[2019] IEHC 744

THE HIGH COURT

[2013 No. 3816 P.]

BETWEEN

RYANAIR LIMITED

PLAINTIFF

AND

ERIK BESANCON

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 6th day of November, 2019

Introduction

1. The plaintiff is a limited liability company, involved in the airline business. The defendant was at the time of the matters complained of in these proceedings a pilot employed by the plaintiff.

2. These proceedings, which will be described in more detail in the next section of the judgment, are defamation proceedings arising out of certain postings made by the defendant on a website in December 2012 concerning an incident that had occurred involving a Ryanair flight at or near Memmingen Airport in Germany on 23rd September, 2012. The plaintiff alleges that these postings were defamatory of it.

3. In this application the defendant seeks production of an investigation report drawn up by the plaintiff into the incident, which is known as the S.A.I.R. Base Investigation – final report dated 30th October, 2012, being the date that it was accepted by the Chairman of the S.A.I.R. review meeting (hereinafter referred to as the "B.I. Report").

4. The defendant submits that this report is highly relevant to the issues that will arise for determination at the trial of the action and accordingly that it is necessary for him to be furnished with a copy of this report in advance of the hearing. The plaintiff resists production of the report on the basis that it is a confidential report, which is protected by both Irish and EU aviation legislation. It is submitted that if the Court carries out the correct balancing exercise, whereby it balances the advantage to the defendant 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 to the Proceedings

5. This action arises out of postings that were made by the defendant concerning an incident at or near Memmingen Airport on 23rd September, 2012. In very brief terms, what happened was as follows: a Ryanair plane was on a flight from Manchester to Memmingen Airport in Germany. It had 135 passengers and 6 crew members on board. There had been a delay of approximately 25/30 minutes in leaving Manchester. On the approach to Memmingen Airport, the flight crew asked for permission 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 the 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 the investigation.

6. As the incident occurred in German airspace, an investigation was carried out by the German Federal Bureau of Aircraft Accident Investigation, which produced an interim report (hereinafter referred to as "B.F.U. Report"). The account of the incident given above, is taken from that report.

7. In 2012 the defendant was employed as a pilot by the plaintiff. He obtained a copy of the B.F.U. Report which had been issued in November 2012. On 9th and 10th 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 to a crew trying to make up for lost time by an 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 undoubted unprofessional pilots and trainers in Ryanair to see the company bring this on itself. [Not clear if this portion was written by the defendant].*
>
> *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."*

8. In January 2013, as part of the general safety review carried out within the company in the wake of the Memmingen incident, an Operations Roadshow was held, where the chief pilot gave a presentation to Ryanair pilots and flight crew concerning general safety aspects and procedures that should be adopted in the wake of the Memmingen incident. The defendant also seeks production of this documentation.

The Present Proceedings

9. As the defendant had made his postings on the website under a pseudonym, it took the plaintiff some time to identify that the postings had been made by him. The defendant accepts that he made the postings in question.

10. On 16th April, 2013, the plaintiff issued a plenary summons against the defendant claiming damages for defamation. On 29th June, 2013, the plaintiff served its statement of claim. In it, the plaintiff pleaded that the words complained of meant, and were understood to mean, both in their natural and ordinary meaning and/or by way of innuendo, that:

> *"(1) Ryanair operates unsafe internal procedures which force crews to operate in a manner that compromises safety.*
>
> *(2) A corporate culture exists in Ryanair in which flight crews are pressurised to operate in a manner that compromises safety.*
>
> *(3) Ryanair flight crews are forced to operate under massive stress.*
>
> *(4) The pressure and stress placed on Ryanair flight crews results in pilots making errors.*
>
> *(5) The culture that exists in Ryanair is a cause for deep concern.*
>
> *(6) Ryanair compromises the safety and lives of its passengers and is an airline that should be avoided."*

11. In August 2013, the defendant was dismissed from his position of employment with the plaintiff.

12. On 29th November, 2013, the defendant filed his defence. In it he denied that 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. He went on to plead that if the words complained of did bear the ordinary meaning or the innuendo contended for in paragraphs 6(3) and 6(5), those words were true in substance and in fact and as a consequence thereof the defendant relied on the defence of justification, or truth, within the meaning of section 16 of the Defamation Act 2009 in respect of those meanings.

13. Alternatively, the defendant pleaded that the publication constituted a fair and reasonable publication on a matter of public interest; the defendant relied on section 26 of the Defamation Act 2009 in that regard. Further, the defendant pleaded that the publication was a publication on an issue of important public interest and the defendant was entitled to avail of a defence at common law arising out of same. Further and in the alternative, the defendant pleaded that he would rely on the defence of qualified privilege in respect of the publication at issue, pursuant to the provisions of section 18 of the Defamation Act 2009.

14. In a reply to defence filed on 12th December, 2013, the plaintiff took issue with the matters pleaded by the defendant in his defence. It was denied that the words complained of constituted a fair and reasonable publication on a matter of public interest, as alleged or at all. It was denied that the defendant was entitled to rely upon section 26 of the Defamation Act 2009. The plaintiff pleaded that the words were not published in good faith or in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for public benefit. They further pleaded that it was neither fair nor reasonable of the defendant to publish the words complained of.

