Judgment

Title: Ryanair Limited -v- Channel 4 Television Corporation & anor

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[2017] IEHC 651

THE HIGH COURT

[2013 No. 8837 P.]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

CHANNEL 4 TELEVISION CORPORATION AND

BLAKEWAY PRODUCTIONS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 5th day of October, 2017

Background

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

2. The first Ryanair flight, with 150 passengers aboard, was requested to hold for a landing slot. However, the crew of this aircraft indicated that it did not have sufficient fuel and subsequently issued a "fuel Mayday".

3. The second Ryanair flight, with 179 passengers on board, radioed the airport that they needed to start an approach to landing in the next two to four minutes. Seven minutes later this flight issued a "fuel Mayday".

4. The third Ryanair flight found itself in a similar position and also issued a "fuel Mayday".

5. A "fuel Mayday" is issued when an aircraft is going into its fuel reserve.

6. All three Ryanair flights landed safely. Ryanair was not the only airline to experience such difficulties that evening. A flight from LAN, Chilean Airlines, lost one of its engines due to lack of fuel.

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

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

9. Further, according to the programme, almost 75% of Ryanair pilots were on so called "zero hour contracts". Under these contracts, pilots only work for Ryanair but have no guaranteed hours of work. This, it was said, resulted in pressure on Ryanair pilots, who could only make a living when they were actually flying which had adverse safety implications.

10. Finally, the programme broadcast various views of pilots concerning their lack of confidence in the official authorities charged with maintaining safety in air travel.

11. The programme broadcast interviews with four pilots who Channel 4 stated had some 44 years of experience of flying with Ryanair between them. They were said to be serving officers, three being captains and the other, a first officer. It was stated that what prompted theses pilots to speak out, was that they believed that the events over Valencia, already described, pointed to a wider problem with Ryanair's fuel policy. These pilots gave their interviews anonymously and were broadcast in silhouette.

12. Another pilot, Captain John Goss, who had been with Ryanair for some 27 years, was interviewed in person by Channel 4. He spoke of his experiences with Ryanair and of his, and other pilots', lack of confidence in the Irish Aviation Authority.

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

14. In addition to Ryanair pilots, Channel 4 also broadcast interviews with Ewert Van Zwol, of the Ryanair Pilots Group, an air traffic controller and other experts.

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

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

Proceedings

17. Ryanair issued a plenary summons on 16th August, 2013, some four days after the programme was broadcast, claiming damages, including aggravated and/or exemplary damages for defamation. The subsequent statement of claim delivered 29th August, 2013, claimed that Channel 4 "falsely and maliciously broadcast and published or caused to be broadcast and published" the said programme. Paragraph 7 of the statement of claim stated that the words complained of meant, and were understood to mean, both in their natural and ordinary meaning and/or by way of innuendo that: -

> (i) Employment practices and working conditions in Ryanair jeopardise the safety and lives of passengers by placing pilots under abnormal stress and pressure;
>
> (ii) Ryanair forces its pilots to fly with dangerously low levels of fuel;
>
> (iii) Ryanair's fuel policy will lead to a crash;
>
> (iv) Ryanair aircraft landed in Valencia on 26th July, 2012, with minimum landing fuel because of Ryanair's fuel policy;
>
> (v) Three investigations where made into fuel emergencies on Ryanair flights in 2010;
>
> (vi) The chances of being involved in a serious incident or accident on Ryanair are greater than on other airlines;
>
> (vii) A serious incident or accident on Ryanair is inevitable;
>
> (viii) Ryanair conceals the truth in order to prevent the proper investigation of incidents;

> (ix) Ryanair compromises the safety and lives of its passengers and is consequentially an airline that should be avoided;
>
> (x) Ryanair is not a safe airline company.

18. Paragraph 12 of the statement of claim set out a number of matters to support a claim for aggravated and/or exemplary damages. These matter included, *inter alia*, that the programme complained of was broadcast in a sensationalist manner; that Captain John Goss had previously furnished correspondence in which he confirmed that he had no concerns regarding safety on Ryanair; and that there was a failure to give any, or any sufficient, weight to the report of the Irish Aviation Authority's investigations into the three flights diverted to Valencia on 26th July, 2012.

19. Channel 4 in its defence, delivered 16th December, 2013, sets out a robust defence. In particular, I refer to para. 6 of the defence wherein Channel 4 pleads:-

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

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

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

21. Ryanair delivered a detailed reply in 2015.

22. I feel that it is important to set out in some detail the nature and extent of the dispute between Ryanair and Channel 4. The issue of "journalistic privilege" is addressed in subsequent paragraphs of this judgment so it is important to highlight the serious issues of public interest that are raised in these proceedings.

