THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 105
Record Number: 2018/35
High Court Record Number: 2013/11363P

Whelan J.
Noonan J.
Haughton J.

BETWEEN/

RYANAIR DAC AND RYANAIR HOLDINGS PLC

APPELLANTS

-AND-

EVERT VAN ZWOL, JOHN GOSS AND TED MURPHY

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 16th day of April, 2020

Introduction

1. This is an appeal from the order of the High Court (Barton J. sitting with a jury) made on the 21st December, 2017 whereby the claim of the appellants (collectively "Ryanair") for defamation was dismissed. Although, after a trial which lasted for 27 days, the jury found that the words complained of were defamatory, they also found that they were published by the defendants without malice and since the trial judge had previously ruled that the publication occurred on an occasion of qualified privilege, Ryanair's claim failed.

2. The primary ground of appeal arises from the refusal of the trial judge to accede to an application by Ryanair on Day 20 to discharge the jury on the ground that a fair trial could no longer be had as a result of the emergence of an undiscovered document during the course of the evidence of a witness for the defence. Ryanair further contend that the ruling of the trial judge that the publication occurred on an occasion of qualified privilege was erroneous. There are a number of other grounds of appeal which I will come to in due course.

Background Facts

3. Ryanair owns and operates a well-known airline. The respondents are airline pilots. The second respondent, Captain Goss, is a former Ryanair pilot but the other respondents, Captains Van Zwol and Murphy, have never flown for Ryanair. At the relevant time, all three respondents were members of what was called the Interim Council of a grouping known as the Ryanair Pilots Group (RPG). RPG was a type of nascent pilots' trade union that was in the course of being formed with the assistance of the respondents. In and

about the year 2013, when the events with which these proceedings are largely concerned occurred, it had always been the Ryanair policy not to recognise trade unions.

4. Evidence was given during the course of the trial that Ryanair pilots in general felt that it was disadvantageous to them to be seen to be involved with any form of union activity and for that reason, there was a desire to maintain anonymity on the part of any current Ryanair pilots involved with the RPG. The respondents did not suffer from that inhibition and were duly elected to the Interim Council of the RPG. In or about June of 2013, a Dutch legal entity known as a Stichting was formed with the name Interim Council Ryanair Pilots Group. The respondents' evidence was that, in the course of forming the RPG, they developed an email database of Ryanair pilots which was used for communicating with the pilots on topics of interest. At the relevant time, there were over two thousand email addresses on this database although in the course of the trial, controversy arose as to whether all of these email addresses were in fact associated with Ryanair pilots.

5. One of the modes of communication adopted by the RPG was the issuing of what were described as "pilot updates" to these email addresses. These were in the form of news bulletins on topical issues of relevance to the pilots. One such bulletin was issued on the 12th September 2013 to which I will refer as the Pilot Update. It was titled "What the Markets are Saying About Ryanair". The first paragraph was as follows: -

> "The company's share price fell sharply last week (down 11.54%) as markets reacted to a negative statement issued by the company management. It has been indicated that profit targets for 2013 – 2014 may need to be revised downwards as the autumn-winter outlook remains weak. This is in spite of positive indications to investors in June which encouraged a share price increase and a sell off of shares by managers in late June, ahead of the winter period."

6. Shortly thereafter, Ryanair commenced the within proceedings for defamation. At para. 6 of its statement of claim, Ryanair pleads as follows: -

> "6. The words complained of meant, and were understood to mean, both in their natural and ordinary meaning and/by way of innuendo, that: -
>
> (i) Ryanair is guilty of market manipulation.
>
> (ii) Ryanair misled investors.
>
> (iii) Ryanair knowingly facilitated insider dealing by its managers.
>
> (iv) Ryanair conspired with its managers to abuse the market(s) for its shares."

The Genesis of the Pilot Update

7. At the time of the publication of the Pilot Update, the Interim Council of the RPG comprised five members, the respondents and two other individuals who were originally

also named as defendants in the proceedings, which were ultimately discontinued as against those two parties. In September 2013, the Interim Council of the RPG was receiving outside assistance in relation to its activities from the Irish Airline Pilots Association (IALPA) and in particular, two executive members of IALPA, Mr. Gerard Kelly and Mr. Martin Duffy. In the course of the respondents' evidence, Mr. Kelly and Mr. Duffy were described as "consultants" who were assisting in the preparation of the Pilot Update. It would appear that both IALPA and the RPG were associated with a larger pan-European pilots' organisation called the European Cockpit Association (ECA), which provided financial assistance for the purpose of furthering the aims of the RPG.

8. Mr. Kelly and Mr. Duffy were primarily involved in the drafting of the Pilot Update which went through several iterations before the final version was arrived at. Prior to the trial, Ryanair sought and obtained an order for discovery against the respondents. The respondents' discovery included an email string of the 4th September, 2013. The participants in that email conversation included Mr. Kelly, Mr. Duffy, Captain Van Zwol and an unidentified pilot. The emails from this pilot that were discovered by the respondents redacted his/her identity. It is fair to say that the pre-trial discovery in this case became extremely contentious, resulting in multiple applications by Ryanair, one of which sought disclosure of the emails from the unidentified pilot in unredacted format. This was ultimately refused by the High Court (Barrett J.) who delivered a written judgment.

9. The first email of the 4th September, 2013 in the relevant string was sent by the unidentified pilot at 10.25 to Mr. Kelly, attaching a media report quoting Ryanair's statement that its full year profit may be lower than forecast. The unidentified pilot described this as "A punch in the face for management". Mr. Kelly replied, copying Captain Van Zwol and Mr. Duffy, *inter alia*, stating that he and Mr. Duffy were going to work on a financial draft for pilots to update them on the share price, amongst other things. Mr. Kelly said "Guys I need to link the share price with [the pilots'] wages".

10. The first draft of the Pilot Update was sent by Mr. Kelly to Mr. Duffy at 14:19 and was not copied to anyone else. In this email, Mr. Kelly said: -

> "I think we need to be relatively non-aggressive on this issue. The signs will suggests (*sic*) that pilots are in for a hard winter which needs to be translated into collective unity.
>
> I'm trying to write in a way that outcasts management and brings the pilots into feeling more connected as a company stakeholder."

11. At 5:57pm on the same date, Mr. Duffy emailed draft 2 of the Pilot Update to Mr. Kelly. Mr. Duffy did not copy anyone else on the email. Draft 1 commenced with the statement that the company's share price fell sharply today as markets reacted to a negative statement put out by the company management. It went on to say that it had been indicated that profit targets for 2013 – 2014 may need to be revised down as the

autumn-winter outlook remains weak. To this first paragraph, Mr. Duffy added the following amendment in draft 2: -

> "This is in spite of positive indications to investors in June which encouraged a share price increase and a sell-off of shares by managers in late June, taking their profits before the winter sets in. (Note that Mr. O'Leary sold 500,000 shares on 27th July when the price was a lot higher while board chairman Mr. Bonderman sold over 1,000,000 shares in mid-June)."

12. At 6:47pm, Mr. Duffy again emailed Mr. Kelly stating that the unidentified pilot had just advised him "that the reference to O'Leary's share dealing was July 2010, not 2013 – he had sent that to me earlier today. Obviously it should not be included in the update." Again this was not copied to any other party.

13. At 21:36 on the same evening, Mr. Kelly sent draft 3, the draft of the Pilot Update ultimately published, to a number of parties including the respondents and Mr. Murphy. The respondents' evidence was that this was the only version of the Pilot Update they saw, and were not privy to drafts 1 and 2. The opening paragraph of draft 3, being the final version, was as I have set it out above and excludes any reference to share sales by Mr. O'Leary or Mr. Bonderman. Later that evening at 22:30, Captain Van Zwol emailed Mr. Kelly, copying Mr. Duffy and others, saying: -

> "Good piece of work! We need to be very careful though in light of possible mistakes leading to court cases…"

14. As noted above, all of these emails were discovered by the respondents in advance of the trial which disclosed Mr. Duffy's involvement in drafting the Pilot Update.

The Evidence of Martin Duffy

15. Mr. Duffy gave evidence on Day 19 of the trial. In the course of cross-examination, Mr. Duffy was asked where he saw the reference to Mr. O'Leary selling 500,000 shares on the 27th of July. His answer was that it had been brought to his attention by a colleague who sent it to him by email. When it was pointed out to him that this email had not been discovered, Mr. Duffy said he thought he had provided it to the respondents' solicitors. That turned out to be incorrect and the email was produced by Mr. Duffy the next day, Day 20 of the trial. The evidence of the respondents, subsequently given, was that they had never seen this email before it was produced in court on Day 20. It emanates from the same unidentified pilot who sent the earlier email at 10:25 and is timed at 13:12. Because it is central to this appeal I think it appropriate to set it out in full: -

> "Hi Martin
>
> Just been reading about the unexpected profit warning from Ryanair. Seems like the city wasn't expecting it as O'Leary had been upbeat at an investor's presentation in June and never hinted at any problems. I noticed from a link on the REPA website that O'Leary sold 500,000 shares on 27th July when the price was a

lot higher (14% drop today!). David Bonderman sold over 1,000,000 shares in mid-June too.

There was a big case earlier this year where a director of Tesco's sold stock ahead of a profits warning. From what I can gather from the FSA guidelines:

'*Directors should not buy or sell shares in their company while in possession of unpublished, price-sensitive information.*'

The regulations, policed by the Financial Services Authority (FSA), also require directors and senior managers to obtain board-level approval before selling shares and forbid trading in shares during the so-called "close periods" between the end of a financial period and the reporting of its results.

I don't know much about finance but could this be seen as some sort of insider dealing based on knowledge he had?