15. The plaintiff further denied that the words complained of consisted of a publication on an issue of important public interest and denied that the defendant was entitled to avail of a defence at common law arising out of same. The plaintiff pleaded that it would rely on the provisions of section 15 of the 2009 Act. Finally, it was denied that the words complained of were published on an occasion of qualified privilege and as such it was denied that the defendant was entitled to rely on the provisions of section 18 of the 2009 Act. Without prejudice to that denial, it was pleaded that the said words were published maliciously by the defendant, he knowing that they were false or recklessly not caring whether they were true or false and/or without any honest belief in their truth out of spite or ill will towards the plaintiff.

16. A request for voluntary discovery of documents was made by the defendant's solicitor by letter dated 4th February, 2016. In a letter dated 19th February, 2016, the plaintiff's solicitor indicated that strictly without prejudice to objections which had been set out earlier in the letter, the plaintiff was willing to make discovery of the following documents instead of category 1 of the documents that had been sought on behalf of the defendant: (1) Ryanair Safety Alert Initial Report-MAN-FMN23/09/12; (2) Ryanair Base Investigation Report (redacted in accordance with EU Regulations); (3) Ryanair Internal Audit Report.

17. There was also an offer in relation to category two of the documents that had been sought by the plaintiff's solicitor in his letter dated 4th February, 2016, which is not relevant to the within application.

18. By letter dated 7th March, 2016, the defendant's solicitor took issue with the arguments set out by the plaintiff's solicitor in its earlier response. In response thereto, the plaintiff's solicitor by letter dated 14th March, 2016, repeated its offer to make discovery of the three categories of documents already outlined, but this time added the further rider: *"Further our client will, as required by legislation, be anonymising the relevant documentation accordingly."*

19. It appeared that the defendant was not agreeable to accepting the offer made on behalf of the plaintiff. A notice of motion seeking discovery of documents was issued on 7th April, 2016. However, agreement was subsequently reached between the parties whereby, in relation to category one, the defendant accepted the offers which had been made by the defendant's solicitor 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 salient parts of which Order are in the following terms:

"[…] 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."

20. In compliance with the terms of the order made by the Deputy Master, an affidavit of discovery was sworn on behalf of the plaintiff by Ms. Yvonne Moynihan, legal and regulatory affairs advisor of Ryanair Limited, on 15th September, 2016. In that affidavit, she had made it clear that the B.I. Report had been redacted/anonymised under Regulation 996/2010, in particular Articles 14 and 15 thereof, and Regulation 376/2014, in particular Articles 15 and 16 thereof. In the body of the affidavit, she had set out the reasons why the redaction had been made. She stated that that had been done in accordance with EU legislation, which was aimed at preserving the "*just culture*" or "*no blame culture*" in aviation. She stated that as was clear from the lengthy recitals to the various EU Regulations, the purpose of the "*just culture*" was to make aviation as safe as possible. That meant encouraging relevant persons to report accidents and incidents and to openly participate in investigations by ensuring that they were not punished for actions, omissions or decisions taken by them, save in extreme cases of wilful misconduct or gross negligence. She stated that it was accepted that confidentiality was an integral part of the "*just culture*"; people would not talk unless they were certain that their information and identity would be kept confidential and, if they did not talk, aviation safety could not be preserved or enhanced. She stated that the Memmingen incident was a serious incident and was therefore subject to occurrence reporting under relevant regulations. She stated that she had personally seen an unredacted version of the B.I. Report. She was satisfied that it was a report that was covered by the regulations and that in those circumstances the plaintiff was bound under the regulations not to disclose it. In particular, she stated that the report contained information which was of a particularly sensitive and personal nature.

21. The B.I. Report which was furnished to the defendant with Ms. Moynihan's affidavit of discovery, was almost completely redacted. The only portions left legible were the various headings to the report under which various items of information and the result of the

information were given. It is fair to say that none of the content of the report was furnished.

22. There was also a document bearing the heading "*MAN-FMN FR3241 EI-DAC*", dated 12th December, 2012. It was also completely redacted, except for these details. There was also a document headed "*Ryanair additional training form, form ref, atf, issue date 1st January 2008"*. It was also completely redacted. There was also a document headed "*Ryanair, line check record 1*" which was also completely redacted.

23. In this application, the defendant seeks production of the B.I. Report in an unredacted form, save that the defendant is willing to accept redaction of the names of any persons who made statements, or were referred to in the report, or of any information that would identify such persons.

Submissions on Behalf of the Defendant

24. Mr. Quinn S.C. on behalf of the defendant stated that the first question which the Court had to decide was whether the B.I. Report was relevant and necessary to enable the defendant to properly mount his defence to the within proceedings. He stated that in this case the document was clearly relevant and necessary for the simple reason that the plaintiff had agreed to make discovery of it on a voluntary basis. Indeed, they had specifically consented to an Order to that effect. This meant that they were conceding that the documents which they had offered in their letters dated 19th February, 2016 and 14th March, 2016, were documents that were relevant and necessary to the defendant's defence, and therefore should be discovered by the plaintiff to the defendant. He submitted that the plaintiff would not have consented to make discovery of the documents if they were not relevant and necessary. Even if that finding did not flow from the fact that they had consented to make discovery of the documents, it was clear that as the document was the report of an investigation carried out by the plaintiff into the Memmingen incident, which was at the core of these proceedings, the document was clearly relevant and necessary to enable the defendant to properly put his defence before the jury at the trial of the action.