Order for Discovery

23. Initially an order for discovery was made by the High Court on 12th December, 2014. This order was subsequently appealed to the Court of Appeal which, to a limited extent, varied the order of the High Court. Arising from these orders, Channel 4 was directed to make discovery of the following: -

> (i) All documents evidencing and/or recording all editorial decisions taken by the defendants, their servants or agents during the course of making the programme not only such documents as arise in respect of editorial decisions bearing on the entitlement of the defendants to invoke the defences of honest belief, (s. 20 of the 2009 Act) and fair and reasonable publication (s. 26 of the 2009 Act);
>
> (ii) All documents evidencing and/or recording all research, investigations and/or inquiries carried out by or on behalf of the defendants, their servants or agents into the subject matter and the content of the programme;
>
> (iii) All documents evidencing and/or recording the "independent investigation" undertaken by or on behalf of the defendants, their servants or agents into the accounts of the defendant's sources (as referred to at para. 10(n)) the defence.

24. Subsequently, an affidavit of discovery was sworn jointly by Tom Porter, Current Affairs Commissioning Editor, Channel 4 and Karen Edwards, Executive Producer of Blakeway Productions Limited. In para. 4, the said deponents deposed : -

> "The defendants object to produce the said documents (or such portions thereof as have been redacted and/or withheld), set forth in the second part of the first schedule hereto. The objection is made on the basis of journalistic source protection privilege and/or legal advice and/or litigation privilege and/or irrelevance."

25. In all, some 2,400 documents were discovered.

26. Ryanair served a "notice to produce" dated 20th January, 2016, wherein they required Channel 4 to produce for inspection the documents listed in the second part of the first schedule of the affidavit of discovery. This was followed by a "notice to inspect documents" dated 22nd January, 2016.

27. Channel 4 objected to making said documentation available for inspection. In response, Ryanair issued a notice of motion seeking an Order pursuant to O. 31, r. 18(1) of the Rules of the Superior Courts 1986, directing Channel 4 to make available for inspection documents listed in the second part of the first schedule of the said affidavit of discovery.

28. Arising from the notice of motion there are three issues which the court has to determine: -

> (i) The adequacy of the description of the documentation listed in the affidavit of discovery;
>
> (ii) Journalistic privilege;
>
> (iii) Legal advice privilege/ litigation privilege.

Adequacy of the Description of Documentation

29. Ryanair made a number of submissions to the court. The principle submission was that the documentation listed in the second part of the first schedule was not adequately described and that there was a failure to properly specify the type of privilege which is being claimed. In particular, Ryanair relied upon the decision of the Supreme Court in *Keating v. RTE* [2013] IESC 22, where McKechnie J. held:-

> "45. Accordingly, the normal Rules of Court apply which means that all relevant documents must be listed in Part Two of the First Schedule, if privilege is sought in respect of them. Having done that, the nature both of the asserted privilege and of the document, the subject thereof, must be sufficiently particularised so as to permit the court to evaluate the claim. Generalised, non-specific details will not suffice: *O'Brien v. Minister for Defence & Ors*. [1998] 2 I.L.R.M. 156 at p. 159. In the vast majority of cases, it is only via this procedure that the privilege issue will be determined."

30. In addition, Ryanair relied upon a passage, from Mahon J. in the Court of Appeal decision of *IBRC v Quinn* (Court of Appeal, 29th April, 2015) where it is stated that what is required was :-

> "50. A meaningful narrative containing a sufficient description of the documents to allow the receiver to make a reasoned judgment as to whether privilege is maintained."

31. Thus specifically, Ryanair claims that the documents are not sufficiently described and that the type of privilege being claimed is not adequately specified. There are instances where multiple privileges are claimed over the same document. Ryanair maintains that Channel 4 have adopted a "heavy handed" approach to redaction and raised the possibility that documents have been redacted which do not attract any privilege. This, it is submitted, makes it difficult for Ryanair to assess whether the redactions were appropriate or not. It is claimed that different standards have been applied to the same document, for example, where an outgoing and incoming email are treated differently. Finally, Ryanair objects to certain documents which Channel 4 have described as "irrelevant". In support of these submissions, Ryanair referred the court to various examples of such documentation.

32. As against this, Channel 4 reject these submissions and state that in describing these documents they had to be careful not to describe a document in such a way as to disclose matters over which privilege is being claimed.

33. As regards documentation which is categorised as being "irrelevant", Channel 4 explains that the term "irrelevant" is used to describe documents, or parts of documents, which are irrelevant to the litigation such as personal information about matters not the subject of the broadcast programme or commercially sensitive material or duplicated within the discovery or "where the redacted material was not caught by the orders of the court and is "unconnected to this litigation".