Also a different perspective on it from the Telegraph: -

[link to Telegraph article]

Best regards"

16. Having been afforded an opportunity to consider this email and take instructions in relation to it, counsel for Ryanair indicated to the court that he was instructed to apply to have the jury discharged. It was also contended that the failure to produce this email earlier amounted to a serious breach of the discovery order made by the court. The basis for this contention was a submission by counsel for Ryanair that Mr. Duffy was clearly the servant or agent of the respondents, the email was thus within their possession, power or procurement and they had to accept the consequences of the failure to discover it. It was submitted that a fair trial could no longer be had in circumstances where, had the email been discovered in a timely fashion, it would have led Ryanair to seek to join Mr. Duffy as a co-defendant and to amend its pleadings to plead that the respondents were vicariously liable for the malice of Mr. Duffy, of which this email was clear evidence.

17. Counsel for Ryanair submitted that the mischief occasioned by the failure to discover the email in question, which has been referred to as the "Tesco email," could not now be undone. It was too late to join Mr. Duffy in the proceedings as the claim against him was statute barred. It was submitted further that Ryanair would have amended its pleadings to plead that the respondents were vicariously liable for Mr. Duffy's actions and if that had been denied by the respondents, it would have led to an application for discovery in relation to the relationship between the respondents and Mr. Duffy. It was further suggested that it may have influenced the outcome of the discovery application previously decided by Barrett J. A plea of malice against Mr. Duffy could not have been made before the discovery of this email as there was, without it, insufficient evidence of that malice, a matter not to be pleaded lightly.

18. The failure to discover the email had further affected the course of the trial and the manner in which the respondents were cross-examined. In that regard, it should be noted that when the Tesco Email came to light, Captains Van Zwol and Goss had already given evidence but not Captain Murphy. All of this would have gone to the credit of the respondents. It was now too late to rectify any of this.

19. The application to discharge the jury commenced on Friday 8th December, 2017 with the submissions concluding on Monday 11th December, 2017. A written judgment was delivered by the trial judge two days later on Wednesday 13th December, 2017, Day 22.

Judgment of the High Court on the discharge application

20. The trial judge noted the background to the matter and the history of discovery which resulted in four affidavits of discovery being sworn by the respondents, the last of which was on the 6th November, 2017 shortly before the trial commenced. It was not in dispute that the Tesco email came within one of the categories of discovery ordered. He noted the evidence of Mr. Duffy and the respondents' solicitor, given in the absence of the jury, concerning this issue. He summarised the submissions of the parties on the application to discharge the jury.

21. In coming to his conclusions, the trial judge observed that the first and foremost issue to be considered was whether a fair trial could be had and concluded in the circumstances that had arisen. Paragraphs 29 – 34 inclusive of the judgment are the subject of significant challenge in this appeal, so it is necessary to set out these passages in full: -

> "29. In the circumstances of the application under consideration a number of observations fall to be made in relation to the missing email. Firstly, although part of the content was incorporated into draft no. 2 by Mr. Duffy, the email was not authored by him but by an individual whom he described as a 'pilot colleague'. Secondly, later the same day the author corrected the information contained in the first mail relating to the sale of shares by Mr. O'Leary. Thirdly, on receipt of the subsequent email, Mr. Duffy acted on the content and largely expunged from draft no. 3 the information from the initial email which he had incorporated into draft no. 2, something which goes to the state of Mr. Duffy's mind in the preparation of the third draft on which the published update was based, albeit that it is the idea represented by what was expressed in the email which the plaintiffs say still found its way into that draft. Finally, the content of the missing email is devoid of any material relevant to the relationship between the defendants and Mr. Duffy, in particular, the assertion that Mr. Duffy was the servant or agent of the defendants.
>
> 30. With regard to the question as to whether Mr. Duffy was the servant or agent of the defendants, the evidence, so far as it goes at this time, is that although Mr. Duffy and Mr. Kelly were undoubtedly providing services to the Interim Council of the RPG as well as to other pilot associations of the European Cockpit Association, the invoices for those services were issued to IALPA, (Irish Airline Pilots Association) which discharged to (*sic*) costs.

31. In so far as the nature of the contractual relationship for the provision of the services is concerned, such appears to me to be one of a contract for services; accordingly, Mr. Duffy was an independent contractor. Furthermore, there is no cogent evidence to found a conclusion that Mr. Duffy was employed and paid by the defendants. In my judgment, the fact that he provided services directly to and for the benefit of the Interim Council of the RPG on foot of a contract for services rendered which were invoiced to and paid by IALPA does not make Mr. Duffy a servant or agent of the defendants.

32. It follows that for the purposes of complying with discovery, the defendants had no legal entitlement to obtain the missing email from Mr. Duffy; the email was not in their power and possession. Moreover, there is nothing in the evidence given so far in the trial which suggests that Captain Goss and Captain Van Zwol were aware of the first or second draft pilot updates or of the missing email or any emails relating to those drafts at the time when the defendants became involved in the preparation of what has been designated 'Pilot Update' draft no. 3 or indeed, subsequently, up to and including publication of the pilot update and beyond.

33. These conclusions have further and other implications for the consequences of the mischief which the plaintiffs contend arise from the omission of the email from the discovery. Absent the relationship of master and servant or of principle and agent, the establishment of malice on the part of Mr. Duffy could not infect the defendants and thus deprive any of them of the defence of qualified privilege on that ground.

34. I am also satisfied that no serious prejudice arises from the fact that the plaintiffs did not join Mr. Duffy or plead that the defendants were vicariously liable for his tortious acts, if any, as a consequence of the late discovery of the missing email. Moreover, to pursue such a case in the circumstances would most likely be futile. In any event I am also satisfied on the evidence presently before the court that the plaintiffs were aware of Mr. Duffy's involvement in the discussions and preparation of the Pilot Update with the defendants and that had they wished to join him into the proceedings or plead a case of vicarious liability they could have done so."

22. The trial judge went on to consider the legal principles to be applied in applications of this kind and reached the following conclusion:

"38. Accordingly, and having regard to the fact that everything about the email will undoubtedly be ventilated before the jury, that Mr. Duffy may now be further cross-examined, that the third named defendant has yet to give evidence and that the first and second defendants may, if required, be recalled for cross-examination on the email, I am satisfied, insofar as there is any mischief remaining from the failure of Mr. Duffy to produce the email for discovery, that the discharge of the jury on that account would be a wholly disproportionate and unjustified response, particularly where, at this juncture, the object of a fair trial can be achieved. Accordingly, I refuse the application and the court will so order."

23. Following the ruling of the trial judge refusing Ryanair's application to discharge the jury, the cross-examination of Mr. Duffy continued with particular reference to his failure to disclose the Tesco email at the same time as the other documents disclosed by him. Captains Van Zwol and Goss were recalled for further cross-examination regarding the email and Captain Murphy in turn was asked about it when he gave evidence. The evidence concluded on Day 24 and legal submissions were made by the parties on a range of issues, the most pertinent of which, for the purposes of this appeal, concerned the issue of qualified privilege. Following hearing the parties on this issue, the trial judge gave an *ex tempore* ruling to which I refer in more detail below.

24. Following closing speeches by counsel, the judge charged the jury following which certain requisitions arose, resulting in the jury being further charged by the trial judge. Again, I will refer to that in more detail as it becomes relevant to some of the grounds of appeal. The content of the Issue Paper that was put before the jury was agreed by the parties in advance. Four questions were addressed to the jury concerning the defamatory meanings of the Pilot Update and were answered as follows:-

> "Did the pilot update of 12 September 2013 mean that:
>
> Q: Ryanair is guilty of market manipulation?
>
> A: Yes.
>
> Q: Ryanair misled investors?
>
> A: No.
>
> Q: Ryanair knowingly facilitated insider dealing by its managers?
>
> A. No.
>
> Q: Ryanair conspired with its managers to abuse the market(s) for its shares?
>
> A. No."

25. As the jury had answered "yes" to one of the foregoing questions, it was necessary for them to consider the following questions in the context of the defence of qualified privilege: -

> "If the answers to one or more parts of Q.1 is "yes", has Ryanair proved malice against: -
>
> - The first defendant, Evert Van Zwol?
>
> A: No.
>
> - The second defendant, John Goss?
>
> A. No.

- The third defendant, Ted Murphy?

A. No."

26. Following the jury's verdict, the trial judge made a consequential order dismissing the action.

Grounds of Appeal

27. The appellants have raised seven grounds of appeal which may be stated in summary form as follows: -

(1) The trial judge erred in refusing the plaintiff's application to discharge the jury.

This ground is based on five allegedly erroneous findings arrived at by the trial judge:

(i) the judge held that Mr. Duffy had largely expunged the Tesco email from the final draft of the Pilot Update which was incorrect;
(ii) the trial judge was wrong in concluding that Mr. Duffy was not the servant or agent of the respondents and that consequently, the respondents were not in breach of their discovery obligations;
(iii) the trial judge was wrong in any event to conclude that the respondents were in breach of their discovery obligations as the Tesco email was within their "procurement";
(iv) the trial judge wrongly held that Ryanair could have joined Mr. Duffy and/or pleaded that the respondents were vicariously liable for his actions;
(v) the trial judge was wrong to conclude that the respondents did not know about the Tesco email before they had been asked about it.

(2) The trial judge erred in failing to ensure that a fair trial occurred, in the wake of the production of the Tesco email and the refusal to discharge the jury.

(3) The trial judge misdirected the jury in relation to the Tesco email by:

(a) precluding the jury from reaching a decision on whether the respondents were aware of it at the relevant time, and
(b) wholly diminishing its importance in the eyes of the jury in a manner which could not be rectified in re-charge.

(4) The trial judge erred in finding, as a matter of law, that the occasion was one of qualified privilege.

(5) The trial judge erred in replacing his initial ruling that the jury could be addressed on the relevance of "open windows" at an appropriate time, with the ruling that all evidence on "open windows" be excluded.

(6) The trial judge erred in expunging Darrell Hughes' (a Ryanair witness) reference to the fact that RPG members were agitating with investors, without hearing counsel for the plaintiff on the matter and by permitting the defendants to imply that the plaintiffs' witness had lied to the Court.

(7) The jury's finding that the respondents (or any of them) were not guilty of malice, was perverse and was grounded upon (a) a misunderstanding on the law in relation to malice or (b) a misdirection in relation to same.