25. Counsel submitted that it was well established on the authorities that a document was relevant if it would assist the party to make his case, or would assist him to damage the case of his opponent. In relation to the concept of necessity, counsel referred to the decision of Kelly J. (as he then was) in *Cooper Flynn v. RTÉ* [2002] 3 IR 344, where at page 354 Kelly J. referred to the decision in *Taylor v. Anderton* [1995] 1 WLR 447, where Bingham M.R. stated as follows at page 462:

> *"The crucial consideration is, in my judgement, the meaning of the expression 'disposing fairly of the cause or matter'. 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. It is, I think of no importance that a party is curious about the contents of a document or would like*

to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment is the test."

26. Kelly J. went on to cite the following portion of the judgment of Salmon L.J. in *Science Research Council v. Nasse* [1980] AC 1028 at page 1071:

> *"Since confidential documents are not privileged from inspection and public interest immunity fails, the tribunal which for this purpose is in the same position as the High Court and the county court, may order discovery (which includes inspection) of any such documents as it thinks fit - with this proviso: 'Discovery shall not be ordered if and so far as the court (tribunal) is of the opinion that it is not necessary either for disposing fairly of the proceedings or for saving costs'.*
>
> *If the tribunal is satisfied that it is necessary to order certain documents to be disclosed and, inspected in order fairly to dispose of the proceedings, then, in my opinion, the law requires that such an order should be made; and the fact that the documents are confidential is irrelevant.*
>
> *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."*

27. Counsel submitted that production of this document was essential to enable the defendant to properly mount his defence to the defamation proceedings brought by the plaintiff. He stated that if the document was withheld from the defendant, this would mean that there would be a "blind spot" at the trial of the action, whereby the defendant, the judge and the jury would all be deprived of an important investigation report which had been carried out into the incident, which was central to the postings which had been made by the defendant on the website. It was submitted that if that were to happen, that would be a very unsatisfactory state of affairs, which meant that the trial could not be fairly disposed of without giving the defendant access to this document. For these

reasons, counsel submitted that the defendant had clearly established that the B.I. Report was relevant and necessary to his defence at the trial of the action.

28. Counsel for the defendant accepted that that did not end the matter. He made a number of concessions. Firstly, he accepted that the B.I. Report was a confidential document. He accepted that it was covered by aviation legislation and he accepted that if the Court ordered its production, the document could be redacted to the extent necessary to remove the names of persons making statements, or referred to in the document, or any information which might identify them.

29. However, counsel stated that the mere fact that the document was confidential and was covered by aviation legislation, did not mean that the plaintiff was entitled to withhold its production on discovery. He submitted that the relevant pieces of aviation legislation made it clear that the High Court, or other competent authority, could in appropriate circumstances direct that disclosure of confidential documents be made, either in full or in a redacted form. The Air Navigation (Notification and Investigation of Accidents, Serious Incidents and Incidents) Regulations 2009 (S.I. 460/2009) provided as follows at Regulation 20:

"Disclosure of records

> *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… [it then goes on to list the various records included in the regulation, including statements taken from persons by the investigation authorities in the course of their investigation; opinions expressed in the analysis of information, including CVR, FDR and data recorder information and names of persons involved in the accident or incident.]"*

30. The second relevant piece of legislation was Regulation (EU) 996/2010 of the European Parliament and of the Council of 20th October, 2010, on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC. Article 14.1 and 14.2 set out a number of records which shall not be made available or used for purposes other than safety investigation, including statements taken from persons by the safety investigation authority in the course of the safety investigation; records revealing the identity of persons who have given evidence in the context of the safety investigation; information collected by the safety investigation authority which is of a particularly sensitive and personal nature including information concerning the health of individuals; 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; drafts of preliminary or final reports or interim statements and cockpit voice and image recordings and their transcripts.

However, Article 14.3 provided for disclosure of these records in appropriate circumstances, as follows:

> *"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 […]"*

31. Counsel stated that once the court was satisfied that production of a document was generally relevant and necessary to enable a party to present his case at the trial of the action, if that document was a confidential document, the court had to carry out a balancing exercise between, on the one hand the factors which would lean in favour of production of the document to the party requesting same for use at the trail and on the other hand, the requirement that the confidentiality of the document be respected. In this regard, counsel submitted that the appropriate test had been formulated in a number of judgments of the High Court. In *Telefonica O2 Limited v. Commissioner for Communications Regulation & Others* [2011] IEHC 265, Clarke J. (as he then was) set out the appropriate test at paragraph 3.3 of his judgement:

> *"However, it seems to me that the overall approach to discovery or disclosure can perhaps be summarised in the following fashion:*
>
> > *1. In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.*
> >
> > *2. If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.*
> >
> > *3. The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight for it must be accepted that those parties who become embroiled in litigation will necessarily have to disclose information about their confidential affairs when that information is necessary to the fair and just resolution of the relevant litigation. See the discussion of the relevant authorities by Kelly J. in Koger Inc v. O'Donnell [2009] IEHC 385.*
> >
> > *4. In attempting to balance those rights the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the*

legitimate interests of confidence asserted. Thema, Yap v. Children's University Hospital Temple Street [2006] IEHC 308 and Hartside v. Heineken Ireland Ltd [2010] IEHC 3. The discovery aspects of Yap are not addressed in the written judgment cited but involved a postponement of disclosure of confidential patient records until determined necessary by the trial judge."

