# THE COURT OF APPEAL

**Unapproved** **No Redactions Needed**

**Neutral Citation Number [2021] IECA 110**

**High Court Record Number: 2013/3816P**

**Court of Appeal Record No. 2019/534**

**Haughton J.**

**Power J.**

**Binchy J.**

**BETWEEN/**

**RYANAIR LIMITED**

**PLAINTIFF/APPELLANT**

**- AND -**

**ERICK BESANCON**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Mr. Justice Robert Haughton delivered on the 15th day of April 2021**

**Introduction**

**1.** This is an appeal from the judgment of Mr. Justice Barr delivered on 6 November 2019 and his order perfected on 6 December 2019, whereby it was ordered, *inter alia*, that the plaintiff/appellant ("Ryanair") is to produce to the respondent's solicitors the SAIR Base Investigation Final Report dated 30 October 2012 ("the B.I. Report") subject to certain specified redaction and limits on circulation/inspection.

**2.** Ryanair is a limited liability company involved in the airline business. The respondent was, at the time of matters complained of in these proceedings, a pilot employed by Ryanair. The proceedings are defamation proceedings arising out of certain postings made by the respondent on a website in December 2012 concerning an incident that occurred involving a Ryanair flight at or near Memmingen Airport in Germany on 23 September 2012. Ryanair alleges that these postings were defamatory of it.

**3.** In the course of these proceedings Ryanair agreed to make discovery of certain documentation, including the B.I. Report which is an internal Ryanair Safety Management System investigation report. Only a heavily redacted form of the B.I. Report was produced for inspection, and this prompted the respondent to apply by Notice of Motion dated 28 August 2018 for an order directing Ryanair to make it available in un-redacted form.

**4.** The respondent contended in the High Court and before this court, that the B.I. Report is highly relevant to the issues that will arise for determination at the trial of the action, and that it is necessary for him to be furnished with a copy in advance of the hearing. Ryanair resisted production on the basis that it is a confidential report, and further that it is protected from disclosure by domestic and EU aviation legislation. Ryanair contend that if the court carries out the correct balancing exercise whereby it balances the advantage to the respondent by production of the report, as against the adverse consequences to the investigation of incidents involving aircraft with the resultant negative effects on airline safety generally, the balance tips in favour of withholding production of the document.

**Background**

**5.** The background to the proceedings is that a Ryanair passenger flight was involved in an incident on its approach to Memmingen Airport in Germany on 3 September 2012. There had been a delay of approximately 25/30 minutes in the flight departing from Manchester. On the approach to Memmingen Airport the flight crew asked to move from runway 6 to runway 24. That request was granted. They also requested permission to make a visual approach to the runway, rather than using a technically guided procedure. That request was also granted. As the plane was approaching the runway, an early warning system known as E.G.P.W.S. generated the warning "caution terrain". Two seconds later the warning system generated a further warning of "terrain, terrain, pull up, pull up". The crew conducted a missed approach procedure and went around, and a short time later landed uneventfully at Memmingen Airport on runway 24. The cockpit voice recorder (C.V.R.) recordings were not retained by the flight crew and accordingly were not available for investigation. This account of the incident is taken from the German Federal Bureau of Aircraft Investigation, which produced an interim report (the "B.F.U. Report").

**6.** In 2012 the respondent was employed as a pilot by Ryanair. He obtained a copy of the B.F.U. Report, which was issued in November 2012. On 9 and 10 December 2012 he made two postings on a website known as the Professional Pilots Rumour Network. He made these postings under the pseudonym "*Enjoy The View*". In the postings he stated as follows: -

> "Ryanair should investigate what internal procedures led a crew trying to make up for lost time by impromptu change of plan that nearly went south. The crew screwed up, no doubt about it. However: it's also about company's culture. Crews being under pressure to make up lost time (it's in the report… negotiating the change of runway with ATC, avoiding longer taxi route, asking for a visual approach to avoid the procedural approach...) It's a bad habit found throughout the company, always run run run. 'Expedite' as they say. The 25-minute

turnaround is a start, putting massive stress on flight crews, but there is a lot more to it. Recent changes in cost index, flying slower but keeping same block times turn most flights into delays… is just another example. Most of us understand these issues which aren't obvious Joe Public. They are being discussed in details on other private forums/websites with deep concerns in the long run."

"BOAC it must be annoying for all those undoubted professional pilots and trainers in Ryanair to see the company bring this on itself." *[This comment does not appear to have been written by the respondent]*"

"Not really, nobody pays attention to MOL or McNamara's declarations in the press. What we do worry about is the corporate culture the company is inflicting on us, which in turn could affect safety."

**7.** In January 2013, as part of a general safety review carried out within Ryanair, an Operations Roadshow was held, where the chief pilot gave a presentation to Ryanair pilots and flight crew concerning general safety aspects procedures that should be adopted in the wake of the Memmingen incident. The respondent also sought production of that documentation, but this was refused by the trial judge and is not the subject of any appeal.

**8.** In August 2013, the respondent was dismissed from his position of employment with Ryanair.

**The pleadings**

**9.** Having identified the respondent as the author of the postings, on 16 April 2013 Ryanair issued these proceedings by Plenary Summons against him claiming damages for defamation. In the Statement of Claim delivered on 29 June 2013 Ryanair pleads that the postings meant and were understood to mean, both in their natural and ordinary meaning and/or by way of innuendo, that: -

"(i) Ryanair operates unsafe internal procedures which force crews to operate in a manner that compromises safety.

(ii) A corporate culture exists in Ryanair in which flight crews are pressurised to operate in a manner that compromises safety.

(iii) Ryanair flight crews are forced to operate under massive stress.

(iv) The pressure and stress placed on Ryanair flight crews results in pilots making errors.

(v) The culture that exists in Ryanair is a cause for deep concern.

(vi) Ryanair compromises the safety and lives of its passengers and is an airline that should be avoided."

**10.** On 29 November 2013 the respondent delivered his Defence. The following relevant pleas were made: -

"9. It is denied the words complained of bore or were understood to bear or were capable of bearing the meanings pleaded at Paragraph 6 of the Statement of Claim.

10. If, which is denied, the words complained of bore the ordinary meaning or innuendo contended for at Paragraphs 6(iii) and 6(v) of the Statement of Claim, those words were true in substance and in fact and as a consequence thereof the Defendant relies on the defence of justification, or truth, within the meaning of the provisions of Section 16 of the Defamation Act 2009 in respect of those meanings.

11. Further, or in the alternative, the Defendant pleads that the publication at issue in the within proceedings constituted a fair and reasonable publication on a matter of public interest and the Defendant shall in this regard rely upon Section 26 of the Defamation Act, 2009.

12. Further, or in the alternative, the Defendant pleads that the publication at issue was a publication on an issue of important public interest and the Defendant is entitled to avail of a defence at common law arising out of same.

13. Further, or in the alternative, the Defendant shall rely upon the defence of qualified privilege in respect of the publication at issue, pursuant to the provisions of Section 18 of the Defamation Act 2009."

**11.** In a Reply to Defence delivered on 12 December 2013 Ryanair pleaded in response: -

"2. It is denied that the words complained of in the meanings alleged in paragraphs 6(iii) and 6(v) of the Statement of Claim are true as alleged.

3. It is denied that the defendant is entitled to rely upon the provisions of s. 16 of the Defamation Act 2009, in circumstances where the defendant does not intend to prove that the words complained of are true in all material respects and in particular that the words complained of are true in the meanings pleaded at paragraphs 6(i), (ii), (iv) and (vi) of the Statement of Claim.

4. Further, the defendant has failed to provide any or any sufficient particulars in support of the plea of truth in respect of paragraphs 6(iii) and 6(v), or at all.

5. It is denied that the words complained of constituted a fair and reasonable publication on a matter of public interest as alleged or at all.

6. It is denied that the defendant is entitled to rely upon s. 26 of the Defamation Act, 2009, as alleged or at all.

7. Without prejudice to the generality of the foregoing the plaintiff pleads that the words complained of were not published in good faith, or in the course of, or for the purpose of, discussion of a subject of public interest, the discussion of which was for the public benefit.

...

8. It is denied that the words complained of consisted of a publication on an issue of important public interest as alleged or at all and it is denied that the defendant is entitled to avail at a defence of common law arising out of same as alleged or at all. In this regard the plaintiff would rely upon the provisions of s. 15 of the Defamation Act, 2009.

9. It is denied that the words complained of were published on an occasion of qualified privilege and it is denied that the defendant is entitled to rely upon the provisions of s. 18 of the Defamation Act, 2009, as alleged or at all.

10. Without prejudice to the foregoing if the words complained of were published on an occasion of qualified privilege (which is denied) the said words were published maliciously…"

**Discovery**

**12.** By letter dated 4 February 2016 the respondent's solicitors requested voluntary discovery of documents, including the following: -

"CATEGORY 1:

All documentation held by the plaintiff relating to the Ryanair flight incident at Memmingen on 23 September 2012, the investigation of same, both by Ryanair and external investigators together with all documentation relating to follow-up on such investigation along with communications with flight crew, and all relevant investigation and safety agencies.