34. The issue as to the adequacy of the description of the documentation over which privilege is being claimed is difficult to resolve. The party claiming privilege does not want to give such a detailed description as to set the privilege claimed at nought whereas the opposing party wants as much information as it can get from the description of the documentation. In resolving this, the court was referred to a number of authorities. *In Bula Limited v. Tara Mines Limited (No.4)* [1991] 1 I.R. 217, Walsh J. stated at p.218: -

> "The format suggested by the plaintiffs in their claim appears to me to be in effect what the Rules of Court require. Unless documents are identified and properly indicated no particular claim of privilege should be made about anything. One must know what the claim of privilege is…"

35. This passage was cited with approval by Finlay C.J. in *Bula Limited (In Receivership) v. Crowley* [1991] 1 I.R. 221 at p.222.

36. In *Keating v. RTE* [2013] IESC 22, McKechnie J. stated at p. 23: -

> "43. Accordingly, the normal Rules of Court apply which means that all relevant documents must be listed in Part Two of the First Schedule, if privilege is sought in respect of them. Having done that, the nature both of the asserted privilege and of the document the subject thereof, must be sufficiently particularised so as to permit the court to evaluate the claim…"

37. Finally, in *IBRC v. Quinn* [2015] IECA 84, Mahon J. stated : -

> "48. Firstly, in respect of every document, its date should be identified. It is not clear from the spread sheets that the dates referenced to each documents necessarily identifies the date of the document itself as opposed to the date upon which it was either inputted or accessed within the computer programme being used for the disclosure process. Secondly, in respect of correspondence, it is insufficient to, for example, refer to 'letter' as the narrative relied upon to demonstrate that the document is privileged. A meaningful narrative requires that at least some generic category of correspondent be identified. For example, 'letter from junior counsel to the defendant's solicitor', or "letter from one of the personal defendants to their solicitor" is at a minimum required."

38. The court was furnished with a spread sheet listing some 2,200 documents (the documents appear to start at number 38). In the spread sheet, there are a number of columns under headings including date, subject, author, documents from/to and the type of privilege being claimed. In the course of argument and written submission, my attention was brought to a number of these documents where there was particular criticism of the description provided. There is obviously a fine line to be drawn between giving a detailed description of the document and undermining the privilege you are seeking to assert.

39. It is noteworthy that, the various authorities referred to deal with legal advice/litigation privilege and not journalistic privilege for the protection of sources. Where a party is asserting journalistic privilege to protect a source, it seems to me that, there is a particular difficulty when it comes to describing the document. Whereas in legal advice/litigation privilege the sender and recipient of a document may be easily disclosable without undermining the privilege; the same is probably not the case where you are seeking to protect a source. Even the most basic description of the document could well have the effect of identifying the source. In general, what is being protected in legal advice/litigation privilege is the advice itself whereas what is being protected in journalistic privilege is the identity of the source. Therefore, in my view, a more general description of documentation over which journalistic privilege is being claimed is more acceptable than where legal advice/litigation privilege is being claimed.

40. Both legal advice/litigation privilege and journalistic privilege are being claimed over a significant number of the documents listed in the second part of the first schedule. One can see how a document could come into existence which attracts both privileges. Examples were given of journalists' notebooks. Clearly such a notebook could well contain both source material and legal advice. I have had an opportunity to look, in some detail, at the spread sheets listing the documentation set out in the second part of the first schedule. Many of the documents over which legal advice/litigation privilege is being claimed (whether on its own or in addition to journalistic privilege) are emails. The

description given is, generally, the title of the email together with the identity of the sender and receiver which does not, in my view, amount to a "meaningful narrative" (as referred to Mahon J. in IBRC v Quinn & Ors referred to above). Using the title of an email as a description of a document where legal advice/litigation privilege is being claimed, though possibly understandable where both legal and journalistic privileges are being claimed simultaneously, is less than the required "meaningful narrative".

41. To meet this situation, I refer, again, to Mahon J. in *IBRC v Quinn & Ors*, where he states:-

> "51. The work of assembling documentation for the purpose of complying with an order for discovery is a role which is usually carried out by the party directed to make discovery, albeit with the assistance and direction of their solicitor. However, the question as to whether any such documents are ones to which legal professional or litigation privilege may attach is essentially a legal question and is one invariably answered by the proposed deponent to the affidavit with the benefit of legal advice. This being so, I have assumed that in respect of each document disclosed in the affidavit of discovery that a qualified solicitor, who is of course an officer of the court, has already inspected each document over which privilege has been claimed and has made a professional judgment that that document is correctly so categorised. That being so I am satisfied that, in addition to the order that a more meaningful narrative be provided in respect of each document over which privilege has been claimed, the court should also make an order directing the solicitor responsible for advising on the discovery process, insofar as the privileged documents are concerned, to swear an affidavit stating that they have inspected each of the documents over which privilege has been maintained and that in their professional opinion each such document has been properly so categorised"

42. Applying that to the circumstances of this case, I will make an order directing that where legal advice/litigation privilege alone is being claimed, a fuller narrative of each such document is to be given and that the solicitor responsible for advising on the discovery process swear an affidavit stating that he/she has inspected each of the documents over which legal advice/litigation privilege is being claimed (either on its own or in addition to journalistic privilege) and that, in their professional opinion, each such document has been properly so categorised.

