of the CIAIA report.."

11. In response to para. 6 (1) of the defence, the plaintiff specifically pleads that investigators were able to investigate the three diversions using the crew voyage reports, Ryanair's in-flight telemetry and the voice recordings provided to investigators by air traffic control in Valencia. Specifically, it is pleaded that the I.A.A. makes no reference whatsoever of CVR's in its official report, since it would have added nothing to the investigation.."

10. It is entirely clear from these extracts from the pleadings that both the role and involvement of the I.A.A. and the CIAIAC (the Spanish Aviation Authority) are relevant in these proceedings.

Affidavits:-

Affidavits were filed by Mr. Simon McAleese and Ms. Karyn Harty on behalf of Channel 4 and Ms. Yvonne Moynihan on behalf of Ryanair. Ms. Aileen Gahan filed an affidavit on behalf of the I.A.A.

11. Ms. Aileen Gahan, company secretary in the course of her affidavit makes a number of points:-

(i) The I.A.A. is a non party in the proceedings and does not wish to engage in a debate about the relevance of the four categories of documents sought in the proceedings;

(ii) Although the I.A.A. does not agree with certain statements and inferences contained in the affidavits filed on behalf of the parties, it wishes to make specifically clear that the I.A.A. is entirely independent and refutes any suggestion that its interests are in some way aligned with those of Ryanair;

(iii) In July 2012, Ryanair submitted mandatory occurrence reports in relation to the flight diversions of 26th July, 2012 in accordance with the relevant aviation regulations;

(iv) The I.A.A. states that it is important that companies (including Ryanair), their employees and every person involved in the aviation industry supply information in relation to safety issues and occurrences on the basis that such information will be treated in confidence and will not be used to penalise them nor will it be divulged;

(v) The I.A.A. wish to make its concerns about confidentiality and its legal obligations under the relevant Irish and EU legislation that deal with aviation safety known to the Court. The I.A.A. wish to voice their concerns that if a precedent is set whereby such information is disclosed, this may have a "chilling effect" on persons in the aviation industry reporting occurrences to the I.A.A. in the future.

Confidentiality

12. In a separate motion between Channel 4 and Ryanair I have considered the issue of the disclosure of documents under the relevant Irish and EU aviation legislation. In the course of giving judgment, I set out the requirement of a court to carry out a "balancing test" in deciding whether to direct the disclosure of documentation given in confidence to an aviation authority, including the I.A.A. In doing so, I had regard to the "chilling effect" referred to by Ms. Gahan.

13. Having carried out the "balancing exercise", I concluded that, in this case, the balance lay in favour of full disclosure, subject to certain redactions, of documentation furnished under Irish/EU aviation legislation. Therefore, in my view, confidentiality is not an issue in this application.

Relevance and necessity

14. Order 31 r. 29 makes specific reference to documents being "relevant". It would appear that "necessity" is also a criteria. I refer

to *Keating v. RTE and the Commissioner of An Garda Síochána (non party)* [2013] IESC 22 (unreported, Supreme Court, 9th May, 2013) McKechnie J. stated:-

"56...although relevance and necessity are separate concepts, there is a close relationship between the two. Hence, once the former criteria is established it will most usually follow that the documents in question can also be regarded as being necessary, i.e. necessary within the meaning of O.31 r.12 (3) RSC which also applies to *non-party* discovery. Indeed, this point was made by Geoghegan J. in *Taylor v. Clonmel Healthcare Ltd* [2004] 1 I.R. 169, and echoed in very much the same language by Murray J. in *Framus Ltd. and Ors. v. CRH plc and Ors* [2004] 2 I.R. 20. An important indicator in this regard is whether the documents requested are required for the fair disposal of the issue to which they are addressed. If they are, it is most likely that they will be considered necessary."

15. There is also authority to the effect that an order for third party discovery should only be made in circumstances where the documents in question are not readily available to be discovered by a party to the action. See the judgments of Morris P. and Moran J. in *Chambers v. Times Newspapers Ltd* [1999] 2 I.R. 424.

Applying the authorities to the categories of documents sought:-

16. I have already set out what I believe to be the relevant passages of both the statement of claim and reply delivered by Ryanair.

Category 1

Given the matters pleaded by Ryanair, it seems to me that there can be little doubt but that the documentation sought in this category is both relevant and necessary. I do have some concerns that there may be duplication with categories of documents sought in the inter parties discovery but, notwithstanding this, I will direct that discovery be made in terms of category 1.

Category 2

As Ryanair is relying upon the report of the I.A.A. to support its claim for aggravated and/or exemplary damages it seems to me that the documents sought in category 2 are both relevant and necessary. In reaching this conclusion, I have had regard to the matters deposed to at para. 17 et seq. of the affidavit of Simon McAleese, solicitor, wherein he sets out terms of correspondence that passed between Channel 4 and the I.A.A. both prior to and after the broadcast of the programme in question.

Category 3

I do not consider that Channel 4 has established that the documentation sought in this category is either relevant or necessary for its claim. It seems to me that it is implicit in this request for documentation that there is in some sense an "unhealthy" relationship between Ryanair and the I.A.A. Such is not pleaded.

Category 4

In this category, Channel 4 seeks documentation from the I.A.A. concerning a meeting on 18th September, 2012 with representatives of the Department of Transport, Tourism and Sport and the Spanish Ministry of Development which appears to have resulted in a "joint statement". It seems to me that seeking to "ascertain the full context, authorship, iterations and meanings of the Joint Statement", as per Channel 4, does not form a basis for directing Third Party Discovery. In my view, the affidavits filed by Channel 4 have not established such documentation is "necessary". Further, I am of the view that such documentation as may involve the relevant Spanish authorities is covered under Category 1. In reaching this conclusion, I am mindful of the passage from Kelly J. in *Re National Irish Bank Ltd (No. 4,)* referred to above.