REASON:

This claim relates to two internet postings by the Defendant on a website called "PPRuNe (Professional Pilots Rumour Network)" on 9 December 2012 and 10 December 2012. The defendant's postings were part of a lengthy "string" of postings relating to a serious incident involving a Ryanair Boeing 737 aircraft near Memmingen, Germany on 23 September 2012. That incident involved an aircraft receiving 'Enhanced Ground Proximity Warning System (EGPWS)' warnings approximately four nautical miles prior to the runway threshold. The plaintiff claims that the words published by the defendant on PPRuNe, and related to this incident, were defamatory of the plaintiff. The defendant denies that the words were defamatory but pleads that, if, which he denies, the words complained of bore the ordinary meanings or innuendos contended for at paragraph 6(iii) ["*Ryanair flight crews are forced to operate under massive stress*"] and 6(iv) ["*The culture that exists in Ryanair is a cause of deep concern*"] then those words were untrue in substance and in fact. Furthermore, the Defendant pleads Fair and Reasonable Publication on a Matter of Public Interest (Section 26 Defamation Act 2009) and Qualified Privilege. The Memmingen Incident was investigated by the German Federal Bureau of Aircraft Accident Investigation which described it as a "*serious incident*". In its report, it stated, *inter alia*, as follows:

> '*The Pilot in Command (PIC) stated take-off in Manchester had been delayed by about 25-30 minutes. During the flight the crew decided to land on runway 24 at Memmingen Airport. The PIC stated the reason was the short taxiways to the apron after landing on runway 24. Were the landing to take place on runway 06 the plane would have to taxi to the end of the runway and then turn back. The aim was to make good on some of the time lost in Manchester*'.

The defendant maintains that the category of documents sought by him as both relevant and necessary for the purpose of defending the claim against him and for the purpose of ensuring fair disposal of the claim and the saving of costs."

**13.** In a letter dated 19 February 2016 Ryanair solicitors refused this category as so worded for a number of reasons, describing "all documentation" as a "fishing expedition" for documentation relating to the investigation by Ryanair and external investigators, and a request for communications with flight crew and investigation and safety agencies generally. Secondly it was argued that "apart from a vague reference to defences pleaded" it was not explained how the sweep of documents sought was "actually relevant to the matters in question between the parties in this litigation". Thirdly it was stated that the respondent "cannot broadly plead the truth, in particular, and then fish for documents from the Plaintiff to support the plea. He must know and be able to identify the documentation on which he relied to make his comments and, by extension, to plead the truth". Fourthly, it was suggested that to require discovery of all such documentation would place "an extraordinarily onerous burden on the plaintiff". The letter then indicated that the documentation sought was "extremely safety sensitive and confidential in nature, as a direct result of the 'just culture' or 'no blame' policy in aviation", and went on to identify the relevant EU Regulation and domestic statutory regulation precluding disclosure of air incident investigation documentation. It was also indicated that as the respondent was already in possession of the B.F.U. Report he had not explained why he considered other documents within the category to be relevant. The letter then stated –

"**Strictly without prejudice to the foregoing**, the plaintiff is willing to make discovery of the following documents instead of category 1 –

1) Ryanair safety alert initial report – MAN – FMM 23/09/2012;

2) Ryanair Base investigation report [the B.I. Report](redacted in accordance with EU Regulations);

3) Ryanair Internal Audit Report."

**14.** By letter dated 7 March, 2016 the respondent's solicitors took issue with the arguments set out by Ryanair's solicitor. In response Ryanair's solicitors by letter dated 14 March, 2016 repeated its offer to make discovery of the three listed documents, but this time added the further rider: -

> "Further our client will, as required by legislation, be anonymising the relevant documentation accordingly."

**15.** As the respondent was not agreeable to accepting the offer made on behalf of Ryanair, a notice of motion seeking discovery of documents issued on 7 April 2016. However, an agreement was subsequently reached between the parties whereby, in relation to category 1, the respondent accepted the offer which had been made by Ryanair's solicitors in their two letters referred to above. In accordance with that agreement, a consent order for discovery was made by the Deputy Master on 25th July, 2016. The relevant part of that Order states –

> "[…] And the Court being informed that the plaintiff will within eight weeks from the date hereof make discovery on oath of the documents offered for category one in the plaintiff's letters dated 19th February, 2016 and 14th March, 2016, which are or have been in its possession or power.
>
> And the Court notes that the defendant reserves his right to:
>
> (a) contest any redaction as may be effected by the plaintiff (bearing in mind that the redaction issue is before the Court in an unconnected case and is likely to be determined in that case), and

(b) To seek further and better discovery in relation to category one but only in the event that it is deemed necessary following consideration of the discovered documents.

By consent IT IS ORDERED that this motion be struck out of the list without further order."

**The Channel Four case**

**16.** I pause here to explain the reference to "an unconnected case" referred to in the Deputy Master's order, as it has some precedential value to consideration of the issues in this appeal. This was *Ryanair Limited v Channel Four Television Corporation and Blakeway Productions Limited* ("the *Channel Four"* case) in which Meenan J. delivered a judgment on 9 November 2017 addressing *inter alia* the redaction of documents relating to air accident investigations. That action concerns a programme broadcast by Channel Four concentrating on events that took place in July 2012 when, as a result of adverse weather conditions, some 12 flights including three Ryanair flights bound for Madrid were diverted to Valencia. The airport at Valencia had only one runway which limited the facilities for the landing of various aircraft and as a result each of the Ryanair flights issued a "Fuel Mayday" as the aircraft were going into fuel reserves. They all landed safely. The Channel Four broadcast referred to prior investigations into fuel emergencies on Ryanair flights and a number of prior safety reports, and it referred to evidence that Ryanair had repeatedly failed to save "Cockpit Voice Recordings (CVRs). The programme also referred to "zero hour contracts" under which Ryanair employed its pilots and contended that these resulted in additional pressure on those pilots so as they could only make a living when they are actually flying, and it suggested that this had adverse safety implications. Ryanair initiated the proceedings, claiming that Channel Four falsely and maliciously broadcasted and published the programme, and that the words meant or were understood to mean that Ryanair did not adhere to appropriate safety standards. Channel Four's defence pleaded that they were reasonable

grounds to investigate and that the references to consequences for passenger safety were true in substance and in fact, and also pleaded "honest opinion".

**17.** There was extensive discovery ordered by the High Court, which was varied on appeal by this court. Category six included documentation relating to twelve incidents referred to in the course of the broadcast where CVRs were not saved. As in the present case, the affidavit of discovery was sworn on behalf of Ryanair by Ms. Yvonne Moynihan. There was significant redaction of documentation, and Channel Four brought a motion challenging this. As in the present case, Ryanair relied on the confidentiality of the redacted records and the EU and domestic legislation preventing disclosure unless the court should determine that the benefits resulting from disclosure of the records outweighs the adverse domestic and international impact that the disclosure might have on that or any future investigation.

**18.** Meenan J. considered that he was required to carry out a balancing exercise, and having undertaken this he found for Channel Four and ordered that only the names of persons who either made the reports or were named in the reports should be redacted.

**19.** I will refer further to the decision of Meenan J. in the *Channel Four* case later in this judgment. For present purposes it suffices to say that any expectation that the parties had that the decision in that case would resolve the dispute over redaction in the present case was misplaced. This led to the issuing of the motion that is the subject of this appeal, in which the respondent sought *inter alia* production of the B.I. Report in an un-redacted form, save that the respondent was willing to accept redaction of the names of any persons who made statements, or were referred to in the report, and of any information that would identify such persons.

**The Affidavit of Discovery and the application for disclosure**

**20.** In compliance with the consent recorded in the Deputy Master's order, an affidavit of discovery was sworn on behalf of Ryanair by Ms. Yvonne Moynihan, legal and regulatory affairs advisor of Ryanair, on 15 September 2016. In that affidavit at para. 13 Ms. Moynihan stated: -

> "13. ***Schedule One Part One***. I have in my possession, power or procurement the documents relating to the matters in question in this suit and falling within categories one and two above, set forth in the First Part of the First Schedule hereto.
>
> 14. ***Schedule One Part Two***. The plaintiff objects to the production of un-redacted or un-anonymised versions of the documents set forth in the Second Part of the First Schedule hereto, i.e. the Ryanair base investigation report – ('the Report') on the following grounds.
>
> 15. The report has been redacted/anonymised in accordance with the EU legislation aimed at preserving the 'just culture' or 'no blame culture' in aviation. In short and as is clear from, *inter alia* the lengthy recitals to the legislation referred to below, the just culture is to make aviation as safe as possible. This means encouraging relevant persons to report accidents and incidents and to openly participate in investigations by ensuring that they are not punished for actions, omissions or decisions taken by them, save in extreme cases of wilful misconduct or gross negligence. It is accepted that confidentiality is an integral part of the just culture; people would not talk if they were not certain that their information and identity would not be kept confidential, and if they did not talk, aviation safety could not be preserved or enhanced."

**21.** Ms. Moynihan then identified that the B.I. Report had been redacted under Regulation (EU) no. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC ("Regulation 996/2010"). She described the incident at Memmingen airport as a "serious incident" as per Article 3 of Regulation 996/2010, and that, as it happened in German airspace, there was an obligation on

the German Federal Bureau of Aircraft Accident Investigation to investigate it under Article 5, and to preserve the evidence, and to protect sensitive safety and personal information and not disclose documents generated as a result of and in the course of the investigation under Article 14.