28. Each of these grounds of appeal will be considered in turn.

General principles

29. Before dealing with the grounds of appeal in detail, it is convenient to first consider how the Court's appellate jurisdiction is exercised in cases such as this. The classic principles set out in *Hay v. O'Grady* [1992] 1 I.R. 210 apply in the same way in appeals from jury trials as they do in other cases. The duty of the trial judge is to ensure that a fair trial occurs. In an application to discharge the jury, the onus is on the applicant to establish that by virtue of the matters complained of, a fair trial can no longer be had.

30. It is clear that this was the primary consideration to which the trial judge had regard in assessing Ryanair's application to discharge the jury. The mere occurrence of some procedural impropriety, erroneous ruling or introduction of inadmissible evidence will not, without more, give rise to a right to have the jury discharged. There may be cases where the accumulation of issues is such that a point is reached where a fair trial is no longer possible. It is a remedy of last resort, as noted by the Supreme Court in *Dawson v. Irish Brokers Association* [1998] IESC 39, where O'Flaherty J. said (at p. 6): -

> "Once again, it is necessary to reiterate, as this Court is doing with increasing frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the very last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant, or should not have been given before them, as well as in the face of adverse pre-trial publicity. See *D v. Director of Public Prosecutions* [1994] 2 I.R. 465, *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 and *Irish Times Limited v. Murphy* [1998] 2 ILRM 161."

31. The authorities seem to be largely to the one effect, namely that the applicant for a discharge bears the onus of showing that there is real risk of an unfair trial which cannot be avoided by the trial judge making necessary rulings and giving the appropriate directions to the jury.

32. The dicta of O'Flaherty J. above were cited with approval by the Court of Criminal Appeal in *People (DPP) v. Fahy* [2008] 2 I.R. 292. The case concerned the refusal of the trial judge to discharge the jury following the introduction of inadmissible evidence prejudicial to the accused. Giving the court's judgment, Finnegan J. noted that the effect of the introduction of inadmissible evidence will depend upon the circumstances of the particular case. He said (at p. 299): -

> "In the case of a trial by jury, it may be possible for the trial judge to cure any prejudice arising by giving appropriate directions to the jury. If, however, the evidence is so prejudicial that it creates a real and substantial risk of an unfair trial which cannot be avoided by any directions that may be given to the jury, then it is appropriate to discharge the jury: see *The People (Director of Public Prosecutions) v. Marley* [1985] I.L.R.M. 17."

33. The Court held, in the circumstances of the case, that the introduction of the inadmissible evidence did in fact create a real and substantial risk of an unfair trial and accordingly allowed the appeal and directed a retrial.

34. The Court of Criminal Appeal again applied the same standard in *The People (DPP) v. Cleary* [2009] IECCA 142. The accused was charged with dangerous driving causing death. The prosecution sought to suggest that the accused was driving a car which was racing another car when the two cars collided and struck a third car in which the deceased was a passenger. The trial judge made a ruling limiting the right of counsel for the prosecution to make comment upon racing based on certain video footage.

35. Counsel for the prosecution, in cross-examining an expert called by the accused, referred to racing whereupon counsel for the accused sought to have the jury discharged on the basis that this was a breach of the earlier ruling. The trial judge refused and the accused was convicted. He appealed to the Court of Criminal Appeal. The Court's judgment, also delivered by Finnegan J., reiterated the dicta of O'Flaherty J. in *Dawson* and laid emphasis on the discretion of the trial judge in discharging a jury. The Court noted (at p. 7): -

> "The decision on whether or not to discharge a jury is a matter within the discretion of the trial judge. The exercise of the discretion will be interfered with on appeal only where there is a real and substantial risk of an unfair trial."

36. The Court also referred to an earlier decision of the Court of Criminal Appeal in *DPP v. JEM* [2001] 4 I.R. 385 concerning the exercise of the discretion and reached the following conclusion (at p. 9): -

> "Having carefully considered the proceedings at the trial in their entirety this Court is satisfied that the question, which ought to have been put to the witness, and the answer to the same did not create a real and substantial risk of an unfair trial and did not prejudice the applicant. Accordingly, this Court should not interfere with the exercise by the learned trial judge of his discretion."

37. The applicable standard was also referred to in *Z v. DPP* [1994] 2 I.R. 476 where Hamilton P. (as he then was) said at p. 495: -

> "When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness particularly to the accused is heavy and burdensome but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues save where there is a real risk of the likelihood of an

unfair trial. The responsibility is discharged by controlling the procedures of the trial, by adjournments or other interlocutory orders, by rulings on the presumption of innocence, the onus of proof, the admissibility of evidence and especially by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer."

38. In *JEM*, after a trial by jury in the Circuit Court, the accused was found guilty on four counts of sexual assault on a 15-year old girl. One of the prosecuting witnesses, a Mrs. O'C, referred in her witness statement to a conversation with the accused in which she said: "At one stage he threatened to kill me". The trial judge ruled that this evidence was not to be led before the jury as it was more prejudicial than probative. However, when Mrs. O'C gave evidence before the jury, she said, contrary to the judge's ruling, that the accused had threatened to kill her.

39. This led to an application by the defence to discharge the jury. The trial judge gave a reasoned judgment, reaching the conclusion that a fair trial could still be had by giving appropriate directions to the jury and he accordingly refused to discharge the jury. The accused appealed to the Court of Criminal Appeal whose judgment was given by Denham J. (as she then was). Having referred in detail to the trial judge's ruling on the application, she noted (at p. 12): -

> "It is clear that the decision by the trial judge was made after careful consideration. It was a decision made mid-trial in the light of events which occurred in the trial. The decision indicates a reasoned decision by the trial judge in exercising his discretion. Reliance was placed by counsel for the accused on *R. v. Sawyer* (1980) 71 Cr. App. R. 283 and on extracts from *Judicial Discretion and Criminal Litigation* (1990) by Dr. Rosemary Pattenden. In *R. v. Sawyer*, Lane L.C.J. giving the judgment of the court stated at pp. 285-286: -
>
> > 'Upon those facts the learned judge had to decide whether or not there was a real danger that the appellant's position had been compromised by what had happened. Was there a real danger that she was or might have been prejudiced by what had gone on? The discretion which he undoubtedly had to stop the trial had of course to be exercised judicially and had to be exercised upon the facts as he knew them.
> >
> > It seems to us that what he principally had to decide was whether there was any danger from anything done or said that the jury might have been prejudiced against the appellant. In our judgment there was no such danger. Certainly there is no ground for us in this case to interfere with the discretion which the judge exercised.'
>
> Consequently, that court held that there was no ground upon which it could interfere properly with the way in which the trial judge exercised his discretion.

> Reasons why a jury may be discharged are set out in Dr. Pattenden's text book *Judicial Discretion and Criminal Litigation* at pp. 160 to 166. On considering the pages to which the court was referred it appears that the author discusses the danger of prejudice to a party and quotes authority for the proposition that the interests of justice are paramount. The court endorses that proposition. In fact, it is apparent that such a principle was at the foundation of the trial judge's decision.
>
> On reviewing the trial judge's decision and the authorities to which the court was referred, it is clear that the decision of the trial court was taken after consideration, with reasons given, having analysed any prejudicial aspect of the matter. The court is satisfied that, in the circumstances of the case this ground of appeal presents no basis on which the court could interfere with the exercise of the judicial discretion. Consequently, this ground of appeal fails."

40. These cases, to my mind, show clearly that the trial judge has a broad discretion in considering whether or not a jury should be discharged and should only exercise that discretion in favour of discharge where, taking into account the proceedings in their entirety up to that point, it is demonstrated that there is a real risk of an unfair trial which cannot be avoided.

41. In the course of submissions to this court, counsel for Ryanair contended that a somewhat different standard applied and that a retrial will be ordered if a reasonable and fair minded observer would conclude that there was a danger, in the sense of a possibility, that a verdict was unsafe. The authority relied upon in support of this submission is *Leech v. Independent Newspapers* [2014] IESC 78.

42. The defendant newspaper published an article reporting on a RTE radio programme broadcast the previous day called "Liveline" in which a listener phoned in and made defamatory remarks about the plaintiff. At the conclusion of the jury trial in the High Court, during their deliberations the jury returned to ask a question. The judge answered the question and the jury retired. Requisitions were raised by counsel on the judge's response to the jury's question and the trial judge agreed to re-charge the jury on the point raised. When the jury returned, they were wearing their overcoats and the jury foreman informed the trial judge that the jury had reached its verdict.

43. The judge asked the jury to reconsider its decision in the light of the clarification he wished to give them and having done so, the jury returned almost immediately with the same verdict. The jury found for the defendant and the plaintiff appealed to the Supreme Court. One of the plaintiff's grounds of appeal was that there was bias on the part of the jury. This is explained in the judgment of Dunne J. (at pp. 206-207): -

> "Apart from any issue with the manner in which the learned trial judge then re-charged the jury, it is contended on behalf of [the plaintiff] that there was bias on the part of the jury in the sense that the jury had clearly reached their decision prior to the final re-charge and thus the verdict of the jury could not be regarded as being unbiased."

44. Dunne J. went on to consider the test for bias in the case of a jury as explained by Fennelly J. in *The People (DPP) v. Tobin* [2001] 3 I.R. 469. In that regard, Dunne J. noted (at p. 207):-

> "In his judgment, Fennelly J. considered the appropriate test to be applied and it was concluded by the Court of Criminal Appeal, in allowing the appeal, that the test to be applied was an objective one, namely, whether there was a 'reasonable apprehension' of bias, which was the test which applied to the judiciary and *a fortiori* applied to the case of a challenge alleging bias in a jury. The Court further held that, in the special circumstances of the case, a reasonable and fair-minded observer would consider that there was a danger in the sense of a possibility that a juror might have been unconsciously influenced by his or her personal experience and for that reason the appellant might not receive a fair trial."