43. As regards the categorisation of certain documentation as being "irrelevant", I accept what was deposed to in the joint affidavit of Tom Porter and Karen Edwards sworn 9th/10th March, 2016 as to the basis upon which term "irrelevant" was used to describe certain documentation. The court was not informed of any substantive grounds to challenge what had been deposed to in the said affidavit.

44. In summary, my findings on the issue of adequacy of the description of the documentation are as follows: -

> (i) I am satisfied as to the adequacy of the description of the documentation over which journalistic privilege is being claimed;
>
> (ii) As regards documentation over which legal advice/ litigation privilege alone is being claimed a more detailed narrative of each such document should be provided;
>
> (iii) As regards documentation over which legal advice/ litigation privilege is being claimed (either alone or in addition to journalistic privilege (source protection)) the solicitor responsible for advising on the discovery process shall swear an affidavit stating that he/she has inspected each of the documents over which legal advice/ litigation privilege has been claimed and that, in their professional opinion, each such document has been properly so categorised;
>
> (iv) I am satisfied as to the basis on which certain documents were classified as being irrelevant.

Journalistic Privilege: -

45. Channel 4 maintains that it is entitled, under journalistic privilege, not to reveal its sources of information for the programme; this includes not revealing the identities of the four pilots who were

interviewed anonymously. It is maintained that such journalist privilege is a "cornerstone" of a free press which is an essential element of democracy.

46. The legal basis for journalistic privilege is to be found, firstly, in Article 40.6.1 (i) of the Constitution which provides: -

> "40.6.1 (i) The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State…"

47. Secondly, Article 10 of the European Convention on Human Rights provides:-

> "10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Also Article 10.2 makes specific reference to "preventing the disclosure of information received in confidence…"

48. The Constitution clearly recognises the role of the media in the "education of public opinion" which is regarded as being "a matter of such grave import to the common good". In order for the media to operate effectively, journalists must be able to protect their sources.

49. Although the media enjoys a constitutional right to freedom of expression, in this case the protection of its sources, individuals, such as Ryanair, are entitled to their good name. Article 40.3.2 of the Constitution provides: -

> "40.3.2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

50. Further, Article 10.2 of the European Convention on Human Rights provides:-

> "10.2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for
>
> the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

51. In issuing defamation proceedings arising from the contents of the Channel 4 programme Ryanair is seeking to "vindicate" its good name.

52. Therefore there are two competing rights. On the one hand, Channel 4 has a right to freedom of expression, in this case the protection of sources, and on the other hand, Ryanair has a right to vindicate its good name. In resolving this, I will now refer to a number of authorities.

53. In *Mahon v. Keena* [2010] 1 IR 336, the plaintiffs were members of a Tribunal of Inquiry (the Mahon Tribunal) and the first named defendant and second named defendant were respectively a journalist and editor of the Irish Times newspaper. The first named defendant received anonymously and unsolicited a confidential communication which had been sent to a witness by the plaintiff. The contents of this communication were published in an article in the Irish Times newspaper written by the first named defendant. The plaintiffs wished to investigate this leak of confidential information and issued a summons to the first and second named defendants requiring them to appear before the Tribunal and produce requested documentation. The defendants duly appeared before the tribunal but failed to produce the documentation requested and refused to answer any questions which they believed might provide assistance or result in identifying the source of the leaked documents.

54. In the course of giving its judgment, the Supreme Court referred to earlier decisions of the European Court of Human Rights, in particular, *Goodwin v. The United Kingdom* [1996] 22 EHRR 123. In *Goodwin v. The United Kingdom* an order was sought that a journalist disclose his source of commercial information which was of a highly confidential character, namely, the corporate plan for the refinancing of an important company. It was claimed that the disclosure of this financial information would threaten the business and livelihoods of its employees. The company had managed to secure an interim injunction which effectively prevented further dissemination of confidential information.

55. In giving the judgment of the Supreme Court, Fennelly J. cited the following passage from *Goodwin v. The United Kingdom* (1996) 22 EHRR 123:-

> "39. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.".