**22.** She further averred that the B.I. Report had been redacted/anonymised under Articles 15 and 16 of Regulation (EU) no. 376/2014 of the European Parliament and Council of 3 April 2014 on reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation 996/2010, and repealing Directive 2003/42/EC ("Regulation 376/2014"). She averred that Ryanair was an "organisation" under Article 2 of Regulation 376/2014 and subject to its terms, including Article 15(1) which required Ryanair, in accordance with national law, to take the necessary measures to ensure the appropriate confidentiality of the details of occurrences received by them under the Regulation. Ms. Moynihan averred therefore that Ryanair was obliged to keep the details of the occurrence confidential, and to use it only for the purposes for which it was collected (Article 15(2)). She averred that Ryanair was not permitted to make available personal details unless absolutely necessary in order to investigate the occurrence and enhance aviation safety.

**23.** At paragraph 29 of her affidavit Ms. Moynihan swore to the usual averment in affidavits of discovery, that is required by the form appearing in the Rules of the Superior Courts, which bears repeating: -

> "29. According to the best of my knowledge, information and belief, the Plaintiff has not now, and never had in its possession, power or procurement or in the possession, custody or power of its solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons, or person on its behalf, any document of any kind or any electronically stored information or any copy of or any extract from any such document or information, relating to the matters in question in this suit, or any of them, or wherein any entry has been

made relative to such matters, or any of them, and falling within categories 1 and 2 above, other than and except the documents set forth in the said First and Second schedules hereto."

**24.** Following this the B.I. Report produced by Ryanair's solicitors to the respondent's solicitors, which runs to 11 pages, was heavily redacted and to such an extent that while there was sufficient information in the heading and first few lines of the report on page 1 to identify it as being the B.I. report, the entire of the rest of the document was redacted. That it was thereby rendered meaningless by the extent of the redactions, and that any potentially relevant material was thereby screened, could not be contested.

**The aviation investigation legislative provisions**

**25.** From the Affidavit of Discovery and the correspondence that preceded the present disclosure motion it is clear that Ryanair claim to be entitled to redact the B.I. Report pursuant to Regulation 996/2010, and S.I. 460/2009. Insofar as Ryanair also purported to rely on Regulation (EU) no. 376/2014, since that was not in force at the time of the Memmingen incident it would not appear to be relevant to the present appeal.

**26.** I do not believe that there is any dispute between the parties as to the relevant legislative provisions, and it is appropriate to set these out now as they were considered by the trial judge and underpinned his decision. While there is a more extensive consideration of the relevant EU and domestic legislation in the useful judgment of Meenan J in the *Channel Four* case, including the Convention on International Civil Aviation 1944 (the "Chicago Convention") which originally provided for non-disclosure of certain accident investigation records, it is not necessary to reprise these older provisions.

**27.** The first relevant provision in time is the Air Navigation Notification and Investigation of Accidents, (Serious Incidents and Incidents) Regulations 2009 (S.I. 460/2009) revoking S.I. 205/1997. This provides: -

> "20(1) The Minister, the Chief Inspector, the investigator in charge, or any other person concerned with the conduct of an investigation into an occurrence (wherever occurring) shall not make any of the following records available to any person for purposes other than such an investigation unless the High Court, on application to it, determines that the benefits resulting from disclosure of the records outweighs the adverse domestic and international impact that the disclosure may have on that or any future investigation:
>
> (a) statements taken from persons by the investigation authorities in the course of their investigation;
>
> (b) communications between persons involved in the operation of the aircraft;
>
> (c) medical or private information regarding persons involved in the occurrence;
>
> (d) CVR recording or transcript from such recordings;
>
> (e) recordings and transcriptions of recordings from air traffic control units;
>
> (f) FDR records or other data recordings or output from such recordings;
>
> (g) cockpit airborne image recordings and any part or transcripts from such recordings;
>
> (h) opinions expressed in the analysis of information, including CVR, FDR and data recorder information;
>
> (i) names of persons involved in the accident or incident.

(2) The records referred to in paragraph (1) shall be included in the final report or its appendices or, where any other report is concerned, only when pertinent to the analysis of the occurrence. Parts of the records not relevant to the analysis shall not be disclosed in the final report or in any other report."

**28.** The second relevant piece of legislation is EU Regulation 966/2010 of the European Parliament and of the Council of 20th October, 2010 on the investigation and prevention of accidents and incidents in civil aviation. This repealed Directive 94/56/EC. Article 14 provides for "protection of sensitive safety information", and the relevant parts provide –

"14.1 The following records shall not be made available or used for purposes other than safety investigation:

(a) all statements taken from persons by the safety investigation authority in the course of the safety investigation;

(b) records revealing the identity of persons who have given evidence in the context of the safety investigation;

(c) information collected by the safety investigation authority which is of a particularly sensitive and personal nature, including information concerning the health of individuals;

(d) material subsequently produced during the course of the investigation such as notes, drafts, opinions written by the investigators, opinions expressed in the analysis of information, including flight recorder information;

(e) information and evidence provided by investigators from other Member States or third countries in accordance with the international standards and recommended practices, where so requested by their safety investigation authorities;

(f) drafts of preliminary or final reports or interim statements;

(g) cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units, ensuring also that information not relevant to the safety investigation, particularly information with a bearing on personal privacy, shall be appropriately protected, without prejudice to paragraph 3."

Article 14.2 then lists further records that "shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety", and includes "(d) occurrence reports filed under Directive 2003/42EC".

**29.** Article 14(3) is of particular importance, and the relevant part states: -

"3. Notwithstanding paragraphs 1 and 2, the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. Member states may decide to limit the cases in which such a decision of disclosure may be taken, while respecting the legal acts of the Union."

**The affidavits**

**30.** The affidavit grounding the application for disclosure was sworn by Mr. Simon McAleese, solicitor for the respondent, on 28th August, 2018. At paragraph 10 Mr. McAleese avers that there is

"very little difference" between the circumstances of the *Channel Four* case and the present case, and he argues for a similar conclusion namely that "the balance of justice lies in favour of disclosure of the Base Investigation Report without redaction". He also avers –

> "It is notable that in the Memmingen incident, the cockpit voice recorder was not saved and, indeed, one of the documents discovered by the Plaintiff appears to confirm that. Hence, I believe, subject to correction, that the Base Investigation Report was among the documents which Meenan J. ordered be produced to the Defendant in un-redacted format in the *Channel Four* case."

Mr. McAleese then avers: -

> "11. I say that it is notable that the Defendant is pleading truth in respect of two of the meanings alleged by the Plaintiff: meaning (iii) and (v) – that '*Ryanair flight crews are forced to operate under massive stress*' and that '*the culture that exists in Ryanair is a cause for deep concern*' respectively. The Defendant also relies upon the defence of qualified privilege. The Plaintiff, in its Reply to Defence accuses the Defendant of malice and says that the Defendant is not entitled to rely upon qualified privilege and alleges that, *inter alia*, "*The Defendant's dominant motive and improper purpose in publishing the words complained of was to undermine public confidence in the Plaintiff and damage the Plaintiff's industry – leading reputation for safety*'. I say that this is a very serious accusation indeed and that the Base Investigation Report is directly relevant to the critical issues at play in this litigation."

**31.** Mr. McAleese's affidavit also grounds the respondent's application for further and better discovery of an "Operations Road Show" presented by Ryanair's chief pilot at Dublin Airport in early 2013 which, it is said, dealt specifically with the Memmingen incident. The trial judge refused that

application for further and better discovery, and, as indicated earlier, that aspect of his order is not the subject of any cross-appeal.

**32.** In correspondence exhibited by Mr. McAleese there is a letter of 11 May 2018 in which Ryanair's solicitors say that the balancing exercise undertaken by Meenan J. in the *Channel Four* case makes it clear that that decision was based on the particular facts of that case. It is asserted that the aviation legislation precludes disclosure "save where a court applies a balancing exercise and determines that it is warranted" and that Ryanair cannot release itself from the confidentiality obligations of the legislation purely because of the decision in the *Channel Four* case.

**33.** Two replying affidavits were sworn by Mr. David Casey, legal counsel of Ryanair, on 12 December 2018 and 13 September 2019 respectively. In the first of these, having referred to the history of the agreement over discovery, and having referred to the affidavit of discovery sworn by Ms. Moynihan, Mr. Casey from para. 16 onwards refers to the confidential nature of the B.I. Report, and that it is "of limited public availability and of a specific character". At para. 17 he avers that "there is an expectation amongst air crew that such documents are confidential and will not be made available to the public by … Ryanair", and that even within Ryanair only members of the Flight Safety and Security Department have full access. It is stated that the report was produced in the context of Ryanair's internal investigation into the Menningen incident.