45. Dunne J. then referred to Fennelly J.'s review of a number of authorities on the issue of bias in decision making bodies, including juries. She summed up her conclusions on this aspect of the appeal as follows (at pp. 209-210): -

> "This is not a case in which there is a suggestion that there was some form of bias in the sense of prejudice towards an accused person or undue sympathy for a victim of a crime as in the cases of *Sander v. United Kingdom* (App. Number 3412/96) (2000) 31 EHRR44 or *Webb v. R* (1994) 122 A.L.R. 41. It is a case in which the issue is as to whether or not there was pre-judgment on the part of the jury in reaching a decision. The jury had reached a decision by the time the trial judge sought to re-charge them following further submissions from counsel. Reference was made in the course of the submissions to 'the robust common sense of juries' (see *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 and *Kelly v. O'Neill* [2000] 1 I.R. 354). I agree with the general proposition that juries have robust common sense. It is for that very reason that we have trial by jury in criminal matters and in a limited number of civil actions. The system of trial by jury has stood the test of time. I accept that as a general rule, a jury is capable of following a judge's directions to ignore a piece of irrelevant evidence or adverse pre-trial publicity, for example. Nevertheless, the most unusual circumstances of this case must give rise to a real concern as to the safety of the verdict where the jury had told the learned trial judge that they had made a decision, were re-charged and told to go back and consider their decision and proceeded to deliver their verdict minutes later. Applying the test identified by Fennelly J. in *People (Director of Public Prosecutions) v. Tobin* [2001] 3 I.R. 469, I am driven to the conclusion that a reasonable and fair-minded observer would consider that there was a danger, in the sense of a possibility, that by the time of the final re-charge by the learned trial judge, the jury had already made up their minds. On that basis, I am satisfied that the verdict of the jury is unsafe."

46. It is manifestly clear from these passages that the court in *Leech* was concerned with the issue of bias, and no other, in reaching this conclusion. This view is reinforced by the fact

that none of the authorities to which I have referred dealing with the standard to be applied in applications to discharge a jury were referred to by the Supreme Court in *Leech*. If it had been the intention of the court to in some way recalibrate the well settled standard, that would undoubtedly have been clearly stated by the court. The issue under consideration by the court was quite different and I am therefore, satisfied that *Leech* is not authority for the proposition advanced by Ryanair.

Was Martin Duffy the servant or agent of the respondents?

47. Ryanair's application to discharge the jury was, in the first instance, predicated on an assertion that Mr. Duffy was the respondents' servant or agent. As such, it was submitted that the Tesco email was within the respondents' possession, power or procurement, as O. 31, r. 12 of the RSC provides. The order originally related to documents within a party's possession or power and the addition of "procurement" was introduced by S.I. 93 of 2009. Documents in a party's possession obviously gives rise to no difficulty. A document is within a party's "power" if that party does not possess the document but has a legal right to obtain it.

48. Victorian concepts of master and servant are becoming increasingly difficult to accommodate in the context of modern employment arrangements and the advent of the "gig economy". The distinction between a servant and an independent contractor was once more clear cut than it now is. Traditionally, the view was taken that a "master" or employer was vicariously liable for the wrongs of his "servant" or employee, whereas a person who engages an independent contractor would not be so liable. The widely recognised distinction between the two categories was, as the trial judge noted, between a contract of service and a contract for services.

49. More recent decisions have tended to focus on the degree of control exercised by the employer. An independent contractor could be told by the employer what to do, but additionally in the case of a servant, how to do it. The fact that the employer pays the remuneration of the person engaged clearly points strongly to one or other of the relationships identified as existing between the payer and payee. It is not, however, conclusive, as many of the cases have shown. In the present instance, it does not follow from the fact that Mr. Duffy was not paid by the respondents, that he had no legal relationship with them. Counsel for the respondents suggested that in fact if Mr. Duffy had a legal relationship with any party, it was with the Stichting.

50. The evidence established that Mr. Duffy's remuneration came from IALPA but his work for the RPG was funded by the ECA. It emerged from his evidence that he was also working on behalf of a number of other pilot groupings within the ECA umbrella. Mr. Duffy was described in evidence by Captain Van Zwol as a "consultant" who was assisting the RPG project. His function appears to have been to draft the Pilot Update in conjunction with Mr. Kelly. He appears to have operated largely autonomously as to how he went about this task. The various drafts of the Pilot Update were produced by him without any reference to the respondents.

51. It was not suggested that he was required to work in any particular manner, in any particular place or for any defined period of time. An invoice was submitted by him to IALPA for payment. When the draft was produced by Mr. Duffy, it was of course subject to approval by the respondents, who could amend or change it in any way they thought fit or publish it or not to the pilots as the case may be. In all of these respects, the description of the legal relationship between Mr. Duffy and the respondents, if there was one, seems to accord more closely to that of independent contractor than employee and I cannot fault the trial judge in reaching that conclusion.

52. However, at that point I would respectfully diverge from the trial judge's conclusion that because Mr. Duffy was not directly employed and paid by the defendants, he was therefore, not their servant or agent for the purposes of discovery. I do not think that it follows from the conclusion that Mr. Duffy was an independent contractor that he therefore, could not also be an agent of the respondents. If he was such an agent, then one must consider for what purpose the agency existed in order to determine whether the disputed document fell within the respondents' power. It must be borne in mind that the Tesco email came from the unidentified pilot into Mr. Duffy's personal email and there was no evidence to suggest that it was seen by anybody other than those two parties.

53. It must also be remembered that, in reaching conclusions as to the legal relationship between Mr. Duffy and the respondents, the trial judge was dealing with an application by Ryanair which required him to rule upon the issue for that purpose. He could not otherwise have reached a conclusion as to whether the Tesco email was discoverable by the respondents or not. His ruling was however, given within the narrow confines of the discovery issue.

54. If therefore, Mr. Duffy was not to be regarded as the respondents' "servant", could he have been their "agent" for the purposes of discovery? In general, an agent is a person who has authority from a principal to do an act that binds the principal, so that the principal assumes a liability towards a third party. It is often described as a power to alter the principal's legal relations. In *A.A. v. F.F.* [2015] IEHC 142, Baker J. described an "agent" thus (at para. 29):

> "An agent on the other hand acts as another person or in place of another person, or in the shoes of that person. The agent takes the role of acting as a person for the purposes of doing certain acts or executing certain documents, and does so as that person rather than on behalf of that person."

55. Bowstead and Reynolds, the authors of the leading work "*Agency*", put the matter thus at para 1 – 034 of the 21st Edition:

> "Some employees have agency powers, and these may be (as in the case of a manager) very wide; in other cases (e.g. domestic employees) they may be very limited. Others have no agency powers. Many agents (e.g. brokers) could be called independent contractors; other independent contractors (e.g. repairers) are unlikely to have agency powers. An independent contractor who has authority to alter

another's legal relations is likely to be an agent and one who does not is unlikely to be treated as an agent. Persons may exercise agency powers who fall into neither category; an obvious example is a gratuitous agent. Though there are interactions, both historical and practical, it is unlikely that the terminology can be reduced to a satisfactory scheme." (My emphasis).

56. Accordingly, an independent contractor may be an agent if the party who engages him confers express or implied authority on him, as a term of that engagement, to bind that party. Thus, for example, if A authorised a public relations firm to publish a defamatory statement, A would be liable despite the public relations firm being an independent contractor, because it was expressly authorised as his agent. The situation here is quite different.

57. Mr. Duffy was a consultant, a person engaged for a particular purpose, to assist in, amongst other things, drafting a document using his particular skill and experience. He was providing similar services to other European pilot groups under the auspices of the ECA. As I have noted, the respondents were free to accept or disregard or amend the document in any way they thought fit before deciding to publish it. Mr. Duffy had no authority to alter the respondents' legal relations. Consequently, in my judgment, Mr. Duffy was not the agent of the respondents, certainly for the purposes of discovery at any rate, and not for any other purpose established by the evidence. I am therefore, satisfied that the respondents had no legal right to compel Mr. Duffy to produce to them the Tesco email, even had they known about it.

58. Indeed on the facts of this case, it would, as counsel for the respondent submitted, be surprising, even on an intuitive level, that the engagement of Mr. Duffy as a consultant to assist in drafting the Pilot Update entitled the respondents to delve into his private emails. That however, does not necessarily dispose of the matter as counsel for Ryanair contended that even if Mr. Duffy was not properly to be regarded as the respondents' servant or agent, the email was still within their procurement.

59. As previously noted, the third limb of Ryanair's first ground of appeal is based on the assertion that even if a document is not within the possession or power of a party in the sense of that party having a legal right to it, it may still be in the party's "procurement" if it is a document that would be furnished voluntarily if requested. In other words, Ryanair contends that if a document can be had for the asking, it becomes discoverable, even absent a legal right to it. This argument was thoroughly analysed and rejected by the Supreme Court in *Thema v HSBC* [2013] 1 I.R. 274.

60. One of the issues considered by the court was whether the addition of the word "procurement" into the rules in 2009 brought about a change in the law. The issue initially appears to have arisen from a judgment of the High Court (Finlay P. as he then was) in *Northern Bank Finance Corporation v. Charlton* [1977] 5 JIC 2601. As the Supreme Court noted in *Thema*, even prior to 2009 it had become commonplace for courts to refer to documents as being within the power or procurement of a party. In

Yates v. Ciba Geigy Agro Limited [1986] 4 JIC 2902, the court offered the following summary of *Northern Bank Finance Corporation v. Charlton* (at p. 3): -

> "Documents not being in the power of a party may still be within his procurement: see the *Northern Bank Finance Corporation v. Charlton & Others*, an unreported judgment of Finlay P. as he then was delivered on the 26th May, 1977. In that case there was an issue as to whether a representation made on behalf of the plaintiff as to a particular shareholding in a particular company was true. The directors of the latter company held their shares as nominees of the plaintiff. It was held that documents in the possession of that company bearing on the issue of ownership of its own shares were in the procurement of the plaintiff upon the basis that if such documents were sought by the plaintiff from the directors of the company there would be no reason to believe that, having regard to the position of such directors as nominees of the plaintiff, they would refuse such request. In the present case, this and other documents of which discovery is sought are all relevant to the issues raised in the pleadings. In the present case, there is no reason to suppose that a request for such documents by the defendants would be refused."