32. Counsel pointed out that the judgement of Kelly J. in *Cooper Flynn v. RTÉ* and Clarke J. in the *Telefonica* case were approved and followed by Kennedy J. in *Maye v. Adams & Others* [2015] IEHC 530. All three of those judgments were followed by Haughton J. in *Courtney v. Ocm Emru Debtco Dac* [2019] IEHC 160.

33. Mr. Quinn S.C., also relied heavily on the judgment of Meenan J. in *Ryanair Ltd. v. Channel 4 Television Corporation & Another* [2017] IEHC 651. Counsel submitted that that case was on all fours with the present application. In that case, the defendant had produced a documentary programme which was critical of safety aspects within the plaintiff company. In the course of the programme reference was made to the Memmingen incident, in the context a failure to preserve the cockpit voice recordings. The programme also covered other areas where it was alleged there had been failures by the plaintiff company in relation to safety matters. The plaintiff sued the television company for defamation in respect of the statements made in the programme. At the pre-trial stage an application was made by the defendants for production of the same B.I. Report as is sought in this application.

34. It was the *Channel 4* case which was the "*unconnected case*" referred to in the consent Order for discovery made by the Deputy Master on 25th July, 2016, in these proceedings.

35. In the course of his judgment, Meenan J. referred to the judgment of Keane J. in *Waterford Credit Union Ltd. v. J&E Davy* [2017] IEHC 8, where he stated as follows at paragraphs 53 and 54:

"53. As Clarke J. put the matter in Telefonica 02 Ireland Ltd, at 3.3:

'The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials.'

54. For the reasons I gave in considering the question of relevance, I am satisfied that the contents of the two regulatory review reports at issue are very likely to be material to issues likely to arise in the proceedings, and that the degree of confidentiality attaching to the relevant materials is not so significant as to outweigh the interest of the common good in their disclosure for the purpose of ascertaining the truth and rendering justice."

36. Having held that it was necessary to carry out a balancing test when the question of production of a confidential document arose, Meenan J. went on to apply the balancing

test to the question of whether the B.I. Report should be produced by the plaintiff and came to the following conclusions:

> *"The 'balancing test' has to be carried out against the background of the claim being brought in the instant case. Of particular relevance here is that Ryanair in its reply to the defence of Channel 4 specifically relies upon the Irish Aviation Authority 'overseeing the standards of Ryanair in accordance with Europe wide Regulations set by the European Aviation Safety Agency (EASA) investigated the Valencia incidents and disproved the contents of the CIAIAC Report…' (para. 5 of reply).*
>
> *In maintaining the confidentiality of the documentation, Ryanair maintains that were such documentation to be disclosed in un-redacted or de-identified form it would have an adverse impact domestically and internationally on any future investigations. In support of this Ryanair relied upon the affidavit of Mr. Aidan Murray, Deputy Chief Pilot Line Operations of Ryanair which I have referred to at para. 74 above. This affidavit underlines the importance of confidentiality which pilots attach to the reporting process and which suggests that the un-redacted disclosure of such information might impact on the willingness to share information in the future.*
>
> *99. It has to be said that there was no suggestion that were disclosure of the information to be ordered, pilots or other relevant personnel in the future might fail in their legal duty to provide information as required by aviation legislation.*
>
> *100. On the other side of the balance, it cannot be disputed but that the documentation sought as discovered by Ryanair, is relevant and subject to the issue of confidentiality, necessary for the hearing of the action and thus to enable a fair trial as is required by the Constitution and the European Convention on Human Rights.*
>
> *101. Although information given under aviation legislation is confidential, that confidentially, unlike legal advice/litigation privilege, is not absolute. This is a fact which must have been appreciated and understood by those persons supplying the information.*
>
> *102. Even though, in the past, courts have directed that such information be disclosed there is no evidence that such has had a 'chilling effect' feared by Ryanair. In the instant case all the information is in the possession of Ryanair and there is no suggestion, whatsoever, of any adverse effects on pilots or other persons who have disclosed such information. Also, there is no ongoing investigation. Nor do I believe there is any serious prospect, arising out of disclosure, of pilots and other personal failing in the future to comply with their reporting obligations under aviation legislation.*
>
> *103. I have set out the relevant authorities in previous paragraphs in which the 'balancing test' has been carried out. Clearly, the application of a 'balancing test'*

depends upon the facts of each particular case. For the reasons set out in paras. 97 – 102, I am satisfied that in this case, the balance lies in favour of disclosure of the documents being made without redactions."

37. However, counsel pointed out that Meenan J. went on to permit the report to be redacted by the removal of the names of persons who either made reports or were named in reports. He allowed this redaction for the purpose of complying with the requirements of aviation legislation.

38. Counsel submitted that in that case, the television company was being sued in respect of allegedly defamatory statements concerning the Memmingen incident. In the context of those proceedings, the court had ordered that production of the B.I. Report was warranted, subject only to the redaction of the names of persons appearing in the report, or any information which might identify them. Counsel stated that the defendant in this case, was happy to accept a similar redaction in relation to the names of parties, or any other identifying material within the report. As the two cases were very similar, and in circumstances where Meenan J. had clearly found that it could not be disputed but that the documentation sought was relevant, that it was clear that production of the same report should be directed in this case as well.