56. However, unlike legal advice/litigation privilege journalistic privilege is not absolute. As Fennelly J. stated: -

> "71. The European Court of Human Rights has been at pains to emphasise that the right to freedom of expression is not unlimited. It usually states, as in the above passage, that the press must not "overstep certain bounds". The court has said that 'article 10 does not … guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern'…
>
> For example, it may be necessary, depending on the circumstances, to balance individuals right to private and family life guaranteed by Article 8 of the Convention. Member states have a certain margin of appreciation in assessing whether there is a need for a restriction."

57. When carrying out the balancing exercise, the Supreme Court referred to what benefit, if any, would accrue to the plaintiffs were the Court to direct the defendants to reveal their sources. As Fennelly J. stated: -

> "100. According to the reasoning of the European Court in *Goodwin v. The United Kingdom* (1996) 22 EHRR 123, an order compelling the defendants to answer questions for the purpose of identifying their source could only be 'justified by an overriding requirement in the public interest'. Once the High Court had devalued the journalistic privilege so severely, the balance was clearly not properly struck. On the other side, I find it very difficult to discern any sufficiently clear benefit to the tribunal from any answers to the questions they wish to pose to justify the making of the order."

58. Similarly in *Goodwin v. The United Kingdom* (1996) 22 EHRR 123, the European Court of Human Rights looked at what benefit would accrue to the party that was seeking disclosure of journalist sources. In reaching its conclusion that the journalist, Goodwin, was not obliged to identify his source, the court attached considerable significances to the fact that the company had obtained an injunction to prevent dissemination of confidential information and observed that the purpose of the order seeking disclosure of the journalist's source was, to a very large extent, the same as that already achieved by the injunction. The court stated:-

> "42. A vital component of the threat of damage to the company had thus already largely been neutralised by the injunction. This being so, in the Court's opinion, in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on

> freedom of expression which it entailed was not supported by sufficient reasons for the purposes of para. 2 of Article 10 of the Convention."

59. In carrying out the balancing exercise the court will examine the level of necessity of the party seeking the disclosure of journalistic sources. In *Goodwin v. The United Kingdom* the court stated:-

> "45. it will not be sufficient, per se, for a party seeking disclosure of a source protected by s. 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity for disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

60. In considering journalistic privilege the courts have also examined its extent. In *Walsh v. News Group Newspapers Ltd* [2012] 3 IR 136. O'Neill J. at p. 146 stated:-

> "20. I would readily agree with counsel for the defendants that the interest which is identified as protected by journalistic privilege is the proper functioning of journalism, namely, that there is a free flow of information from the public to journalists which is not inhibited or "*chilled*" by the prospect that the source will be disclosed. Implicit in all of this is that the risk to the proper functioning of journalism is disclosure or identification of the person supplying the information. Ordinarily, information supplied will end up published; thus, *per se*, it could not be said that the content of the information enjoyed privilege from disclosure. If, however, the content of the information which, necessarily, was not published, could lead to the identification of the source, then it would seem to me that it too must enjoy the privilege from disclosure, as otherwise the overall purpose of the privilege would fail."

61. This case also illustrated a situation where journalistic privilege will not be allowed namely where information is given to a journalist that is prohibited by law.

62. Journalist privilege was also considered in *Cornec v. Morrice* [2012] 1 IR 805. In this action the parties were involved in commercial litigation in Colorado in the United States concerning a disputed share purchase agreement. It was alleged that the plaintiff's attorney had travelled to Ireland and met with a journalist which then gave rise to articles being published in a national newspaper and had, thereby, contravened a non-disparagement clause in the share purchase agreement. The defendant thus contended that the journalist was now a relevant witness who ought to be deposed and sought that the Irish courts give effect to letters rogatory issued by the District Court of Denver under the *Foreign Tribunals Evidence Act*, 1856. In effect, the defendant was requiring that the journalist reveal her sources.

63. In giving judgment Hogan J. considered the extent of journalistic privilege:-

> "61. Fourth, it cannot be said that there is any *ex ante* distinction between the protection of the *source* on the one hand and the contents of what the source disclosed on the other. In some cases – perhaps a majority – the source will wish to have their identity protected. In other instances, the source will wish to have the contents of what they actually said protected, even if they have been identified as a source for the article. In both cases, the public interest in protecting the journalist from compelled disclosure is very high, since the exploration of the contents of any discussions with the source also has the ability significantly to hamper the exercise of freedom by the journalist in question."