61. On this basis, Barron J. considered that the documents should be discovered.

62. However, doubt was cast on the correctness of this approach in *Johnston v. Church of Scientology* [2001] 1 I.R. 682. The plaintiff sought discovery of documents from the defendant being the Irish Church of Scientology and a corporate entity. The documents were in fact in the possession of the English Church of Scientology, also a separate corporate entity. The High Court held that the documents were discoverable on the basis that the Irish church could procure them from the English church if they were requested. The Supreme Court held that this was not the correct approach. The sole judgment of the Supreme Court was delivered by Denham J. (as she then was) with whom the other members of the court agreed. She reviewed the previous authorities including *NBFC v. Charlton and Yates v. Ciba Geigy* and she characterised these decisions as being "a practical solution to a particular set of circumstances". Her conclusion (at p. 703) was as follows: -

> "Documents which are in the possession, custody or power of a party must be discovered. A document is in the power of a party when that party has an enforceable legal right to obtain the document.
>
> The documents in issue in this case are not in the possession, custody or power of the defendants and the defendants have no enforceable legal right to obtain them. Accordingly the plaintiff is not entitled to the discovery sought. I would allow the appeal."

63. All of these authorities were reviewed in the judgment of Clarke J. in *Thema*. This case arose out of the Bernard Madoff litigation. The plaintiff sought discovery from the defendant, an Irish corporate entity which was part of the multinational HSBC Group. The plaintiff sought discovery of documents in the possession of other corporate entities

outside the jurisdiction within the HSBC group on the basis that they were within the procurement of the Irish company. The High Court granted the order and the defendant appealed. The sole judgment of the court was given by Clarke J. with whom the other members agreed.

64. As *Johnston* preceded the change in the rule in 2009, the question arose as to whether the addition of the word "procurement" had in fact introduced a change in the law. The court held that the rule was not intended to change the pre-existing law but rather to bring its language into conformity with the commonly used phraseology in the relevant jurisprudence. Clarke J. gave other reasons for this conclusion and then observed (at p. 290): -

> "For those reasons I am not satisfied that any material change in the scope of discovery was brought about by the amendment of 2009 and for that reason it seems to me that the law remains as described by this court in *Johnston v. Church of Scientology* [2001] 1 IR 682.
>
> On that basis, it seems to me that the discovery ordered in this case goes beyond the scope of that which the rule permits. Whatever may be the case in the sort of situation where there is a single or small number of readily identifiable documents in respect of which there is good reason to believe that production can be procured, I am satisfied that the court does not have jurisdiction to order discovery which would require a third party (even where that third party is a related company of a party to the proceedings) to itself engage in what would be a form of delegated discovery. On that basis I am satisfied that the appeal should be allowed and the order for further and better discovery made on the 27th July, 2012 discharged."

65. In making some additional observations, Clarke J. noted that it would be an abuse of process for a company to decline discovery of documents held by a related company on the basis of not having the power to obtain the documents concerned, and to then place reliance on those documents at trial.

66. An analysis of these authorities demonstrates that Ryanair's contention that there is an obligation on a party to discover documents which would be furnished voluntarily, if requested, is misconceived. Insofar as it could be said that there is any exception to the rule that a party is only obliged to discover documents either in its possession or to which it has a legal right, and it is perhaps not entirely clear that that is so, it is limited to documents which Clarke J. described as being "readily identifiable" and a single or small number thereof. It would appear that when Clarke J. spoke of documents being "readily identifiable", this must be taken to refer to documents that are identifiable by the party seeking the discovery. Thus, where documents are known to exist and are available on request to the party against whom discovery is sought, it may be that in a small number of exceptional cases an order could be made. It is however, not necessary to decide that point in this case because it is not relevant to the issue that arises.

67. Here, Mr. Duffy agreed to provide documents voluntarily to the respondents. The respondents, as I have held, had no legal right to obtain those documents but they became discoverable when they came into the respondents' possession. Accordingly, the respondents were only obliged to make discovery of such documents as Mr. Duffy actually gave them. Further, at the stage of the trial when the application to discharge was made, the trial judge correctly noted that up to that point in time, and indeed subsequently as it emerged, there was no evidence to suggest that any of the respondents knew of the existence of the Tesco email.

68. Paradoxically, even if they did know about it, it was still not discoverable unless actually in their possession. By the same reasoning, even had Mr. Duffy made a deliberate decision to withhold that and perhaps other documents from the respondents, and of course there was absolutely no evidence to support such a contention, that would not have rendered the respondents in breach of their discovery obligations.

69. Accordingly, I am quite satisfied that the trial judge was correct in concluding that the respondents were not in breach of the order for discovery.

Could Ryanair have joined Mr. Duffy and/or pleaded vicarious liability?

70. Ryanair's case in this regard is that prior to the production of the Tesco email, it had no evidence of Mr. Duffy's state of mind which would have justified him being joined. For the same reason, it argued that since malice is not a plea to be made lightly as it is in effect a plea of dishonesty, there was no basis upon which it could have pleaded that the respondents were vicariously liable for Mr. Duffy's malice. Throughout the course of this appeal, Ryanair have attached great importance to the Tesco email, describing it as "explosive". I think that is to significantly overstate its relevance.

71. In truth, although much is made of the suggestion that the email reveals Mr. Duffy's true state of mind, previously unknown to Ryanair, I cannot accept that contention. The email was simply sent to Mr. Duffy. That fact alone does not reveal anything about his state of mind but rather the state of mind of the sender. It is illogical to suggest that if A sends B an unsolicited defamatory email, that demonstrates B's state of mind. It clearly does not. The email sent by the unidentified pilot to Mr. Duffy contained information concerning a sale of shares by Mr. O'Leary that was entirely untrue.

72. Mr. Duffy initially accepted that at face value and modified the second draft of the Pilot Update accordingly. Later that day, the unidentified pilot informed Mr. Duffy that he had been mistaken about Mr. O'Leary and in response, Mr. Duffy removed the reference to Mr. O'Leary from the third and final draft. In commenting on this, the trial judge held that Mr. Duffy had "largely expunged" the information from the Tesco email which had been incorporated into draft no. 2. He said this was something which went to Mr. Duffy's state of mind and I agree with that conclusion.

73. It is important to recall that Ryanair had been aware of Mr. Duffy's involvement in drafting the Pilot Update long before he gave evidence. The respondents swore an affidavit of discovery in August 2014, over three years before the trial commenced, which

discovered the emails to which I have referred and made clear Mr. Duffy's involvement in drafting the pilot updates. Mr. Duffy was himself a former Ryanair pilot who had been dismissed from his employment by Mr. O'Leary personally.

74. Ryanair led this evidence in chief and it is difficult to see what its relevance was, if not to demonstrate Mr. Duffy's malicious disposition. In the disputed discovery application in which access was sought to the emails in unredacted format as to the identity of the senders, Ryanair's solicitor, Ms. Yvonne Moynihan, in an affidavit sworn on the 14th May, 2015 averred "it shall be necessary to either amend the proceedings and/or join additional parties to the proceedings" following inspection of the unredacted documents. In a further affidavit sworn by Ms. Moynihan on the 1st July, 2015, she stated:

> "If, as the plaintiffs' suspect, the defendants intentionally enlisted the assistance of individuals known for their animus against the plaintiffs then such a fact would clearly be material to the issue of malice."

75. There could be little doubt that the individuals referred to included Mr. Duffy. Shortly prior to the commencement of the trial, Ryanair served further particulars of malice on the 26th October, 2017 which pleaded as follows: -

> "4. Prior to the establishment of the RPG the campaign against Ryanair was carried on by IALPA. There is a long running and bitter history between IALPA and Ryanair going back to a dispute over union representation at Ryanair which commenced in 2004 and culminated in a ruling in Ryanair's favour by the Supreme Court in 2007, that Ryanair was entitled not to deal with trade unions. The second defendant was involved in this dispute.
>
> 5. Over the years IALPA brought a number of misguided and ill-fated proceedings on behalf of pilots against Ryanair.
>
> 6. During the course of the preparation of the statement the subject matter of the proceedings, the defendants communicated with members of IALPA who assisted in the preparation of the defamatory statement. The individuals who participated in the preparation of the statement are well known agitators against Ryanair.
>
> 7. The contemporaneous email communications passing between the defendants, members of IALPA and other unidentified individuals during the preparation and publication of the defamatory words complained of (disclosed by the defendants in discovery) demonstrate, *inter alia*, that: -
>
> …
>
> (iii) at the time of publishing the statement the defendants knew and were aware that the allegation of market manipulation and insider trading was defamatory and untrue but believing that they were protected from being sued for defamation the defendants published the defamatory statement.

(iv) the intention of the defendants in publishing the defamatory statement was to attack Ryanair and outcast management in the eyes of pilots."

76. It therefore, appears clear that both in their pleadings and affidavits, Ryanair was making the case that Mr. Duffy, *inter alia*, had a known animus against Ryanair, was a well-known agitator against Ryanair, had been dismissed by Ryanair and was directly involved in drafting the defamatory statement complained of. For Ryanair now to suggest that, until the Tesco email was produced, there was no basis upon which it could have pleaded malice against Mr. Duffy and pleaded that the respondents were vicariously liable for his malice, is scarcely credible.

77. There can be little doubt, in the light of the foregoing, that Ryanair had at all material times the opportunity to sue Mr. Duffy if it wished to do so and/or to plead that the respondents were vicariously liable for his actions. I do not think it can be open to serious doubt but that Ryanair made a deliberate choice to do none of these things for its own reasons and I am unconvinced that the emergence of the Tesco email had any significant bearing on that. The most that might be said is that the email strengthened Ryanair's case against Mr. Duffy but a party who has a cause of action is not entitled to delay pursuing it until the evidence in support of it is strong or overwhelming.