39. Counsel further submitted that applying the balancing test as set out by Clarke J. in the *Telefonica* case, it was clear that the B.I. Report was central to the issues which would arise at the trial of the action and was not merely a tangential document of limited materiality to the issues that would arise at the trial. In these circumstances, he submitted that the balance was clearly in favour of production of the document.

40. Counsel further submitted that in the course of his judgment in the Channel 4 case, Meenan J. had noted that there was no evidence of there being any actual "*chilling effect"* or adverse effect on pilots or airline crew as a result of the disclosure of documents in other cases. Furthermore, there was no evidence before this Court of any such adverse consequences as a result of the ruling made by Meenan J. in the *Channel 4* case in November 2017. Which ruling had not been appealed by the plaintiff.

41. In conclusion, Mr. Quinn S.C. submitted that when one considered the nature of the B.I. Report and its probable content, then applying the balancing test as set out in the *Telefonica* and *Channel 4* decisions, and having regard to the level of redaction which the defendant was prepared to accept in relation to anonymising the report, it was clear that the Court should come down in favour of production of the document to the defendant.

42. Finally, Mr. Quinn S.C. stated that in relation to the second category of documents sought in the notice of motion, being the documents provided or referred to during an "*Operations Roadshow*" presented by the plaintiff's chief pilot at Dublin Airport in or around January 2013, this was a document which specifically related to the Memmingen incident. The Operations Roadshow was a presentation given to pilots and allied crew in the wake of that incident. The basis for seeking that document was set out at paragraph 12 of the affidavit sworn by Mr. McAleese, the defendant's solicitor, on 28th August,

2018. He stated that after sending his letter seeking voluntary discovery, the defendant drew to his attention the fact that the Operations Roadshow had been given in early 2013 dealing with lessons that had been learnt from the Memmingen incident and procedures that should be adopted in the wake thereof. On that basis he was seeking all documentation relevant to the Memmingen incident as presented by the chief pilot at the roadshow, on the basis that he believed it to be relevant and necessary following consideration of the discovered documents in line with reservation (b) in the Order of the Deputy Master of 25th July, 2016.

43. Counsel submitted that the documentation presented at that roadshow was relevant and necessary to the plea of justification contained in the defendant's defence. It was clearly established on the authorities that where a plea of justification had been made, the person who had made the statements was not confined to evidence or knowledge that they had had at the time that they made these statements, to support their plea of justification. They were entitled to have regard to evidence which came into being after the making of the statement which tended to prove that the plea of truth was correct.

44. While counsel accepted that the airline was always entitled to do a "*zero blame review*" in the wake of an incident, and while such a document may not be admissible in a negligence action to establish negligence on the part of the airline or its crew in relation to the occurrence of the incident, it was a document that was discoverable in the context of a defamation action, because it would support the plea of justification made by the defendant. Furthermore, while the plaintiff had put forward the case that the document was confidential, they had not made the case that production of the documents would have adverse consequences, such that the airline could not in the future present such reviews or presentations in the wake of serious incidents. Insofar as the case was being made that that document came into existence after the Memmingen incident, it had to be remembered that the B.I. Report also came into existence after the incident. In these circumstances, it was submitted that the document was relevant and necessary to enable the defendant to establish the plea of justification and accordingly, it should be produced to the defendant.

Submissions on Behalf of the Plaintiff

45. Mr. Hogan S.C. on behalf of the plaintiff began by dealing with what might be termed the estoppel point. He stated that just because the plaintiff had consented to make voluntary discovery subject to redaction of the B.I. Report, that was not a concession that the report was relevant and necessary. It was merely an agreement by the plaintiff to make a list of documents as set out in the correspondence from the plaintiff's solicitor. He submitted that notwithstanding the agreement by the plaintiff to make discovery subject to redactions, it was still open to the plaintiff to argue that the redacted document should not be produced to the defendant, as it was not relevant and necessary to enable the defendant to establish his defence at the trial of the action, or to damage the plaintiff's case.

46. Counsel stated that this case was very different to the *Channel 4* case, because in the *Channel 4* case, the High Court and the Court of Appeal had already determined that the

various documents in dispute, including the B.I. Report, were relevant and necessary. In this case, there had only been a consent to make discovery of the identified documents, but there had been no ruling as yet that such documents were relevant and necessary.

47. In addition, one had to have regard to the fact that the plaintiff simply did not have the power to consent to the production of the B.I. Report to the defendant. This was due to the fact that that report was covered by aviation legislation, which provided that it was confidential and could only be furnished to unconnected third parties by Order of the High Court, or order of another competent authority. In other words, the plaintiff was legally obliged to preserve the confidentiality of the document, unless and until directed to produce it by the High Court.