64. Hogan J also considered what benefit, if any, would accrue to the defendant were Ms. Tallant (the journalist) required to reveal her sources:-

> " 59. Second, while Ms Tallant's evidence would be plainly relevant to the Colorado proceedings, it should be remarked that such evidence is essentially confirmatory of evidence already available to Ms. Morrice through the United states deposition and discovery process…. given that this avenue is already open to Ms. Morrice – and she has

already successfully availed of this – this weakens the case for disclosure on the part of Ms. Tallant. Her evidence – while undoubtedly helpful and confirmatory of other evidence – cannot be said to be *essential*"

65. It seems to me that from the foregoing authorities a number of principles concerning journalistic privilege can be stated:-

(i) The protection afforded by journalistic privilege protects not only the identity of source(s) but, where necessary, the information provided by such source(s);

(ii) Unlike legal advice/litigation privilege journalistic privilege is not

absolute and may be displaced following a balancing exercise carried out by the court between, on the one hand, the right to freedom of expression and, on the other hand, a legal right such as a person's right to a good name;

(iii) A heavy burden rests on the person who seeks disclosure of

journalistic source(s). The court must be satisfied that such disclosure is justified by an overriding requirement in the public interest or is essential for the exercise of a legal right.

66. In seeking disclosure of Channel 4's sources, Ryanair made a number of submissions. It was submitted that Channel 4 was not entitled to rely upon journalistic privilege without swearing to the full details of the assurances of confidentially allegedly given to each source. There does not appear to be any authority for this proposition. In either allowing or refusing journalistic privilege, in my view, it is not encumberant upon a court to embark on a exercise to establish what assurances were or were not given to sources and whether such assurances were sufficient to invoke the protection of journalistic privilege. Further, such an exercise in examining the details of assurances could in some, if not many, cases lead to the identity of the source being revealed.

67. Ryanair submitted that Channel 4 withheld film and audio recodings of what it described as being "open sources", i.e. persons who were publicly identified in the programme, in particular, John Goss and Evert Van Zwol. In my view, such a submission is not sustainable having regard to the passage from the judgment of Hogan J. in *Cornec v. Morrice* referred to at para. 63 above. Further, by analogy with legal advice/litigation privilege a plaintiff, for example, does not lose the protection of such privilege even though he/she might give evidence in the course of a hearing.

68. Ryanair submitted that Channel 4, in effect, waived journalistic privilege by "over circulation". I do not accept this submission as it is readily apparent that the processing of information from source to broadcast necessarily involves that information going through a number of hands. The whole point of journalistic privilege is that information which is in the public interest can get from a source to the general public without that source being identified. What happens in effect is that a wider group of people come bound by confidentiality relating to the identity of the source or the information given.

69. Ryanair further submitted that Channel 4's claim to journalistic privilege was unsustainable due to a "heavy handed" approach in redactions. In the previous paragraphs I have referred to the scope of journalistic privilege. It is clear that the scope of journalistic privilege is extensive, i.e. it protects not only the identity of sources but also information that may lead to the identification of sources. So it follows that extensive redactions of the documentation involved may be necessary so as to avoid the risk of identification.

70. In carrying out the "balancing test", I will now look at a number of factors. Firstly, there can be no doubt but that the safety of passengers, crew and those on the ground beneath is a matter of the most serious public interest. Not only passengers and crew but also the wider general public have a clear public interest in knowing that an airline, such as Ryanair, operates in accordance with the appropriate safety standards. Ryanair seeks to vindicate its good name in these defamation proceedings. Clearly the identification of Channel 4's sources, in particular the four pilots, would be of assistance to Ryanair. However, it was not submitted nor was it established that the identification of these sources was essential for Ryanair to vindicate its name at the hearing of the action. Secondly given that Channel 4 have pleaded "truth" pursuant to the 2009 Act, the burden of such defence rests with Channel 4 so it would seem inevitable that John Goss and Evert Van Zwol would be called to give evidence and thus be the subject of cross-examination by Ryanair. Thirdly, as is clear from the reply

delivered by Ryanair, Ryanair intend to rely upon the report(s) of the Irish Aviation Authority, and other Aviation Authorities in respect of flying incidents. Fourthly, it does not appear to me to be necessary for Ryanair to know the identity(ies) of Channel 4's sources to establish the appropriateness of its work/employment practices. Fifthly, in its statement of claim, Ryanair has pleaded malice which, presumably, was not pleaded in the absence of evidence to sustain it.

71. Finally, by invoking journalistic privilege, Channel 4 may weaken its ability to defend the action, as in doing so Channel 4 would be precluded from calling the four anonymous pilots as witnesses without waiving such privilege. Such may be of advantage to Ryanair.

72. Therefore, in my view applying the authorities which I have referred to, the balance lies in favour of Channel 4's assertion of journalistic privilege so I will not direct either the production or inspection of documents over which such privilege is being claimed.

Legal Advice / Litigation Privilege:-

73. In dealing with this aspect of the application, where appropriate, I will refer to the first named defendant and the second named defendant individually. Otherwise, I will refer to both defendants collectively as "Channel 4".