78. I should also say that in the absence of a finding that Mr. Duffy was the servant or agent of the respondents, there was no other basis for imputing his malice to them. The fact that he may have been a joint tortfeasor does not mean that his malice could without more infect his fellow tortfeasors. In Gatley on Libel and Slander (12th Ed.), the authors note (at pp 314-315): -

> "Where A publishes material by B on an occasion of qualified privilege, if B was actuated by malice and A was unaware of this state of mind, A will have a defence unless the relationship between A and B was such as to make A responsible (i.e. vicariously liable) for B's actions."

79. Counsel for Ryanair argued that his client was in fact prevented from applying to amend to plead vicarious liability because the judge's ruling that Mr. Duffy was not the respondents' servant or agent put paid to that. Following the conclusion of submissions in relation to the discharge application on Monday 11th December, 2017, the trial resumed on Wednesday the 13th. The judge indicated that his written judgment was not yet typed but he indicated the main features of it including (at Transcript Day 22, p. 5): -

> "And, significantly, Mr. Hogan, in light of the submissions which were made on behalf of the Plaintiffs, I have come to the conclusion, for reasons which will be stated in the written judgment, that the Defendants are not the servants or agents of – sorry, that Mr. Duffy is not the servant or agent of the Defendants and that this email was not a document, therefore, to which they were legally entitled to have possession of; in other words, this document was not, for the purposes of discovery, in their power or possession."

80. Thereafter the following exchange took place between counsel for Ryanair and the court (at pp. 7-8): -

> "Mr. Hogan: Well, Judge, you appear to have based your decision on a finding of fact as to whether Mr. Duffy was a servant or agent of the Defendants, or it seems to …
>
> Mr. Justice Barton: If I had my own way, Mr. Hogan, I would not have said anything until I delivered the judgment.
>
> Mr. Hogan: Well, that's the difficulty, Judge, I think perhaps we have to see the judgment. Because it may well be – sorry, I was anticipating that, if you were to refuse my application, that I would be requesting or I would be applying to the court to amend my pleadings to plead vicarious liability on the part of the Defendants for the acts of Mr. Duffy. That may still be my application, Judge, but I need to see the basis –.
>
> Mr. Justice Barton: Of course, I understand.
>
> Mr. Hogan: - upon which it is suggested that the Defendants – that Mr. Duffy wasn't a servant or agent of the Defendants. I would say, Judge, I would only make this observation: That if that is a factual issue in the case then it's an issue that only the jury can decide. If it's a factual issue, Judge, if that is a matter of fact only the jury can decide that; in other words, it may ultimately be a question that has to be for the jury whether or not Mr. Duffy was a servant or agent of the Defendants…"

81. Following this exchange, counsel for the respondents said at pp. 8-9): -

> "Mr. O'Higgins: Well, Judge, if I may, it is an outrageous and unstatable application. First of all, the issue of servant or agent was determined on the evidence for the purposes of deciding the discovery issue. It's nothing to do with servant or agent for the purposes of the case as a whole, it is merely as to whether or not my clients were the employers, as it were, or whatever it might be of Mr Duffy for the purposes of the application to make discovery and whether or not they had power or possession. So the Court has arrived at no other determination in relation to the matter, and that matter is a matter for the determination of the Court and not for the jury. So it only goes to the obligation to discover."

82. Further discussion ensued with counsel for Ryanair indicating (at p. 13): -

> "Mr. Hogan: Yes, Judge. Well my application, Judge, is for liberty to amend my proceedings to make a claim of vicarious liability.

Mr. Justice Barton: I'm not going to entertain that application until you see the judgment of the court."

83. The written judgment was made available later that day and having had an opportunity to consider it overnight, counsel for Ryanair indicated the following afternoon that he did not intend to make an application to amend the pleadings. In the light of those exchanges, I cannot accept the suggestion that the trial judge's ruling on the discharge application precluded Ryanair from seeking to amend its pleadings to plead vicarious liability on the part of the respondents for the malice of Mr. Duffy. The trial judge's ruling on the legal relationship between the parties was made in the context of discovery only as was argued by counsel for the respondents. Further, as appears from his re-charge to the jury quoted at para. 96 below, the judge himself made that clear. Had Ryanair made such an application to amend, it could not have been opposed by the respondents on the grounds that the issue had already been ruled upon, having regard to the remarks above. Having chosen not to make the application, the appellants cannot now complain that they were prevented from doing so.

The Judge's ruling that the respondents did not know of the Tesco email

84. In ruling on the application to discharge the jury, the trial judge considered whether the respondents were aware of the Tesco email before Mr. Duffy produced it on Day 20. This was a relevant consideration in the context of the contention by Ryanair that the respondents were in default of their discovery obligations. As noted in the above discussion about whether the email was in the respondents' procurement, the judgment in *Thema* suggests that there may be some limited circumstances where documents to which there is no legal right but are readily identifiable and available, are discoverable. It was therefore, necessary for the trial judge to consider and determine this issue. He could obviously only determine the issue on basis of the evidence that had been given at that point in time. That it perfectly clear from his ruling.

85. He also came to the conclusion that any unfairness to Ryanair arising from the late production of the Tesco email could be rectified by allowing the email to go before the jury and permitting counsel for Ryanair to recall Captains Van Zwol and Goss so that they could be further cross-examined as to their knowledge of the email. Captain Murphy had not given evidence at this stage and so there was no difficulty about cross-examining him. Similarly, Mr. Duffy was already under cross-examination when the issue emerged.

86. Permitting the recall of the witnesses for further cross-examination clearly admitted of the possibility that such further cross-examination may have elicited evidence to show that they did in fact know about the email. Had that emerged, Ryanair would have been perfectly free to renew its application for a discharge or any other application it wished to make. It is, therefore, somewhat unfair to criticize the trial judge for deciding that the respondents were unaware of the email before they were asked about it.

87. Neither can I accept the proposition that because the trial judge made this finding in dealing with the discharge application, the respondents were somehow emboldened in their subsequent evidence. This amounts to little more than a suggestion that the ruling

encouraged the respondents to be untruthful in their evidence, a contention for which there is no support. This underpins the second ground of appeal, as does the submission that because of the erroneous finding that Mr. Duffy was not the servant or agent of the respondents, Ryanair was, in practical terms, prevented from pleading that the respondents were vicariously liable for Mr. Duffy's malice.

88. I have already held that there was no impediment to Ryanair pleading that the respondents were vicariously liable for Mr. Duffy's malice from at least 2014. Having chosen not to do so, it cannot complain that the judge's ruling that Mr. Duffy was not the respondents' servant or agent precluded it from doing so. In any event, I have already held that the trial judge was correct in making this ruling. This accordingly affords no legitimate ground of complaint to the appellants.

89. However, a separate ground of appeal (Ground 3) arises in relation to the trial judge's reference, in his charge to the jury, to the fact that he had already ruled that the respondents had not seen the email. Ryanair complains that this trespassed on the jury's function as triers of fact and wrongly precluded them from considering whether the respondents saw the email.

90. During the course of the judge's charge on Day 26, the trial judge said (at Transcript Day 26 pp. 42 – 45): -

> "But nobody knew, and, ladies and gentlemen, the court has decided in your absence on another application, the defendants didn't know about this email either, they didn't know about it, they didn't know about it…
>
> Ladies and gentlemen, I don't want any of you, I don't want any of you to draw a negative conclusion or an inference against the defendants on the basis that this mail was not produced. I have made a direction, I have made a ruling in relation to this. I am satisfied that they didn't know – they knew nothing about it…
>
> Ladies and gentlemen, I am satisfied, as I have said, that the defendants knew nothing about it."

91. Following requisitions on the charge, Barton J. recharged the jury and said (Transcript Day 27 p. 57): -

> "But, ladies and gentlemen, you don't have to concern yourselves with whether or not the defendants saw the email. I have ruled that they didn't and I have also ruled that they are not responsible nor for anything, for the fact that Mr. Duffy omitted to include it in the documentation he gave for discovery."

92. In his replying submissions before this court, counsel for the respondents conceded that it would have been preferable if the trial judge had not made these comments and I agree with that observation.

93. Having said that, the case that is now made by Ryanair on appeal has to be contrasted with what was said by their counsel at the trial apropos of this issue. Following the judge's charge on Day 26 when the comments to which I have referred above, were made, counsel for Ryanair, on Day 27 raised the following issue arising out of the charge. To understand the complaint that was being made, it is I think necessary to set out in full what was said (Transcript Day 27 pp. 19 – 20): -

[Counsel for Ryanair]

> "Judge, while I am on my feet overnight I have a concern myself in relation to something you said in your charge and I suppose if I could deal with that now as well. This is in relation to the Tesco, the insider dealing email. My concern is this, judge, that you emphasise very strongly could I respectfully say that the defendants knew nothing about the email. I just say that, judge, because I feel that placing so much emphasis on that, obviously you ruled in relation to that, in relation to the issue of discovery. In that context you said that they didn't know anything about the existence of the email, the document, such as would have given rise to an obligation on them to discover it. Now, at the time of your ruling in fact the defendants, none of the defendants had given evidence in relation to their knowledge or otherwise of that particular email but you ruled in the context of discovery, judge. So the problem I see is that your speech then went on to suggest firstly they knew nothing about it but then that we had suggested, invited the jury to conclude or to consider whether there had been any discussion at all about it. If I might respectfully say, judge, you effectively closed us down on that case. You made a number of observations, judge. The first was that effectively nothing from the email had gone into the statement because effectively you suggested to the jury that the statement sorry, the email, related entirely to Mr. O'Leary. Now, can I say with respect that this is perhaps to misunderstand the case that we are suggesting to the jury. The case we are suggesting to the jury, judge, is that the very idea of insider dealing, the very notion that somebody in a managerial position might sell shares in advance of a profit warning, that that is something that we suggest must have been discussed. <u>It is not the words of the email, judge, it is the ideas that were brought forward in that email, the idea of insider dealing, the idea of selling shares in advance of the profit warning</u>. In my respectful submission they were appropriate matters for the jury to consider in the context of what the defendants might or might not have discussed. But unfortunately, judge, you analysed the email in such a way as to say well the bit about Mr. O'Leary was taken out and then nothing of the email went into the draft three which the defendants got. <u>In my respectful submission, judge, that is a matter for the jury to decide whether the ideas that were contained in the email are actually contained in the statement we complain of, selling shares in advance of the profit warning</u>." (My emphasis).