**34.** In paragraph 18 Mr. Casey refers to confidential data within the report which is subject to Data Protection Legislation. In para. 19 he avers that the report is confidential as a result of the aviation legislation and he cites in support of this the decision of Meenan J. in the *Channel Four* case at para. 77 where it was noted that "it would appear to be the case that this documentation came into existence for the purpose of compliance with the requirements of aviation legislation" and therefore "Ryanair are entitled to rely upon the confidentiality provisions provided for in said legislation". At para. 20 he avers that the report came into existence in accordance with law and that it was a condition of

Ryanair's Air Operators Certificate that it have in place an effective Safety Management System and that this requires Ryanair to have effective procedures for reporting and investigating incidents". At para. 21 he says that the B.I. Report was submitted to the Irish Aviation Authority ("IAA"). He avers that IAA would consider the report to be confidential. He goes on refer in para. 24 to details in the report which would expressly preclude it from disclosure under the relevant aviation legislation, such as the identities of those involved, and details of the occurrence and information sources – matters which he avers are covered by Art. 14(1)(b) of Regulation 996/2010, and Regulation 20(1)(i) of S.I. 460/2009. He avers at para. 26 that the report also reveals the content of statements taken from persons, and that this information is confidential under Art. 14(1)(a) and Regulation 20(1)(a). At para. 27 he avers it contains information of a personal nature, or "with a bearing on personal privacy, including individuals' personal and professional data, which is confidential under Arts. 14(1)(c) and/or (g), as well as Regulation 20(1)(c)". At para. 28 he avers that it contains information produced in the course of the investigations such as "notes, drafts, opinions written by investigators, opinions expressed in analysis of information" which is confidential information when produced in investigations by virtue of Art. 14(1)(d) and Regulation 20(1)(h). At para. 29 he avers that the report also contains communications between persons involved in the operation of the aircraft, and that this is protected by Regulation (20)(b). In respect of each of these averments Mr. Casey identifies particular pages and points by reference to numbers within the B.I. Report. At para. 31 Mr. Casey then deals with the impact of the decision in the *Channel Four* case on the B.I. Report, and in essence relies on the letter sent by Ryanair's solicitors on the 11 May 2018 for the proposition that, while the judgment of Meenan J. "would be relevant to and would undoubtedly be relied upon by your client to support an application for production of a wholly/partially unredacted version" of the B.I. Report, it doesn't permit Ryanair to produce same in the absence of a court order and is dependent on the pleadings/facts of this case.

**35.** Mr. Casey then makes averments to support his contention that production of an un-redacted report should not be ordered in the present case. At para. 35 he draws the distinction between Channel Four and the present case that in *Channel Four* the court ordered discovery whereas in the present case it was the subject of agreement on a counter offer made "without prejudice to overriding objections". He also points out that in the *Channel Four* case the defendant's plea of truth was highly particularised and therefore capable of supporting a request for discovery to that plea, whereas here "the plea of truth [in paragraph 10 of the Defence] is no more than a bare assertion". He asserts further that merely because the B.I. Report was produced in un-redacted form in the *Channel Four* case (thus confirming that this did indeed happen following the judgment of Meenan J.) this does not mean that it should be so produced in this litigation as the cases are different. He asserts that the respondent in the present case was not entitled "to boldly plead the truth and then obtain the discovery of documents in support of that plea". Then at paras 38 – 42 Mr. Casey makes general averments to support his contention that aviation legislation militates against disclosure of particular types of information in order to protect "just culture" or "no-blame culture" in aviation. He avers that airline safety depends upon systems of mandatory and voluntary reporting of "occurrences" which is now governed by S.I. 376 of 2014, but which was preceded by Directive 2003/42/EC, and in Ireland by S.I. 285 of 2007. Mr. Casey refers to Recital 11 in Directive 2003/42/EC: -

> "The sensitive nature of safety information is such that the way to ensure its collection is by guaranteeing its confidentiality, the protection of its source and the competence of personnel working in civil aviation."

In paragraphs 40 and 41 Mr. Casey emphasises the need for "the truthful and accurate flow of information from those involved in an accident or incident" and the need for frank exchanges of information including the routine "… naming and blaming of colleagues and friends, owning up to an error which in other circumstances could cost that person his/her job, providing details of private

or embarrassing exchanges between colleagues which might be relevant…". This he avers is the basis for the legislation that requires a court to perform a balancing exercise before deciding whether to disclose a document in an un-redacted form, and where the court must decide, under Art. 14(3) of Regulation 996/2010 whether disclosure "outweigh(s) the adverse domestic and international impact that such action may have on that or any future safety investigation". In para. 43 Mr. Casey avers that Ryanair has a personal interest in ensuring that documents such as the B.I. Report are not routinely disclosed in litigation, because Ryanair produces such reports in order to ensure it has a proper record of what occurred, that it is properly investigated and that the information is used in the future training of crew. In para. 44 he believes and is advised by colleagues in the Operations Department that "pilots cooperate with base investigations on the understanding that the B.I. Reports are kept confidential and only used for the purposes of flight safety (this is noted on the face of the Memmingen B.I. Report at the bottom of p.9, in relation to a particular issue)." Ryanair is therefore "keen to ensure that such confidential documents are not routinely made available in litigation, unless a court finds that the benefits of the disclosure of this type of information outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation."

**36.** In his second affidavit Mr. Casey makes averments confirming that the B.I. Report was submitted to IAA, and that it treated the report with confidentiality, and would not submit it to a member of the public, "save in accordance with any statutory or other legal obligation to do so" (exhibited letter of 15 January 2019 from Mr. Wayne Tyrrell, legal officer of the IAA).

**37.** There is one further affidavit sworn on behalf of Ryanair by Mr. Martin Timmons, Deputy Director of Safety and Security, on 13 September, 2019. This is sworn to support Mr. Casey's averments as to the practical importance of confidentiality to the "just culture" and the aircrew in

Ryanair, and because his department advised Mr. Casey on such matters for the purposes of his first affidavit. He confirms from his own knowledge the averments made by Mr. Casey.

**The High Court**

**38.** The trial judge sets out in some detail the submissions of counsel and the authorities referred to by them. He then sets out his conclusions. He notes (paragraph 66) that both sides accepted that the B.I. Report was a confidential document, and that the respondent accepted that the confidentiality attaching to the document was protected by the provisions of the domestic and European legislation. He also noted that the respondent "further accepted that if production of the document was ordered by the Court, it would be appropriate to allow some redaction of the document to ensure that the names of people making statements or referred to in the report, or other information of which would identify them, could be redacted".

**39.** At paragraph 31 the first issue which the trial judge decided was whether Ryanair was estopped from arguing that the B.I. Report was not relevant or necessary to enable the respondent to properly put his defence before the court, or attack the case made against him by Ryanair, by virtue of the fact that Ryanair consented to making voluntary discovery of this document, albeit subject to redactions. The trial judge was satisfied that the provisions of O. 30, r. 12(7) of the R.S.C. make it clear that where a party has consented to make voluntary discovery it should be done in like manner and is of like effect as if ordered by the court. He found that "when a party consents to make voluntary discovery they are implicitly accepting that the documents which they are agreeing to produce are relevant and necessary to the case being made by the other side." (para. 67). He considered that if this were otherwise it would lead to the absurdity that a party could agree to make discovery and then redact the documents completely, and could then attempt to prevent production of the document by arguing that it was not relevant and necessary. He considered that this would "lead to utter chaos in

the system", and he found that Ryanair "cannot now argue that the report is not relevant and necessary to the issues to be tried at the hearing of the action." He then stated: -

> "69. Even if I am wrong in that, I find as a fact, having inspected the un-redacted report, that it is relevant and necessary to the issues to be tried at the hearing of the action. I am satisfied that the document will assist the defendant in establishing some of the pleas contained in his defence. I find that production of the document is necessary as it will enable the fair disposal of the issues in dispute between the parties at the trial of the action."

**40.** At paragraph 70 the trial judge accepted that having regard to the Irish and EU legislation Ryanair was not in a position to make voluntary discovery of an un-redacted or redacted copy of the B.I. Report without an order of the High Court. However, he considered that Ryanair had gone considerably further by arguing that an un-redacted copy of the report, or a copy that was only redacted to the extent suggested by the respondent, should not be directed to be produced by Ryanair. This finding had later implications for the costs of the application.

**41.** At para. 71 the trial judge rejected Ryanair's argument "that this was no more than a fishing exercise being engaged in by the defendant so as to establish the plea of justification, which was no more than a bare assertion of truth". The trial judge stated: -

> "While the plea of justification in the defence has not been particularised, I am satisfied that the defendant in making that plea did have some evidence available to him to support the plea. In particular, he had the B.F.U. Report and he could also rely on evidence of his own experience as a pilot employed by the plaintiff. I am satisfied that in these circumstances, the application for discovery of the B.I. Report is not an attempt to establish a bare plea of justification, which did not have any supporting evidence at all, but is in fact an effort to obtain further supporting evidence to justify that plea."

**42.** The trial judge then addressed what he regarded as being the central issue, namely whether the court should direct production of the confidential B.I. Report, referring to counsel's submissions based on the judgments of Clarke J. in *Telefonica O2 Limited v Commissioner for Communications Regulation and Ors.* [2011] IEHC 265 and Meenan J. in the *Channel Four* case. In this regard, the trial judge noted that the parties were agreed that the court was required to undertake a "balancing test" as envisaged in those decisions. He stated –

> "72. … Applying that test, the Court has to balance on the one hand, the confidentiality of the document and in particular the important reasons why such confidentiality has been put in place, as set out in the recitals to the various regulations, as against the materiality of the document to the defendant's case. While the plaintiff cannot argue that the report was not relevant and necessary to the defendant's case, it can certainly argue that having regard to the issues raised on the pleadings, the materiality of the document is not sufficiently great as to outweigh the confidentiality attaching to the report and therefore production of it should be refused."