48. Counsel submitted that the question of whether the document was relevant and necessary, had to be considered in the context of the pleadings. In this regards, it was noteworthy that the defendant had only pleaded justification in respect of the meanings set out at paragraphs 6(3) and 6(5) in the statement of claim. These were as follows: "*Ryanair flight crews are forced to operate under massive stress*" and "*The culture that exists in Ryanair is a cause for deep concern"*. Counsel submitted that it was hard to see how the report of an investigation into an incident such as occurred at Memmingen Airport, could be relevant to these somewhat vague assertions in respect of which justification had been pleaded. In this regard, it was relevant that the defendant had only made a bare assertion that those particular meanings were true. He had not provided any particulars to back up the plea of truth made in the defence. It was well settled that a party could not make a plea of truth in their pleadings and then seek discovery of documents as a means of establishing that plea in evidence. In support of that submission, counsel referred to the dicta of Pollock C.B. in *Metropolitan Saloon Omnibus Company Ltd v. Hawkins* (1859) 4 H & N 146:

> *"A person who ventures to publish libel, or utter slander, should be in a condition to justify his conduct and not come to the court to ask for assistance to get up some proof."*

49. Counsel further submitted that where a plea of justification was not particularised, that would stand against a party who sought discovery in an effort to support that plea. In this regard he referred to the judgment of Macken J. in *McDonagh v. Sunday Newspapers Ltd*. [2005] 4 IR 528 at page 543:

> *"Moreover, it is the Court itself which must be satisfied at the end of the day that the documents sought on discovery are, in the case of a libel action in which justification is pleaded, sought for the purposes of advancing an existing plea, and are actually relevant to the issues in the proceedings, whether or not a plaintiff has raised particulars."*

50. Counsel further referred to the decision of McKechnie J. in *Keating v. RTE* [2013] IESC 22, where he stated as follows at paragraph 62:

"It seems clear, at least in principle, that a sharp distinction exists between situations where a party, be he plaintiff or defendant, seeks discovery to support or advance his particular viewpoint and where such is sought for the purposes of making or formulating a claim which otherwise does not exist. In other words, discovery is an aid to further a viable action or defence, or an issue in either, but not a means in itself to establish one […]"

51. Counsel submitted that in this case, where there was simply a bare plea that the meanings set out at paragraphs 6(3) and 6(5) were true, without any particulars being provided to support such a plea, this was essentially a classic fishing exercise, whereby the defendant was hoping to unearth something from the B.I. Report which would give him evidence with which to support the plea of justification. Based on the authorities set out above, it was submitted that the Court should refuse production of the document on this basis.

52. If the Court were to hold that the document was relevant and necessary and that the application was not a fishing exercise, then the Court had to carry out the balancing test whereby it would weigh on the one hand the materiality of the document to the defendant's case and on the other hand, the very good policy reasons for which confidentiality had been applied under aviation legislation to this document. In looking at the strength of the case for confidentiality, the Court should have regard to the fact that this document was drawn up by the plaintiff in compliance with its obligations under Irish and EU aviation legislation. The European Community (Occurrence Reporting in Civil Aviation) Regulations 2007 (S.I. 285/2007) placed a clear obligation on the plaintiff as a "*civil aviation (category 1) person*" as defined in Regulation 5, to report relevant occurrences to the competent authority as soon as was practicable after they had occurred. Regulation 9 specifically provided for the confidentiality of information supplied by an airline in the wake of occurrences as defined in the regulations.

53. Counsel submitted that the Court should also have regard to the recitals contained in EU Regulation 996/2010, which set out the important policy considerations which underpinned the making of the regulations. These recitals made it clear that it was imperative to the object of promoting airline safety, that full and comprehensive investigations be carried out into occurrences, so that lessons could be learned for the future, thereby promoting airline safety. In particular, recital (4) provided that the sole objective of safety investigations should be the prevention of future accidents and incidents without apportioning blame or liability. Recital (20) provided that measures should be put in place to enable safety investigation authorities to carry out their tasks in the best possible conditions in the interest of aviation safety. To that end, they should be granted immediate and unrestricted access to the site of the accident, and all the elements necessary to satisfy the requirements of a safety investigation should be made available to them, without compromising the objectives of a judicial investigation. Counsel submitted that the question of confidentiality had to be seen in the light of the purpose for which such confidentiality had been conferred on investigation reports, as set out in the recitals to the regulations.

54. Counsel further submitted that there was clear evidence in the affidavits sworn on behalf of the plaintiffs, that it was essential to the promotion of a *"just culture"* or "*no blame culture"* in the context of such investigations, that persons making statements or otherwise assisting such investigations, could do so with the knowledge that their statements and other information provided, would be kept confidential. To that end, it was relevant to note that the B.I. Report would only receive a limited circulation within the plaintiff company. It would only be disclosed to operations and training personnel insofar as it was deemed necessary to ensure, or promote the ongoing safety of passengers and crew. It was submitted that the Court should further take account of the evidence contained in the affidavits to the effect that there was a 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. It was for that very reason, that the confidentiality of such documents had been specifically provided for in both EU and Irish aviation legislation. These were matters to which the Court should give significant weight when carrying out the balancing test required under law.

55. In relation to the assertion by the defendant that there was no evidence that there had in fact been any such "chilling effect" in the wake of Orders for disclosure of such reports either in previous cases, or in the wake of the *Channel 4* decision, counsel submitted that it was almost impossible for the plaintiff to establish in evidence that there had in fact been such a "*chilling effect".* It was simply not possible to prove that in the wake of Orders for disclosure of such reports, other pilots and flight crew had held back or been less forthcoming in their statements to subsequent investigations. This did not mean that that very real mischief, which was specifically noted as being a possibility in previous decisions, had not in fact come to pass.