94. Thus, it appears that Ryanair's complaint about the judge's charge was not that the jury were precluded from considering whether the respondents actually saw the email but

rather whether the ideas it embodied concerning insider dealing were discussed by the respondents.

95. This is also clear from a subsequent exchange between the court and counsel for Ryanair (Transcript Day 27 pp. 31-32): -

> "Mr. Hogan: My complaint, Judge, wasn't in relation to the existence of the email but what you charged the jury in relation to the existence of the email, Judge, that was perfectly appropriate and I make no complaint in relation to that, Judge… Judge, as I say, my complaint wasn't in relation to the knowledge of the Defendants as to the existence of the email. I didn't make any complaint in relation to that. You very fairly explained to them, Judge, that you had made a ruling in relation to discovery…That they weren't to take any adverse inference from the fact because the Defendant didn't know about the existence of the email…My difficulty, Judge, as I have explained, is in relation to the idea of insider dealing; that that idea it is a matter for the jury whether that idea first emerged … Found its way into the statement or into discussions or anywhere, whether it did or it didn't and that is what I would like clarified with them, Judge."

96. Following that requisition, the trial judge re-charged the jury as follows (Transcript Day 27 pp. 56 – 58): -

> "I believe that I had sufficiently communicated to you that all matters of fact are matters for you and exclusively for you and I told you that it was not my intention in any way to trample on something which is your preserve. I reiterate that now. Judges very often make comment about evidence. They make observations about evidence. They are entitled to do that, but it's extremely important for you to understand that any observations I made about in particular the missing email, those are observations, they are comments made by me and that's all they are. Matters of fact are to be found by you and only by you. You do not have to say well the judge said that, then that's it, that's absolutely – the only thing you have to accept from me is anything I tell you in relation to the law, but only the law. Any comments or observations I made about facts are precisely that, you may agree with them and you may not and you are entitled to…
>
> But insofar as I may have given you an impression yesterday, insofar as I am making a comment and I am making a comment now that I found that the defendants on a ruling weren't aware of the email, I have made that ruling, in the context of discovery they weren't aware of the email and that is a finding by the court in the context of discovery. I have also made a comment that the reference to Mr. O'Leary selling shares in the missing email was itself expunged from the final update that was published, there is no reference to Mr. O'Leary because of course we know that the email, there was a subsequent email from the same pilot saying actually that was in 2010. But, ladies and gentlemen, you don't have to concern yourselves with whether or not the defendants saw the email. I have ruled that

they didn't and I have also ruled that they are not responsible in law for anything, to the fact that Mr. Duffy omitted to include it in the documentation he gave for discovery…

Now, what's germane to your deliberations is the idea contained in that email. Did the idea expressed in that email, not just about Mr. O'Leary, but people in a managerial position, that idea, did that idea find its way into discussions between Mr. Duffy and the three defendants. We know that they had two Skype calls before the update went out. Did they discuss it? Did they discuss the idea? They were recalled. Mr. Murphy came after I had made the ruling on the email and he was asked about that and Captain Van Zwol and Captain Goss and they say no. It's a matter for you to decide on the balance of probabilities whether you accept it was likely that they did nor didn't discuss it. That is entirely your domain, so I certainly wouldn't want you to get the idea that simply because there was any reference to Mr. O'Leary in the email that had been expunged and didn't appear in it that that's the end of any relevance, it's not the end of the relevance. That's a matter for you to decide subsequently as to whether (a) the idea featured in any discussions before the update went out and whether it had any impact on ultimately what did go out because there is reference, as you know, to managers selling their shares. The defendants each say they have no recollection of that."

97. Following this re-charge, counsel for Ryanair made no further requisitions so it must be assumed that counsel was satisfied that the trial judge had adequately addressed the concern expressed by counsel as set out above. If counsel was not so satisfied, it was open to him to further requisition the trial judge or indeed apply to have the jury discharged. Neither occurred. In my view therefore, it is not now open to Ryanair on appeal to seek a retrial on the basis that the trial judge precluded the jury from considering whether the respondents saw the email or that he misrepresented its importance. Having acquiesced in the charge, Ryanair cannot now complain that it was deficient.

98. As counsel for the respondents put it, an appellant is not entitled to have an "each way bet" by not objecting to a charge, allowing the matter to go to the jury and then complain about the charge if the verdict is adverse. I am fortified in that conclusion by the dicta of Keane C.J. in *Cooper Flynn v. Radio Telefís Éireann* [2004] 2 I.R. 72 (at p. 107): -

> "I am satisfied that, in a case where the directions were acquiesced in without reservation by the party who now argues that they were incorrect, the court should not order a retrial unless it is satisfied that a substantial wrong or miscarriage resulted from the directions given. The possibility, let alone the probability, of any such wrong or miscarriage not having been established in this case, it follows that this ground of appeal also fails."

Qualified Privilege

99. Ground 4 of the appellants' grounds is concerned with the issue of qualified privilege and in this respect, Ryanair makes three points. First, Ryanair says that the respondents,

who bore the onus of proving qualified privilege, failed to establish that a substantial portion of the email recipients to whom the Pilot Update was published were in fact Ryanair pilots or members of the RPG. Second, it says that there was no evidence that the respondents had a duty or interest in publishing the Pilot Update.

100. The basis for this is that none of the respondents were, at the material time, Ryanair pilots. Captain Van Zwol was a KLM pilot who had never worked for Ryanair. Captain Goss had worked for Ryanair in the past until he was dismissed. Captain Murphy was a retired pilot who flew for Aer Lingus but was never employed by Ryanair. Third, Ryanair contend that the statement complained of was entirely irrelevant to the Pilot Update and as such, was a gratuitous swipe at Ryanair such that the privilege was lost.

101. Following the conclusion of the evidence on Day 24, the court heard detailed submissions from the parties on the issue of qualified privilege, after which the trial judge delivered an *ex tempore* ruling. In order to properly understand the basis upon which the trial judge reached his conclusion, it is necessary to set out parts of the ruling at a little length. At Transcript Book Day 24 pp. 224 – 225, the trial judge said: -

> "… None of the members of the Interim Council were actually Ryanair pilots. Captain Goss had been until very – for a brief period – had been, until recently, relatively closely to the date on which the statement was made before he was actually dismissed himself. I don't think there is any basis for suggesting that they didn't have an interest because they weren't Ryanair pilots. In my view, it's not necessary, for the purposes under consideration here, for all of the people to be employed by Ryanair. In my view, it was perfectly permissible for the pilots in Ryanair, or for the pilots in Ryanair, to elect people who weren't pilots to represent them in furtherance of the objectives, the state of objectives, of the RPG. I agree with Mr. Hogan that these stated objectives are relevant. And the evidence which we have, lots of evidence that we have in this regard is that what the members of the Interim Council wanted to do was, they wanted to actually establish a representative body, a body which would represent the pilots of Ryanair collectively, to engage in collective bargaining with the plaintiffs through what most members of the public would recognise as a Trade Union: In this instance, essentially a body like IALPA, which itself is part of the IMPACT Trade Union, and they chose to call that the Ryanair Pilot Group. Their hope was that they would quickly move off the council and be replaced by Ryanair pilots themselves. They gave evidence as to why it was necessary in the initiating stages to have people who are not Ryanair pilots, or how it was difficult to have Ryanair pilots, for reasons which I am not going to go into now and don't need to go into now, there was evidence of certainly a belief that Ryanair pilots would find it very difficult to actually be named, and, in fact, the evidence of the defendants was that those who did, in fact, associate with the RPG did so on the basis that their identity wouldn't be disclosed."

102. The judge continued (at pp. 226 – 228): -

"When you look at the rest of this article and you see what the rest of the article is about, I cannot imagine anything more of an interest to pilots than what is actually contained in this article as a whole, and by this I mean Ryanair pilots. Now, Mr. Hogan makes a point which is potentially critical to the outcome of this application. He says that if publication was to people who are not members of the RPG, that is essentially publication to disinterested people. They don't have interests for the purposes of the Act. And we are not just talking about one or two bodies; we are talking about maybe five or six hundred people, because, as he says, the actual registered membership, as he puts it, was somewhere between 1,709, I think, or 1,760 persons. Now, that leaves an awful lot of other individuals who are simply not members of the RPG, and therefore publication, to them, is simply – actually deprives the defendant of this defence because they could not possibly be – or qualify as persons who would have an interest for the purposes of the provisions in the Act.

This really rather depends on what is meant by 'membership'. And Mr. O'Higgins replies and says, well, this is not quite a fair categorisation because the evidence establishes that the way in which the lists, the lists of communicants, in other words the list to whom people were communicated by email, how that list was compiled. Initially, it was drawn from – it was drawn from a number of different sources, but the purpose of it – part of the purpose of it – part of the purpose of drawing a composite list together, albeit from these different sources, was to identify who the Ryanair pilots were. That was the first thing. There is very clear evidence about that. The object of that – there were several sources contributing to the communication list, undoubtedly, but the purpose was to – the purpose was to identify who are the Ryanair pilots, who are the Ryanair pilots."

103. I should note at this point that it was common case between the parties that the Pilot Update was published to up to 2,289 email addresses. Of that number, 1,775 individuals had registered themselves with the RPG by the completion of what was described as a "challenge process". This meant that there were 514 unregistered recipients of the Pilot Update. The trial judge dealt with this issue in the following passage of his ruling (at pp. 229 – 231): -

"Now, the defence evidence is, in my view, convincing to a point, almost of certainty, that by the time they got to the statement, they believed they were dealing with Ryanair pilots. I do not accept the proposition that those who had registered to vote and participate in surveys were considered by the defendants to be members of the RPG. I don't think that that is the case at all. We have to remember, and I am talking about context, that they were in the business of forming, getting a union off the ground. So, as I have already said, what they had to do was identify, first of all, who are the Ryanair pilots, and then essentially start communicating with them.