**43.** The trial judge then sets out at para. 73 – 77 of his judgment the balancing test that he undertook and the reasons that he weighed on each side of the argument for and against production/more limited redaction: -

> "73. In carrying out the balancing test, I accept the evidence in the plaintiff's affidavits that there is a real apprehension of a 'chilling effect' on future investigations, should reports be routinely disclosed to third parties. I further accept the submission that it is not possible to definitively prove the existence of a chilling effect or reticence on the part of pilots to make full and frank disclosures in the event that such reports are subject to disclosure. It is simply not possible to prove that as a result of disclosure being ordered of a report in previous cases, pilots and other crew have been less forthcoming in subsequent investigations. Just because it

cannot be proven definitively, does not mean that it is not a legitimate concern on the part of the airlines and legislators. I have taken this into account in weighing up the question of whether the document should be produced to the defendant.

74. However, I have also had regard to the fact that the defendant has conceded that if the document is produced, the plaintiff should be allowed to redact the names of any persons making statements, or are referred to in the report and to redact any other information which would identify them. I am satisfied that this concession goes a long way to avoiding the negative repercussions that may be feared by pilots and aircrew due to production of the report, because parties to whom it is made available, or should it be referred to in the course of the hearing, people generally would not know who made the statements, or provided the information, or who were referred to in the report. I think that the preservation of confidentiality in relation to these matters will go a long way in preventing any feared 'chilling effect', or negative consequences arising as a result of production of the document.

75. As noted earlier, having viewed the unredacted document, I am satisfied that it will assist the defendant in the conduct of his defence and will be of assistance in enabling the defendant to attack the case made against him by the plaintiff. I am satisfied that it is a material document and is not one of only marginal significance. I cannot elaborate further on my reasons for making this finding, as I have undertaken to not reveal the content of the unredacted B.I. Report.

76. Taking all of these matters into account and having regard to the level of confidentiality that will be preserved by means of the redaction outlined above, I am satisfied that the balancing test comes down in favour of directing production of the B.I. Report by the plaintiff to the defendant, but subject to redaction of the names of any persons, or any other information

that would identify them. Furthermore, I will place strict limits on the extent of circulation of the report once furnished to the defendant. I will outline these at the end of the judgment.

77. Before passing on, I merely observe that all of this may become academic if the *Channel 4* case goes to trial before this case, because the B.I. Report may be opened to the jury in the course of that trial. However, I have not taken that fact into account, as the *Channel 4* case may settle, or for other reasons may not come on for hearing before this case comes to trial. Accordingly, I have had to decide this case without regard to this practical consideration which may come to pass."

**44.** The trial judge goes on to deal with the respondent's application for production of the Operations Roadshow documentation, which he refused and which is not the subject of any cross-appeal.

**45.** In his judgment (and order) the trial judge specifies the permitted redactions and limits on dissemination of the B.I. Report in the following terms: -

"2. The Plaintiff is to produce to the Defendant's solicitor the said Ryanair Base Investigation Report. The Plaintiff may redact the report so as to remove the names of persons making statements or providing information and the names of persons referred to therein and may also redact any other information which would identify them.

3. The Plaintiff is to furnish six copies of this redacted version of the Report to the Defendant's solicitor. The Plaintiff's solicitor may put identifying marks on the copies of the report so furnished. The report may not be copied by the Defendant's solicitor.

4. The Defendant's solicitor may retain a copy for his own use - he may furnish three copies to Counsel and he may furnish two copies to such experts as may be retained on behalf of the

Defendant. The Defendant may view the report in his solicitor's office. Any expert to whom the report is given, must furnish a written undertaking not to copy the report, or otherwise disclose its content to any third parties. The expert may refer to the content of the report in the body of any report furnished by him to the Defendant's solicitor.

5. At the conclusion of the hearing, or upon settlement of the matter, the Defendant's solicitor is to return all six copies of the report to the Plaintiff's solicitor, subject to the reports being returned to the Defendant's solicitor in the event of an appeal.

6. The parties have liberty to apply in the event of there being any disagreement between them as to the extent of the redactions made to the report."

A stay was placed on the order pending the determination of this appeal.

**46.** The trial judge ordered Ryanair to pay the respondent's costs of the motion and order, with a stay on that order pending the determination of the proceedings. Ryanair have also appealed in respect of that costs order.

***Notice of appeal***

**47.** In the Notice of Appeal Ryanair set out four grounds, asserting that the trial judge erred in law and in fact in: -

(1) in finding that Ryanair was estopped from arguing that the B.I. Report was not relevant or necessary;

(2) in finding that (a) the Report was relevant and necessary to the issues to be tried at the action; (b) that the application did not amount to fishing; and, (c) that inspection could be ordered on foot of an un-particularised plea of truth;

(3) in finding that the balance favoured the production of the un-redacted version of the B.I. Report; and

(4) in awarding costs to the respondent.

In respect of each ground the Notice of Appeal sets out extensive elaboration, reciting case law and other materials, much of which is in the nature of arguments/submissions, with the result that the Grounds of Appeal runs to over five pages of small print. Much of this is in fact repeated in Ryanair's written submission, or was repeated in counsel's oral submissions to this court.

**48.** In Respondent's Notice, which is commendably concise, the respondent joins issue with each of these grounds.

**The approach to this appeal**

**49.** Before considering each of these grounds in turn it is important to restate that this is not a re-hearing. In *Goode Concrete CRH v Kilsaran* [2020] IECA 56 this court, in the context of an appeal against a discovery order of the High Court, held that –

> "These appeals do not proceed by way of a rehearing. The onus is on the party who appeals an order for discovery to show where the trial judge erred in the identification, or application, of the applicable legal principles, or in the exercise of his or her discretion in applying them to the discovery sought." (para. 2)

**50.** This applies equally to an inspection application. As stated by Irvine J. on behalf of this court in *Colston v Dunnes Stores* [2019] IECA 59, in the context of an appeal where Dunnes Stores resisted inspection of documents on the basis of litigation privilege: -

> "It is important when considering an appeal such as the present one to have regard to the fact that the role of the appellate Court is to review the decision made by the High Court judge. Its function is not to rehear the application." (para. 23)

This is particularly relevant to the present appeal where most of the arguments advanced by Ryanair in the Notice of Appeal and submissions reflect arguments that were advanced in the High Court and rejected by the trial judge.

**51.** Further, Irvine J. on behalf of this court in *Lawless v Aer Lingus* [2016] IECA 235, in a discovery appeal, gave the following guidance: -

> "In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion." (para. 23)

Accordingly the onus is on Ryanair to establish not just that the trial judge erred in law or fact, or in the application of the law to the facts, but also, insofar as he exercised his discretion to order inspection, that Ryanair would suffer "real injustice" if the B.I. Report were to be inspected in the less redacted version directed by the High Court.

**Ground One - Estoppel**

**52.** Ryanair argues that the trial judge erred in his findings at paragraphs 67 and 68 of the judgment that the respondent was estopped from arguing that the B.I. Report was not "relevant or necessary". It is submitted that the consent discovery order was "on terms", and that Ryanair never made any express or implied concession that the B.I. Report was relevant or necessary, and that "This was for

another day, if the Report was found to be confidential" (para. 12 of their written submission). It was submitted that the trial judge erred in disregarding Ryanair's express reservation of its position in their letter of 19 February,2016 in response to the request for voluntary discovery, and that this could not have been regarded as an unequivocal promise by Ryanair such as to give rise to a promissory estoppel.

**53.** In my view this submission is misconceived. While it is true that in the letter of 19 February 2016 Ryanair through its solicitors denied that the broad sweep of documentation first sought as Category one was relevant, or, more accurately, that the respondent had not explained why such documents would be relevant, nevertheless the offer was made in the following terms: -

> "**Strictly without prejudice to the foregoing** the plaintiff is willing to make discovery of the following documents instead of category one:
>
> (1) …
>
> (2) Ryanair Base Investigation Report (redacted in accordance with EU Regulations),
>
> (3) …"

**54.** This offer was not accepted by the respondent – see their solicitor's letter of 7 March 2016. Ryanair's solicitors then, in their letter of 14 March 2016, repeated their offer in identical terms, but with the additional sentence "Further, our client will, as required by legislation, be anonymising the relevant documentation accordingly." Agreement was not reached at that time, and the motion seeking discovery issued. It was the respondent's entitlement to pursue such a motion pursuant to O. 31, r. 12(1) in order to obtain discovery on oath of documents "which are or have been in [Ryanair's] possession, power or procurement relating to any matter in question" in the suit. Subsequently, agreement was reached that Ryanair would make the discovery in respect of category one offered in

Ryanair's letters of 19 February 2016 and 14 March 2016 and this was incorporated into the Deputy Master's order dated 25 July, 2016. This preserved Ryanair's right to redact to ensure *anonymity* for those involved in the incident. That agreed order records the *respondent's* reservation of the right to contest any redaction, and to seek further and better discovery, *but does not record any reservation in relation to relevance or necessity*. By offering and agreeing that discovery Ryanair was accepting that the B.I. Report related to one or more matters in question in the suit, and bound itself to make discovery on oath of the B.I. Report in the First Schedule to the affidavit of discovery. Thus, while the order contains a reservation on the part of the respondent to contest redaction, it does not contain any reservation in favour of Ryanair to contest relevance, or, subject only to what follows in respect of the issue of confidentiality, necessity.