56. Counsel submitted that a further factor which should be weighed in the balance when considering whether to direct production of the document, was the fact that the defendant was already in possession of the B.F.U. Report. Counsel stated that the B.I. Report went no further than what had already been contained in the B.F.U. Report. Accordingly, the defendant was not at any disadvantage in establishing his plea of justification at the trial of the action. In addition, the Court should also have regard to the fact that the plaintiff had made discovery of the Ryanair Internal Operations Quality Audit Report dated June 2013, which set out the corrective steps which had been taken in light of the B.I. Report. It was submitted that as the defendant had possession of these documents, there was simply no necessity for the Court to furnish him with the B.I. Report.

57. In relation to other issues raised on the pleadings, such as the plea that the publication constituted a fair and reasonable publication on a matter of public interest, the plea that the defendant would rely on the defence of qualified privilege, or the plea made on behalf of the plaintiff of malice in respect of the plea of qualified privilege; it was submitted that production of the B.I. Report was not relevant to those issues. It would not advance the defendant's case, nor damage the plaintiff's case in respect of those issues, as it was simply an investigation report into an occurrence which had occurred at Memmingen Airport.

58. Finally, counsel submitted that having regard to the purposes for which confidentiality had been granted to the B.I. Report under EU and Irish aviation legislation and having regard to the extent of the defendant's plea of justification and the fact that he already had the B.F.U. Report and the Operations Quality Audit Report, and having regard to its lack of relevance to the issues that would be canvassed at the trial of the action, it was submitted that the Court should come down in favour of protecting the confidentiality of the document and refuse production of it to the defendant.

59. In relation to the request for the production of the Operations Roadshow document, counsel submitted that the Order of the Deputy Master of 25th July, 2016, merely entitled the defendant to seek further and better discovery arising out of the documentation produced in relation to category 1. This request did not arise out of any documentation that had been furnished under that category. It was clear from the affidavit sworn by Mr. McAleese that it was in fact an afterthought, which arose as a result of the defendant giving subsequent instructions to his solicitor. As such, it was an attempt to obtain by a backdoor method another class of discovery which they had simply not sought at an earlier stage.

60. Counsel further submitted that the Operations Roadshow documentation was not relevant or necessary to enable the defendant to put forward his defence, or damage the plaintiff's case. It was noteworthy that that presentation had been given at a time when the defendant remained employed by the plaintiff. As such, he would probably have attended the presentation in question. It was noteworthy that he had not sworn an affidavit setting out his recollection of what the documentation contained, or if he could not recall such, he could have referred to evidence from some other pilot, who had attended the presentation. Thus, the Court had no idea what the documentation was thought to contain, and why it may be of assistance to the defendant.

61. It was submitted that there was also a policy reason why the document should not be furnished to the defendant. It was of vital importance that after any occurrence that could affect the safety of passengers or crew, the airline should be free to conduct a "*no blame review*" or have a presentation to pilots and other staff, with a view to avoiding a recurrence of such incidents in the future. The holding of such presentations or reviews was an important safety matter which had to be undertaken by the airline and should not be curtailed by any fear that by holding a full and frank review and making a presentation, the documentation and information presented on a confidential basis to pilots and other crew, could be produced in subsequent legal proceedings and thereby published to the world at large.

62. Counsel submitted that in summary therefore, the Court should refuse to direct production of this documentation on the basis that the defendant had not established that he was entitled to seek production of such documentation arising out of his consideration of the documentation furnished in category 1, nor had he presented any evidence that the documentation was relevant and necessary and thirdly, there were sound policy reasons

why such documentation should not be furnished for use in litigation to which it had extremely limited, if any, relevance at all.

Replying Submissions on Behalf of the Defendant

63. In response to the submissions made on behalf of the plaintiff, Mr. Quinn S.C. made two submissions. Firstly, in relation to the assertion that by agreeing to make voluntary discovery, the plaintiff was not precluded from arguing that it was not obliged to produce the documents because they were not relevant and necessary to enable the defendant to make his defence, or to damage the plaintiff's case; that was an absurd argument. Order 31, Rule 12 (7) made it clear that where parties had agreed to make voluntary discovery, it should be made in like manner and form and have such effect as if directed by Order of the Court. He stated that in this case, the plaintiff had agreed to make discovery of three specific documents, albeit subject to redaction, it had then proceeded to effectively redact the entire of the B.I. Report and when challenged on this, then sought to argue that it was not obliged to furnish the report as such report was not relevant and necessary. He stated that if such an argument were allowed to be made, not only would it fly in the face of the Rules of the Superior Courts, but it would lead to utter chaos in the general system for making voluntary discovery, because parties would in fact be in a weaker position if they agreed to voluntary discovery, because they may then have to argue the right to obtain the documents at a later stage, when the opposing party effectively failed to produce it by way of voluntary discovery.

64. It was submitted that discovery of documents is only made in respect of documents that are relevant and necessary to the determination of issues that will arise at the trial of the action. Counsel submitted that having agreed in their letters dated 19th February, 2016 and 14th March, 2016 to make discovery of the B.I. Report, they could not subsequently, when challenged in relation to the fact that the entire of the report had been blanked out by them, argue that the document was not relevant and necessary to the issues that would arise at the trial of the action.

65. Secondly, in relation to the assertion that the defendant's application for discovery was a mere fishing exercise based on a bare assertion of truth in respect of the meanings set out at paragraphs 6(3) and 6(5), that was not a correct assessment of the situation. In this case the assertion of truth was not a bare assertion made without any support or foundation. The plaintiff had the B.F.U. Report which supported his plea of justification and he would also be able to rely on his own evidence as a pilot employed by the plaintiff company to support the plea of truth. As such, he had a basis for making the plea in his defence. In seeking the discovery herein, he was merely seeking documentation to further support the plea of justification for which there was already a basis.