74. Earlier in this judgment, I have directed that the solicitor responsible for advising on the discovery process swear an affidavit stating that he/she had inspected each of the documents over which legal advice / litigation privilege has been claimed and that, in his/her professional opinion, each such document has been properly categorised. Therefore, in this part of the judgment, I will deal with the various submissions which Ryanair has made as to the categories of documents that should or should not be protected by such privilege.

75. There was agreement between the parties as to the general principles that a court should apply when legal advice privilege is claimed. Legal advice privilege applies to communications:-

> (a) "between a client and his lawyer, where the lawyer is acting in the course of their professional relationship and within the scope of his professional duties;
>
> (b) under conditions of confidentially; and
>
> (c) for the purpose of enabling the client to seek, or the lawyer to give, legal advice or assistance in a relevant legal context" (Passmore, *Privilege*, 3rd edition, 2013, (Sweet & Maxwell, London) at pp. 127-128.

76. However, there were significant areas of dispute as to how these principles were to apply to the particular categories of documents discovered by Channel 4.

77. Ryanair objected to certain documents being protected by legal advice privilege on the basis that the documents were not created for the purposes of giving or receiving legal advice.

78. Firstly, Ryanair objected to legal advice privilege being claimed over draft scripts of the programme when, according to Ryanair, such scripts were not drafted with the dominant purpose of seeking legal advice. In support of this submission, Ryanair relied upon the New Zealand case, *Simunovich Fisheries v. Television New Zealand* [2008] NZCA 350. However, in giving the judgment of the Court of Appeal, Miller J. stated:-

> "170. the real issue in this appeal is not whether a distinction should be drawn between the original draft scripts and the copies sent to the solicitors, but whether the scripts disclose legal advice sought or given about their content.
>
> 171. the judge further reasoned that disclosure of the draft scripts would tend to reveal the content of privileged communications between lawyer and client. That was so because they formed the basis of those communications. He might have added that, as Mr. Galbraith submitted, the scripts reveal advice given, by way of inference from changes made to successive versions. We accept, as Mr. Ivory pointed out, Mr. Vaughan did not make the claim expressly in his affidavit. But the evidence does show that advice was sought on the drafts and each successive version reflected advice given on its predecessor. In those circumstances, the inference was available to the judge that disclosure would reveal privileged communications."

> Therefore, in my view, the scripts of the programme may well attract the protection of legal advice privilege.

79. Secondly, Ryanair objected to legal advice privilege being claimed over the notebooks used by certain individuals, including journalists, who were involved in the making of the programme. It may well be the case that those notebooks record or refer to legal advice that had been given. If so, in my view, they would attract the protection of such privilege. This would also extend to internal notes of meetings.

80. Ryanair objected to legal advice privilege being claimed over what it described as being "emails between lawyers themselves". I can readily see how such documentation would attract legal advice privilege.

81. Ryanair objected to legal advice privilege being claimed over documentation and transcripts received from various sources which were forwarded to the first named defendants' lawyers for advice. In my view, leaving aside the issue of journalistic privilege, in applying the passage which I have already cited from the *Simunovich Fisheries v. Television New Zealand* [2008] NZCA 350, such documentation could attract legal advice privilege.

82. In a further submission, Ryanair claimed that legal advice privilege was unsustainable in respect of communications between the second named defendant and the lawyer's of the first named defendant on the basis that there was no evidence that the second named defendant was "the client". Further, objection was taken to legal advice privilege being claimed in respect of communications between the first named defendant's lawyers and "third parties". In support of this submission, Ryanair relied upon *Three Rivers District Council & Others v. Governor and Company of the Bank of England* [5] (2003) QB 1556.

83. In the course of its written submissions to the court, Channel 4 stated at para. 88:-

> "88. the lawyers in Channel 4 were providing advice in their professional capacity as lawyers, specially tasked with giving advice on the programme. Advice was sought from these lawyers by others within Channel 4 and employers of the second named defendant on the basis that they were consulting their own lawyer, specially tasked with giving them legal advise. Further, those communications were at the time of a confidential nature and they remain so…"
>
> And
>
> "95. In the case of certain contentious programmes, a contractual indemnity is additionally provided to independent production companies in respect of the legal advice Channel 4 provides to it which creates a further contractual relationship between the two bodies and ensures continuity of approach in legal advice and in any proceedings that may arise from the programme should such a complaint be made.
>
> 96. The indemnity was provided by Channel 4 to Blakeway in this instance. Accordingly, Blakeway was given the benefit of the legal advise from Channel 4 in respect of the programme and Channel 4 is contractually subrogated to Blakeway's position in this litigation and the interests of the two parties are inextricably linked."

84. Based on these submissions, it is the case that the second named defendant was "the client" of the first named defendant's lawyers and thus entitled to the protection of legal advice privilege.