**55.** Further, Ms. Moynihan in the affidavit of discovery properly avers:

> "13. ***Schedule One, Part One*** I have in my possession, power or procurement the documents relating to the matters in question in this suit and falling within categories one and two above, as set out in the First Part of the Schedule hereto.

Ms. Moynihan then lists the B.I. Report in the First Schedule, and, as set out fully earlier in this judgment, expressly avers at para. 29 that this was a document "relating to the matters in question in this suit", in accordance with the standard form of averment required by the R.S.C. and set out in Form No. 10 in Appendix C.

**56.** The provisions of O. 31, r.12(7) of the R.S.C. make it clear that where a party has consented to make voluntary discovery it must "be made in like manner and form and have such effect as if directed by order of the court". This means that if there had been a voluntary discovery *simpliciter* on an agreed basis this would have had precisely the same effect as if ordered by the court, and accordingly no point arises from the effect that the order of the Deputy Master recorded the agreement between

the parties in relation to discovery rather than ordering discovery as such. The same remedies for default in making discovery apply in relation to an agreement to make a voluntary discovery as apply to court ordered discovery.

**57.** In their Notice of Appeal Ryanair seemed to suggest that O. 31, r. 12(7) is merely "a stick to ensure that parties do what they agreed to do and the litigation moves along as efficiently as possible." They submit that had it been intended that agreements to make voluntary discovery carried with them an open concession as to relevance or necessity, this would have been explicitly stated in the Rules.

**58.** I cannot accept this submission. It flies in the face of the words "have such effect as if directed by order of the court". Where a category is agreed that is a clear and binding acceptance that the documents within that category are relevant and necessary. As was stated in *Ganley v Radio Telefís Eireann* [2017] IEHC 78, at [36] – [37]:

> "the rules regarding the content of an affidavit of discovery are not something to be honoured in the breach or brushed to one side; the rules are required to be observed and ought to be observed in whatever form they subsist from time to time."

That the swearing of an affidavit of discovery necessarily involves the concession of relevance and necessity is also borne out by the following passages on inspection from *Delany & McGrath on Civil Procedure* (Round Hall, 4th Edition, 2018):

> "11-51 Where inspection is sought of a document referred to in an affidavit of discovery, the court will not have to consider whether the document is relevant or whether it is in the possession, power or procurement of the party against whom the motion is brought, but simply whether that party can establish a good reason, such as a sustainable claim for privilege, for objecting to the production of the document for inspection. If the court is satisfied that the claim of privilege is properly made, then it will refuse the application for inspection.

11-52 An application for inspection can also be used as a means of challenging redactions to documents made to protect the confidentiality of information or objections to production of documents on any other basis…"

**59.** It would of course have been open to Ryanair to have fully contested relevance and necessity before the Deputy Master, or to have sought to have the matter transferred to the High Court for that issue to be adjudicated there. However, this did not occur and Ryanair lost the opportunity to contest relevance, or to contest necessity (save in a limited way in the context of the application to inspect a fuller copy, a subject which I will address shortly in this judgment). It is of note that in response to a question that I put to Ryanair's counsel he accepted "with hindsight" that Ryanair should have fought these issues at the discovery application stage, and that what it considered it was doing in agreeing the discovery was fast tracking resolution of the redaction/confidentiality/balancing issue.

**60.** Ryanair was also critical of the trial judge in holding that any contrary conclusion would lead to an "absurd situation whereby a party could agree to make discovery of certain documents, they could then redact the documents completely and when they were challenged on that, they could attempt to prevent production of the document by arguing that it was not relevant and necessary", and thereby putting the party who had agreed to accept voluntary discovery in a worse position by having agreed to accept voluntary discovery in the first place, which he felt would lead to "utter chaos in the system". In my view this strongly worded comment by the trial judge was warranted, at least so far as relevance is concerned. The redaction of discovered documents is a practice that has become commonplace in recent years. Whilst wholesale or partial redaction may be justified on certain grounds, these are not reasons for excluding from listing in a discovery affidavit documentation that is relevant to any particular category, and which is "necessary", subject only to privilege, confidentiality, commercial secrecy, or other statutory obligation that may justify resistance to full production and inspection. If parties to proceedings routinely agreed to discover documentation with

the intention of extensive or material redaction and later contesting relevance at the point where inspection/production is sought, this would indeed undermine the system of agreed/voluntary discovery.

**61.** The position with regard to "necessity" is that where documents are relevant, they are *prima facie* necessary to support the case being made or the defence raised. This was established in *Taylor v Clonmel Health Care Limited* [2004] IESC 13, where Geoghegan J., who delivered the judgment of the court, stated at p. 182: -

> "If a party is entitled to a document on grounds of relevance to assist him in his case on the ordinary discovery principles it will usually be *'necessary'.* Save in exceptional cases a formal verification of this in the affidavit will be sufficient on a *prima facie* basis. The opposing party of course may decide to raise the issue of necessity and put forward reasons why it is not necessary and that issue can then be disposed of in due course."

What "necessity" means is that the documents are "necessary for disposing fairly of the cause or matter". This wording is used in O.31 r.12(1) (a) in the context of an application for discovery, and again in O.31 r.18(2) in the context of an application for inspection. O.31 r.18, sub rule (1) empowers the court to make an order for inspection, and sub rule (2) provides –

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

**62.** In this regard the trial judge correctly refers to *Cooper Flynn v RTE* [2002] 3 I.R. 344, a case where production was resisted in the context of banker confidentiality. Kelly J. derived assistance from the *dictum* of Bingham J. in *Taylor v. Anderton* [1995] 1 WLR 447, at p.462, which established that the test of "necessity" is whether the documents will lead to "litigious advantage". Kelly J. also

cites with approval Salmon L.J. in *Science Research Council v. Nasse* [1980] AC 1028, where at p.1071 it was stated:

> "The law has always recognised that it is of the greatest importance from the point of view of public policy that proceedings in the courts or before tribunals shall be fairly disposed of. This, no doubt, is why the law has never accorded privilege against discovery and inspection to confidential documents which are necessary for fairly disposing of the proceedings. What does 'necessary' in this context mean? It, of course, includes the case where the party applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such cases. Suppose, for example, a man had a slim chance of success without inspection of documents but a very strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection. I, of course, recognise that the tribunal, like the courts, has a discretion in the exercise of its power to order discovery. It would, however, in my view, be a wholly wrongful exercise of discretion, were an order for discovery and inspection to be refused because of the court's or the tribunal's natural aversion to the disclosure of confidential documents notwithstanding that the proceedings might not be fairly disposed of without them."

**63.** Fennelly J. in *Ryanair plc v Aer Rianta cpt* [2003] IESC 62 found that the amendment of Order 31 r.12 in 1999 -

> "…shifted the primary burden of proof. The applicant [for discovery] must, under the present rule, discharge the prima facie burden of proving that the discovery sought *"is necessary for disposing fairly of the cause or matter".*

Fennelly J. also approved of the notion of *"litigious advantage"* adopted by Kelly J. in *Cooper Flynn*, while cautioning that it should not be substituted as a term of art for the words of the rule. In paragraph 55 he adds that "the applicant does not have to prove that they are, in any sense, absolutely necessary".

**64.** Accordingly the respondent in the discovery process has already satisfied the court of the burden of showing that discovery of the B.I. Report is "necessary" in the sense of being of "litigious advantage". The burden, scale and cost of discovery, which may also be argued to resist an application for discovery on grounds of "necessity", or "proportionality", as an aspect of necessity, have no application to the present case. While there may be exceptional circumstances that might render a second analysis of necessity appropriate, no such circumstances are identified in the present appeal. Discovery of the B.I. Report has in fact been made. It follows that inspection can now only be resisted on limited grounds. Privilege does not arise in the present case, and the only basis upon which inspection could be resisted is confidentiality/the aviation investigation legislation.

**65.** Finally I note that in the *Channel Four* case at para. 85, Meenan J. stated:-

> "… In my view, the documents which Ryanair have redacted were discovered so therefore it follows that such documentation is necessary and relevant for the purposes of a fair trial. Therefore, Channel Four have a *prima facie* right to such documentation. This right, however is subject to the 'balancing test' referred to."

That summation in my view applies with equal force in the present case.

**66.** For these reasons I am satisfied that the trial judge did not err in fact or in law in the conclusions that he reached at paragraphs 67 and 68 of his judgment. In my view an issue estoppel arose such that Ryanair, having agreed to make discovery of the B.I. Report, could not thereafter challenge an application for inspection or seek to justify complete or extensive redaction on the same grounds on

grounds of relevance, or of necessity, provided always that this did not prevent Ryanair contesting the inspection application on grounds of confidentiality or grounds arising under the provisions of the aviation investigation legislation. In so far as Ryanair has attempted to go beyond this and relitigate these issues on this appeal it has in my view engaged in an abuse of the process and wasted valuable court time both in the High Court and in this court. The only real issue that arises on this appeal is the question of whether, in the light of the confidential nature of the B.I. Report and/or the aviation investigation legislation, the report should be disclosed.