Conclusions

66. Having considered the detailed submissions of counsel and the authorities referred to by them, as detailed above, I have been able to reach the following conclusions in this case: firstly, there are a number of matters which were largely agreed between the parties. It was accepted by both sides that the B.I. Report is a confidential document. The defendant accepted that the confidentiality attaching to that document is protected by the provisions

of Irish and European legislation. The defendant 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 which would identify them, could be redacted.

67. The first issue which I must decide is whether the plaintiff is estopped from arguing that the B.I. Report is not relevant or necessary to enable the defendant to properly put his defence before the Court, or to attack the case made against him by the plaintiff, by virtue of the fact that the plaintiff had consented to making voluntary discovery of this document, albeit subject to redactions. I am satisfied that the submissions made by Mr. Quinn S.C. in this regard are correct. The provisions of Order 31, Rule 12 (7) of the Rules of the Superior Courts 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. In civil litigation, a party can only be directed to make discovery of documents that are relevant and necessary to the issues that are to be tried at the hearing of the action. Accordingly, 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.

68. If this were not the case, one would have the 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. This would effectively put the party who had agreed to accept voluntary discovery in a worse position by having agreed to accept voluntary discovery in the first place. That would lead to utter chaos in the system. Accordingly, I hold that as the plaintiff agreed to make voluntary discovery of the B.I. Report subject to redactions, it cannot now argue that the report is not relevant and necessary to the issues to be tried at the hearing of the action.

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.

70. Before passing from this specific issue, I accept the point made by counsel on behalf of the plaintiff that, having regard to the confidentiality provisions of Irish and EU legislation, the plaintiff was not in a position to make voluntary discovery of an unredacted 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. However, in this case the plaintiff has gone considerably further by arguing that an unredacted copy of the report, or a copy that was only redacted to the extent suggested by the defendant, should not be directed to be produced by the plaintiff to the defendant. In other words, the plaintiff has not adopted the position that the report is relevant and necessary to the defendant, but that

they needed the protection of a court Order to enable them to produce it to him, but have argued strenuously that they should not be directed to make discovery of the B.I. report to him.

71. In relation to the argument put forward on behalf of the plaintiff 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, as contained in his defence; I do not think that that submission is well founded. 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.

72. This brings the Court to what is the central issue in this case: whether the Court should direct production of the B.I. Report to the defendant. The law as to the approach which should be taken by a court in these circumstances has been set out in the judgment of Clarke J. in the *Telefonica* case and in the judgement of Meenan J. in the *Channel 4* case. It is not necessary to repeat the relevant extracts from those judgements which have been cited above. The parties were agreed that the Court should undertake a "balancing test" as envisaged in those decisions to decide whether to direct production of the report. 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 that therefore production of it should be refused.

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.

78. In relation to the application for production of the Operations Roadshow documentation, I refuse the application that the plaintiff should make discovery of this documentation. I do so for the following reasons: firstly, the application for discovery of these documents does not arise out of the documents furnished in category 1. Therefore, this application does not come within the proviso to the Order made by the Deputy Master in July 2016. It is in effect an effort to obtain a further category of discovery by the backdoor.

79. Secondly, there has been no evidence as to what this documentation may contain. This is surprising, given that the defendant was an employee of the plaintiff at the relevant time. Presumably he and his fellow pilots attended at these presentations as they were made at various locations after the Memmingen incident. The defendant has not given any evidence as to the content of these documents, either from his own recollection of them,

or from the recollection of other pilots, who may have attended the presentations. In these circumstances, there is no evidence before the Court that such documents may be of any relevance to the issues that are to be tried at the hearing of the action.

80. Finally, I am satisfied that this presentation was part of the ongoing safety management system employed by the plaintiff company. It was a presentation made by the chief pilot to the other pilots in relation to safety aspects that had come to the fore as a result of the Memmingen incident. Such presentations are vitally important to ensure the ongoing safety of both passengers and crew. These presentations are somewhat similar to review meetings that may be held in various hospital departments in the wake of adverse events occurring at a hospital. In the course of argument, Mr. Quinn S.C. on behalf of the defendant very fairly conceded that in a medical negligence action, it was unlikely that the Court would direct discovery of such review meetings held in the hospital after an adverse event. I am of the view that these presentations were of a similar character. There is a strong policy reason why the Court should not direct production of such documents, because to do so may make the airline less likely to carry out a full and frank presentation in the wake of a serious incident in the future. That would be a very undesirable consequence from the point of view of the safety of airline passengers and crew. For all of these reasons, I refuse to direct production of this category of documents.

The order

81. As a result of the conclusions reached by me in this judgment, I make the following order:

(a) The plaintiff is to produce to the defendant's solicitor the B.I. Report within a period of six weeks from today's date. 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.

(b) The plaintiff is to furnish six copies of the redacted 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.

(c) 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 the 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. However, the expert may refer to the content of the report in the body of any report furnished by him to the defendant's solicitor.

(d) 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.

(e) 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.

(f) There will be a stay on my order herein for a period of four weeks and if a notice of appeal is lodged within that period then the stay is to continue pending the final determination of the matter before the Court of Appeal.