85. Further, reliance was placed on observations made by Lavan J. in *Ochre Ridge Ltd v. Cork Bonded Warehouse Ltd & Another* [2004] IEHC 160, wherein he stated:-

> "60. privilege may be claimed by a person who is not strictly the client of the legal advisor if he has an interest in common with such client".

In my view, this provides a further ground upon which employees of the second named defendant can claim the protection of legal advice privilege.

86. Ryanair relied upon the decision in the *Three Rivers District Council & Others v. Governor and company of the Bank of England* case referred to above. In that case the claimants, the liquidators

and creditors of BCCI brought an action against the Bank of England for misfeasance in public office in respect of its supervision of BCCI before its collapse. The claimants sought disclosure of numerous documents which had been produced for a private non-statutory inquiry into the Bank of England's supervision of BCCI conducted by a senior judge (Bingham LJ). After this enquiry was established, the Governor of the Bank of England appointed three officials to deal with all communications between the bank and the inquiry. This unit became known as the Bingham Inquiry Unit ("BIU"). The claimants made clear that disclosure was not sought of documents passing between BIU and Freshfields or vice versa, nor was disclosure sought of any of Freshfields' internal memoranda or drafts. It was accepted that the BIU was a client of Freshfields and that communications passing between them were covered by legal advice privilege. In applying this decision to the facts of the instant case, Ryanair argued that there must of have been such a "special unit" within Channel 4 for the purposes of producing and broadcasting the programme. Ryanair accepted that such a "special unit" would have the protection of legal advice privilege; however, it argued that no such protection was afforded to other employees or agents of Channel 4.

87. In the absence of any evidence that there was such a "special unit" in Channel 4, this submission is not sustainable.

88. There are a number of documents over which legal advice privilege is being claimed which appear to be communications not involving the first named defendant's lawyers. If these documents contain legal advice then that part of the document would be privileged.

89. Ryanair submitted that Channel 4 is not entitled to claim legal advice privilege over documents which have been shared with persons outside of Channel 4 where there was no particular purpose for such disclosures. It is argued that this, in effect, is a waiver of privilege. I do not accept this submission as firstly, where a document is disclosed to a number of people it does not follow that it is no longer confidential; secondly, the purpose of the disclosure, as asserted by Ryanair, is only speculative, and, thirdly, there is no evidence of any waiver on the part of Channel 4.

Litigation Privilege:-

90. There was no dispute between the parties as to the basis for claiming "litigation privilege". In particular, litigation privilege covers all communications and documents produced by the client or a third party insofar as they are:

(a) Confidential in nature;

(b) Produced for the "dominant purpose" of the litigation;

(c) Brought into existence once litigation is contemplated.

91. Ryanair's principal objection to Channel 4's claim for litigation privilege is that litigation privilege has been claimed over documentation which came into existence as early as May 2013, many months before the programme was broadcast and when Ryanair had not even been notified of the programme.

92. It is well established that to avail of the protection of "litigation privilege", litigation must be "apprehended or threatened", as per O'Hanlon J in *Silver Hill Duckling v. Minister for Agriculture* [1987] 1 IR 269. The test clearly depends on the facts of the particular case.

93. In this case, Channel 4 broadcast a programme calling into question the safety standards, work practices and the investigation of previous incidents involving Ryanair. This programme was many months in the making. Given the content of the programme, I would readily accept that Channel 4 must, at least, have "apprehended" litigation arising. The fact that in late 2012 Ryanair had initiated defamation proceedings against KRO in the Netherlands, for a programme similar in content to that which Channel 4 was going to broadcast, must have contributed to such apprehension. Therefore, I accept that documentation which came into existence as early as May 2013 would be entitled to the protection of litigation privilege.

94. In any event, Channel 4 have submitted that of the 157 documents over which litigation privilege is claimed all but ten notebooks and nine documents are communications dating between 30th July and 12th August 2013.

95. In its submissions on "litigation privilege", Ryanair repeated the submissions made with regard to "legal advice privilege" in respect of certain documentation, in particular, notebooks, certain emails (not created with the dominant purpose of seeking legal advice) and emails shared between many people. It seems to me that the content of such documentation could well record or deal with legal advice concerning apprehended litigation and thus be privileged.

96. In conclusion, I do not accept the various objections which Ryanair has raised as to Channel 4 relying upon legal advice or litigation privilege in respect of certain of the documentation. However, if there are concerns as to the scope of the legal advice/ litigation privilege being claimed over documentation, I believe these are met by my direction that the solicitor responsible for advising Channel 4 on the discovery process swear an affidavit stating that he/she has inspected each of the documents over which legal advice/ litigation privilege has been claimed (either on its own or in addition to journalist privilege) and that in his/her professional opinion each such document has been properly so categorised.

Back to top of document