**Ground two:**

***(a) relevant and necessary, (b) fishing exercise, (c) un-particularised plea of truth***

**67.** It follows from the finding that Ryanair is not entitled to contest that the B.I. Report is both relevant and necessary, that ground two does not arise. However for the sake of completeness I briefly will address these issues.

**68.** As to (a), Ryanair submits that the trial judge erred in para. 69 of his judgment in stating that he was "satisfied that the [B.I. Report] will assist the defendant in establishing some of the pleas contained in his defence" and that "production of the document is necessary as it will enable the fair disposal of the issues in dispute between the parties at the trial of the action". The argument is that in its defence the respondent only pleads that two of the meanings/innuendos contended for in the Statement of Claim are "true in substance and in fact", namely the following meanings: -

> "(iii) Ryanair flight crews are forced to operate under massive stress.
>
> (v) The culture that exists in Ryanair is a cause for deep concern."

It is submitted that these pleas are general in nature, and that neither of them relate to what happened in Memmingen. Indeed Ryanair went so far as to make an extraordinary submission that "what the

defendant has to prove has nothing to do with what happened in Memmingen that day", and that the B.I. Report is "tangential". It was submitted that the B.I. Report relates only to the imputation pleaded at (iv) namely "the pressure and stress placed on Ryanair flight crews resulted in pilots making errors", in respect of which the respondent has not pleaded the truth. It is argued, by extension, that inspection of the B.I. Report will not confer a litigious advantage such that it would be relevant or necessary as the respondent cannot lead evidence beyond the parameters of his plea of truth, and cannot be permitted to "fish for this report".

**69.** I cannot agree with these submissions. Although the Statement of Claim studiously avoids any mention of the Memmingen incident it is clear that the respondent's postings pleaded in the Statement of Claim were part of a string of postings relating to the Memmingen incident on 23 September 2012. This is the incident referred to in para. 4 of the Statement of Claim which quotes the main posting the subject matter of the proceedings, which opens with the sentence "Ryanair should investigate what internal procedures lead to a crew trying to make up for lost time by impromptu change of plans that nearly went south." Lest there be any doubt that this referred to the Memmingen incident, in Replies to Notice for Particulars dated 10th April, 2014 at para.1 the respondent gives particulars of the material facts upon which he intends to rely in support of the plea that the words complained of constituted a fair and reasonable publication on a matter of public interest, and the first bullet point reads: -

> "The contents of the German Federal Bureau of Aircraft Accident Investigation Report ('interim report') dated 23 September 2012."

This is the BFU Report referred to in the posting.

**70.** Secondly this court, as did the trial judge, had an opportunity of inspecting the un-redacted B.I. Report. Having inspected it I am satisfied that it is relevant to the defences of justification in respect

of the pleas at para. 6(iii) and (iv), and further relevant to the defence of fair and reasonable publication on a matter of public interest under section 26 of the Defamation Act, 2009 and/or the defence at common law of publication on an issue of public important interest. As with the trial judge, this court is constrained in the detail which it can provide on reasons for finding the B.I. Report potentially relevant to issues that arise in the case, but it seems to me that there is content at paras. 3.1, 6.1, 8.2, 13.4, 14, and in highlighted references to the manual concerning the circumstances in which the CVR should be preserved.

It follows from above that the centrality of the Memmingen incident to these proceedings cannot be ignored or glossed over.

**71.** In a further argument, that does not appear to have been made in the High Court, counsel for Ryanair relied on the "single meaning rule" under which at trial a plaintiff in a defamation action seeking to prove by implication/innuendo a lesser meaning may be tied to only proving that lesser meaning. It was argued that as the truth of the plea at 6(iv) ("the pressure and stress placed on Ryanair flight crews results in pilots making errors") was not one in respect of which the respondent pleaded justification and therefore the B.I. Report was not relevant to the defence of that pleaded innuendo, then *a fortiori* it could not be relevant to what were suggested to be the less serious pleas at para. 6(iii) and (v), quoted above.

**72.** The first difficulty with this argument is that it is a matter for the trial judge to decide what might be regarded as the more serious, and by contrast the less serious innuendos pleaded in the Statement of Claim; this is not an issue that this court could or should be asked to determine. Furthermore, in my view the B.I. Report is also relevant to the pleas under s. 26 of the Defamation Act, 2009 and/or publication on an issue of important public interest.

**73.** Further, insofar as Ryanair suggests that the discovery sought is not "necessary" because the respondent already has the BFU Report and can rely on his own personal experience as a pilot, this

cannot be deployed by Ryanair to suggest that the discovery sought is not "necessary". As stated earlier, if the category sought is relevant, then it is usually also necessary, and even if the content of the B.I. Report overlaps with the BFU Report, or other evidence available to the respondent, that is not a reason to refuse discovery. Provided the documentation sought is likely to undermine the plaintiff's claims, or advance a defence, then it should be discovered, and be available for inspection because it is necessary "for disposing fairly of the cause or matter". As Bingham M.R. stated in *Taylor v Anderton* at p.434, in another passage quoted with approval by Kelly J. in *Cooper Flynn v RTE* –

> "Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection."

And as Fennelly J observed in *Ryanair plc v Aer Rianta CPT* the respondent does not have to show that the documentation is "in any sense absolutely necessary".

**74.** Finally having read the B.I. Report I am satisfied that not only is it relevant but that its discovery is "necessary" for disposing fairly of the proceedings in the sense that it may give litigious advantage to the respondent in defending the proceedings.

**75.** Accordingly, even if Ryanair were not estopped from pursuing the issues of "relevance and necessity" it has failed to satisfy me that the trial judge erred in law or in fact in any respect in his determination that the un-redacted B.I. Report is both relevant and necessary, and *prima facie* should be produced for inspection.

**Ground three:**

***Confidentiality and the balancing exercise***

**76.** There was no issue between the parties that the B.I. Report attracted confidentiality, and that disclosure was governed by Art. 14(3) of Regulation 996/2010, and that the High Court, and this court on appeal, was required by Regulation 20(1) of S.I. 460 of 2009 to carry out a balancing exercise, and not to permit the report to be made available unless determining "that the benefits resulting from disclosure of the records outweighs the adverse domestic and international impact that the disclosure may have on that or any future investigation…" . As Meenan J. put it in the *Channel Four* case: -

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

**77.** However, Ryanair in its Notice of Appeal and written submissions appears to criticise the trial judge for applying a balancing test derived from *Telefonica O2 Ireland Limited v Commission for Communications Regulation* [2011] IEHC 265 and the *Channel Four* case which required him, per paragraph 72 of his judgment –

> "… to balance on the one hand, the confidentiality of the document, and in particular the important reasons why such confidentiality has been put in place, as set out in the recitals to the various regulations, as against the materiality of the document to the defendant's case."

**78.** As I understand the argument, Ryanair contended that this fell short of what was required in a case concerning disclosure of aviation incident investigation documents, where the balance to be drawn was between "benefits resulting from disclosure" and the "adverse domestic and international

impact such disclosures may have on any future safety investigation" (*per* paragraph 81 in the *Channel Four* case). Ryanair submitted that the trial judge made no distinction between domestic and international impact of such disclosures, and only weighed in the balance the "real apprehension of a chilling effect on future investigations" which he dealt with in para. 73 of his judgment.

**79.** In my view this criticism of the trial judge's approach to the balancing exercise is not justified. Firstly, it is very clear from the judgment that the trial judge was alive to the relevant aviation legislation, which he recites or summarises in some detail in paras. 29 and 30 of the judgment. He also clearly considered the judgment in the *Channel Four* case, quoting extensive extracts in paras. 35 and 36 of his judgment. He also notes at para. 46 Ryanair's submission that the *Channel Four* case was "very different", and he notes at paras. 52 – 58 counsel's detailed submissions on the balancing test. These included: -

- the "very good policy reasons for which confidentiality has been applied under aviation legislation to this document";
- the policy considerations underpinning EU Regulation 996/2010 to promote airline safety and ensure full and comprehensive investigations could be carried out into occurrences, and in particular Recital (4) (the sole objective of safety investigations should be the prevention of future accidents and incidents without apportioning blame or liability) and Recital (20) (measures should be put in place to enable safety investigation authorities to carry out their tasks in the best possible conditions in the interests of aviation safety);
- that the affidavits of Mr. Casey and that of Mr. Timmons provide evidence that it is essential to promote a "just culture" or "no blame culture" for air incident investigations, such that the B.I. Report would only receive limited circulation within Ryanair, and for limited purposes;

- the "real risk" that if disclosure of investigation reports was ordered, pilots and other flight crew, may hold back or be less forthcoming in giving assistance to future investigations (the "chilling effect");
- the submission that "it was almost impossible for the plaintiff to establish in evidence that there had in fact been such a "chilling effect";
- that the respondent was already in possession of the B.F.U. Report, and that the B.I. Report went no further than that, so that the defendant was not at any disadvantage in establishing his pleas of justification;
- that in addition Ryanair had already made discovery of the Ryanair Internal Operations Quality Audit Report dated June 2013, setting out corrective steps taken in light of the B.I. Report; and
- that the B.I. Report was not relevant to the pleas such as publication constituting a fair and reasonable publication on a matter of public interest, qualified privilege, or Ryanair's plea of malice in respect of the plea of qualified privilege.

**80.** Having recited these arguments it cannot be said that they were not weighed in the balance when the trial judge carried out the balancing exercise. It is clear that he bore in mind the international dimension from the simple fact he recites and was applying EU Regulation 996/2010 which is a provision that has application across the European Union. He does not, as Ryanair suggests at para. 24 of its written submissions, only weigh in the balance the "real apprehension of a chilling effect on future investigations". He did accept that this was a real apprehension if reports were "routinely disclosed" to third parties. He also accepted Ryanair's submission as to the difficulty in proving the existence of a chilling effect, stating –

> "73. …It is simply not possible to prove that as a result of disclosure being ordered of a report on previous cases, pilots and other crew had been less forthcoming in subsequent investigations."

This finding may have been over generous to Ryanair's submission: I would have expected that it would be possible to demonstrate Ryanair pilot and cabin crew attitudes to disclosure of air incident reports, for example from research based on anonymised questionnaires amongst relevant staff, or from employee exit interviews. Be that as it may the trial judge was entitled, in carrying out his analysis, to comment, as he does at para. 73 –

> "Just because it cannot be proven definitively, does not mean that it is not a legitimate concern on the part of the airlines and legislators. I have taken this into account in weighing up the question of whether the document should be produced to the defendant."

**81.** It is also evident from para. 75 of his decision that the trial judge took into account Ryanair's submissions as to the lack of materiality of the B.I. Report. He was entitled in my view to come to the view that in its un-redacted form it would nevertheless assist the respondent in the conduct of the defence, and enable him to attack the case being made against him by Ryanair. He could not elaborate further on this without revealing the content of the un-redacted B.I. Report.

**82.** The trial judge was also entitled to have regard to the respondent's important concession, made on affidavit and repeated in court, that Ryanair should be allowed to redact the names of any persons making statements, or referred to in the report, and to redact any other information that would identify them. His observation in para. 74 that "… this concession goes a long way to avoiding the negative repercussions that may be feared by pilots and air crew due to production of the report… and will go a long way in preventing any feared 'chilling effect', or negative consequences arising as a result of

production of the document", is in my view reasonable and certainly falls within the margin for appreciation that this court should afford to the trial judge in addressing this issue.

**83.** The effect of such concession on the B.I. Report is that Ryanair may – and should - redact the identity and relevant biographical details in respect of the captain and first officer on p.1, the reference to the captain by way of initials on p. 6, the reference by initials to an individual on p. 10 in a section introduced by "Debriefed by…", and the signature of the fire safety officer appearing on p. 11. In my view the trial judge was entitled to place considerable store by these permitted redactions, and further by the strict limits on the extent of circulation of the report which he imposed in the order at paras. 3, 4, 5 and 6, quoted earlier in this judgment. These restrictions limit the number of copies that may be made, and circulation is limited to the respondent's solicitor and counsel and experts, and the respondent may only view the report in the office of his solicitor.

**84.** I would also observe that it is now eight and half years since the Memmingen incident, and all investigation of the incident must have ended long ago; at this remove it could not reasonably be argued that disclosure to the respondent in these proceedings could adversely impact investigation of that incident. This passage of time may also be a factor that militates against the broader argument for a "chilling effect" on future investigations, but I would prefer to leave that for consideration in an appropriate case.

**85.** I am satisfied that no valid or persuasive criticism is made of the trial judge's approach to the balancing exercise, whether in identifying the relevant domestic and aviation law, or in applying that to the facts and the pleaded case. Further, the balancing exercise is one that falls within the discretion of the trial judge, and this court, whose function as an appellate court is limited to review rather than a re-hearing, must afford a reasonable margin of appreciation to the trial judge. It would not be appropriate for this court to interfere with the exercise of the trial judge's discretion unless there was

a clear error of law or fact, or clear misapplication of legal principle to the facts. Nothing approaching anything of that nature has been demonstrated by Ryanair, and I would reject this ground of appeal.

**Ground Four:**

**Costs in the High Court**

**86.** Ryanair's submission is that the trial judge should not have awarded full costs to the respondent given that Ryanair successfully defended the application for further and better discovery. It appears that before the trial judge Ryanair proposed that costs should be costs in the cause.

**87.** Ryanair rely on s. 169(1) of the Legal Services Regulation Act, 2015, which provides –

> "169(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –
>
> (a) conduct before and during the proceedings;
>
> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings;
>
> (c) the manner in which the parties conducted all or any part of their cases;
>
> (d) whether a successful party exaggerated his or her claim;
>
> (e) whether a party made a payment into court and the date of that payment;
>
> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and;

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more then one of the parties was or were unreasonable in refusing to engage in the settlement discussions or mediation."

**88.** Ryanair argue that although the respondent's application for inspection, and the application for further and better discovery, were brought within the same motion, they were distinct applications, and as the respondent was unsuccessful on the application for further and better discovery that was a separate event which required a freestanding costs order. It is further argued that the respondent should not have been awarded his costs of the motion for inspection as he was not truly "entirely successful". Ryanair refer to para. 70 in which the trial judge accepts the point that having regard to the Irish and EU aviation legislation "the plaintiff was not in a position to make voluntary discovery of an un-redacted or redacted copy of the "B.I. Report". The plaintiff could only lawfully do so pursuant to an order of the High Court or other competent authority. It was also submitted that the respondent had initially sought a fully un-redacted version of the B.I. Report, and only consented to the exclusion of the names of individuals in the grounding affidavit. It was submitted that the order for inspection was not something that was won, but rather "a necessary consequence of the statutory regime, because the court had to look to the materiality of the document before making its Order". Ryanair, it is suggested, was all but required to play the role of *legitimus contradictor*.

**89.** The respondent's written submission states that the trial judge identified the "event" as the hearing of the respondent's application for the reliefs sought in the Notice of Motion, and that he took the view that the respondent had succeeded in the substantive application namely the inspection motion, thereby winning the "event". It appears that the trial judge took the view that costs had not been materially increased, or the hearing of the motion materially prolonged, as a consequence of the

inclusion of the application for further and better discovery, and for that reason made no deduction to his award for costs.

**90.** Whilst clearly the respondent could have brought the two applications by way of separate motions, that would have increased costs, and the decision to combine the applications is to be commended.

**91.** It is true that Ryanair were obliged to consider the application for further and better discovery, and they did in fact oppose it, and Mr. Casey's first affidavit addresses it at paras. 45-48. It is addressed in the High Court decision at paras 78-80 inclusive. I accept Ryanair's submission that it cannot be said that the respondent was entirely successful in the application, viewed in the round, in the High Court.

**92.** In these circumstances the High Court, retained the discretion as to costs as set out in O. 99, r. 2.

**93.** As to Ryanair's submission that it could not agree to furnishing an un-redacted report and that a court application was unavoidable and a necessary consequence of the statutory regime, this does not bear scrutiny. I accept the respondent's submission that Ryanair went considerably beyond the position that it could only furnish the un-redacted report on foot of a court order – Ryanair actively and vigorously resisted the inspection motion instead of consenting to an order for inspection of the B.I. Report with minimal redaction for the purpose of avoiding identification of any persons referred to in the report or making statements or providing information. It is clear from Mr. Casey's first affidavit that Ryanair made no offer to furnish a less redacted version, and the respondent was required to run the principal motion, and was, in respect of the inspection application, entirely successful. The analogy of Ryanair to that of a *legitimus contradictor* was not in my view apposite.

**94.** Furthermore the Ryanair contested relevance and necessity (above and beyond the issue of confidentiality/aviation legislation) and were found to be estopped from doing so, a finding with which I consider was correct. This added to the submissions and must have increased the length of the hearing.

**95.** In those circumstances I am of the view that the trial judge was entitled to exercise his discretion in relation to costs in the way that he did, and I would reject the appeal in respect of his costs order.

**Appeal costs**

**96.** As this judgment will be delivered electronically, and in accordance with the practice of this court, I will give my proposal as to the costs in this appeal. As the respondent has entirely succeeded he is, under s.169(1), *prima facie* entitled to his costs of the appeal. I see nothing in the nature or circumstances of the case, or the conduct of the appeal by the respondent, that would lead to a different order. Should Ryanair wish to seek a different order its solicitors should so indicate by email to the Court of Appeal Office within 14 days from the electronic delivery of this judgment, and a short costs hearing will be scheduled accordingly.

**Viewing by the respondent personally**

**97.** I note that the respondent in the Memorandum of Appearance on his behalf gives as his place of residence an address in the French West Indies. In light of the travel and other limitations resulting from the Covid-19 pandemic this may give rise to practical difficulties in the viewing of the B.I. Report by the respondent in a solicitor's office in Dublin (as ordered by the trial judge). In the High Court order liberty to apply is given "in the event of there being any disagreement between them as to the extent of the redactions made to the report", but not otherwise. I would be disposed in the circumstances to extend the liberty to apply to cover the possibility that the parties are unable to agree appropriate alternative means by which the respondent may view the report while preserving it from

further circulation. It may be that agreed viewing could be arranged via a reputable lawyer with an office in the French West Indies.

**Ms. Justice Power and Mr. Justice Binchy having read this judgment and the proposed orders have indicated their agreement with same.**