> I accept the submission by Mr. O'Higgins that, based on the evidence given by – by the defendants, that the purpose of registration, or what is referred to by – was not to make people members of the RPG; it was actually for the purposes of conducting surveys and voting on matters. They – this did not, as far as the defendants were concerned, mean that they would cease to communicate with pilots, who they identified as Ryanair pilots but who hadn't registered to vote or participate in surveys. There could be any number of reasons for that, including a reason that they weren't interested in participating in surveys or voting."

104. The trial judge went on to note that the respondents in evidence accepted that some of the email addresses may belong to persons who were no longer Ryanair pilots, evidence having been given at the trial that there was a significant level of turnover of pilots at Ryanair. The trial judge commented on this (at pp. 230 – 231): -

> "I accept that there may have been, and we don't know for sure, that and it did come out in cross-examination with Mr. Murphy in particular, that the list contained the names of people who may well have been pilots at the time when they went on the list, but may not have been pilots at the time when the statement went out. In fact, Mr. Murphy specifically agreed in cross-examination, he accepted it was possible that there was somebody on that list or that there may have been people on that list – who were no longer, who were no longer Ryanair pilots. The Act makes a specific provision that makes provision for that particular – for that particular situation. And in my view, if there was, and again it would be that it's speculation, I mean if there was somebody who wasn't on that list, there was certainly no intention on the part of the defendants to communicate with anybody other than somebody whom they believed, genuinely believed to be a Ryanair pilot… In my view, everything about the evidence establishes that the defendants intended at all times to communicate with the pilots."

105. In commenting finally on the content of the article as a whole, the trial judge said (at pp. 226 – 227): -

> "When you look at the rest of this article and you see what the rest of the article is about, I cannot imagine anything more of an interest to pilots than what is actually contained in this article as a whole, and by this I mean Ryanair pilots."

106. The judge accordingly ruled that the defendants were entitled to rely on the defence of qualified privilege.

107. It should also be noted that no evidence was led by Ryanair of publication of the Pilot Update to any disinterested party. The statutory provision to which the trial judge was referring in the above passages was clearly section 18 of the Defamation Act, 2009 which provides in relevant part as follows: -

> "18.— (1) Subject to *section 17*, it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought

would, if it had been made immediately before the commencement of this section, have been considered under the law (other than the Act of 1961) in force immediately before such commencement as having been made on an occasion of qualified privilege.

(2) Without prejudice to the generality of *subsection (1)*, it shall, subject to *section 19*, be a defence to a defamation action for the defendant to prove that—

(a) the statement was published to a person or persons who—

(i) had a duty to receive, or interest in receiving, the information contained in the statement, or

(ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and

(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons." (My emphasis).

108. The foregoing passages to my mind demonstrate that in ruling on the qualified privilege issue, the trial judge made the following necessary findings:

(i) There was nothing to prevent Ryanair pilots from electing non-Ryanair pilots to the Interim Council of the RPG and there was good reason for so doing.

(ii) The Pilot Update as a whole was of interest to Ryanair pilots.

(iii) The evidence established, almost to the point of certainty, that the respondents believed when they published the Pilot Update that they were communicating with Ryanair pilots.

(iv) The purpose of registration with the RPG was not to constitute the Ryanair pilots as members but rather to enable them to participate in voting and surveys if they wished.

109. Applying the *Hay v. O'Grady* principles, these findings appear to me to be of a kind that this court cannot upset, unless it is established that there was no credible evidence to support them. Beyond a bare submission that these findings were not supported by credible evidence, counsel for Ryanair made no specific reference to such evidence. Implicit in this appears to have been the suggestion that it was unnecessary to do so since the respondents carried the onus of established the defence of qualified privilege. I do not think that this is the correct approach on an appeal.

110. It is true to say that the onus lay upon the respondents in the High Court to prove the defence of qualified privilege. They led evidence in that regard and having considered that evidence, the trial judge ruled that it supported the plea. In order to challenge that ruling on appeal, the onus lies on the appellants to show that there was no such evidence by referring to the transcript passages of the evidence of the respondents in this regard

taken at its height which they suggest fail to support the finding. The appellants did not do so.

111. In any event, in my view, a review of the transcript of the trial demonstrates clearly that there was more than ample evidence to support each of these findings and as such, this court is bound by them. It seems to me it must follow therefore, that the respondents were entitled to the protection of section 18(2)(a)(ii) of the 2009 Act. This appears to reflect the position at common law described in *Defamation Law and Practice* by Cox and McCullough where the authors state (at para. 8 – 72): -

> "*Incidental publication to disinterested parties*
>
> As we have seen, it may, in particular circumstances, be either impossible or at best impracticable to ensure that a publication on a privileged occasion is not made to any disinterested parties. In such circumstances, leaving aside the possibility that malice will be inferred from the level of incidental publication, at common law the privilege will not be lost, provided:
>
> - that the publication to disinterested parties is merely an incidental consequence of publication to interested parties;
> - that the mode of publication was reasonable having regard to the nature of the privileged occasion or was the only effective way of publishing material that the publisher had a duty or interest in disseminating; or
> - that the publication is, for any other reason, reasonable in the circumstances."

112. It seems to me that the facts as found by the trial judge on this issue fall squarely within those principles.

113. Ryanair further contend that the words "this is in spite of positive indications to investors in June which encouraged a share price increase and a sell-off of shares by managers in late June, ahead of the winter period" were so irrelevant to the content of the rest of the Pilot Update that the privilege was thereby lost. The authority for that proposition is a decision of the House of Lords in *Adam v. Ward* [1917] AC 309. A different view was reached by the same court (Lord Diplock) in *Horrocks v. Lowe* [1975] AC 135 who held that irrelevant statements do not fall outside qualified privilege but can be evidence of malice. Commenting on the tension between these two authorities, Warby J. said in *Bartholomew Umeyor v. Innocent IBE* [2016] EWHC 862 observed: -

> "…that the law is that mere irrelevance does not deprive a statement of privilege. The issue is discussed in some detail in the authorities, reviewed in *Gatley* at paras. 14.63 – 14.64. It is enough to say that a statement which is logically irrelevant may be evidence of malice, but it will only fall outside the protection of the privilege if it has no reference whatsoever to the occasion, and is entirely irrelevant and extraneous."

114. The passage in *Gatley* to which Warby J. was referring states: -

> "On any view, the test of relevance is not whether the statement complained of is strictly necessary for or logically relevant to the discharge of the duty or protection of the interest which is the foundation of the privilege. One should not take the approach that the defendant is only protecting and doing 'the bare minimum' necessary to comply with his duty. Where the statement has any reference to the subject matter of the privilege, or is in any way pertinent or germane to it, it is material only as evidence of malice to take the case out of the privilege."

115. In my view, the trial judge having ruled that the Pilot Update as a whole was of interest to pilots, the words complained of could not reasonably be viewed as so entirely irrelevant as to have no reference whatsoever to the occasion and could accordingly only be relevant to the issue of malice, as distinct from privilege. Indeed, it would appear that counsel for Ryanair addressed the jury in his closing speech on the basis that the irrelevance of the statement pointed to an improper motive or purpose, thus suggesting it went to the issue of malice.

116. Accordingly, in my judgment, the ruling of the trial judge on the issue of qualified privilege was correct.

"Open Windows"

117. In opening the case to the jury, counsel for the plaintiff made reference to the concept of "open windows" in the context of share dealing. There were four periods in the year in which senior management, executives, directors or persons connected with them were permitted to sell shares. These periods, described as open windows, commenced 48 hours after the publication of Ryanair's quarterly results and continued for a period of 28 days. Ryanair issued quarterly results in May 2013 and the relevant 28-day period ended on the 18th June, 2013.

118. Following Ryanair's counsel opening these matters to the jury, counsel for the respondents applied to the trial judge for a direction that there should be no further reference to open windows and the jury should be instructed to ignore such references in the opening. The basis for this application was that counsel for the respondents argued that an un-pleaded true innuendo had been opened to the jury and Ryanair was making the case that there was an implication in the Pilot Update that managers had sold outside the open window and thus unlawfully. It was in effect submitted that this was never part of Ryanair's case and was highly prejudicial to the respondents.

119. In response, counsel for Ryanair submitted that as this was part of the factual matrix, it was an appropriate matter for the jury to have regard to and further, that it was relevant to the issue of malice. Having heard the submissions of counsel, the trial judge said: -

> "Alright, I have heard the parties. It seems to me that this is something which can be dealt with by an address at the appropriate time."

120. Counsel for the respondents sought to address the judge further on the issue which the court permitted. In response, counsel for Ryanair again said that no complaint was being

made about the open windows but it was relevant to the facts of the case and further, Ryanair would be hampered in its plea of malice in the context of suggesting that the respondents were reckless in not checking the open windows.

121. The trial judge, having debated the matter further with counsel gave a reasoned ruling, in the course of which the judge said: -

> "And the question which has now arisen and which has now been debated before the court in relation to the dealing window – which, is it accepted on all sides, it's not actually a matter of complaint by the plaintiffs against the defendants – I can see that there is a potential for prejudice were this now to be further referred to in the evidence. And the question then is whether that is something which can be dealt with by a direction now or later in the case, and having listened carefully to you both, gentlemen, I am now taking the view that it would be very difficult by direction to undo the potential later in the case and it also seems to me that in fact the potential of prejudice to the defendant far outweighs any impact on the case which the plaintiffs want to make in relation to malice, and on that basis I am going to direct right now that there will be no further mention about the dealing window in this case, in any reference to the jury in it or in the evidence."

122. The trial accordingly proceeded without any reference to the issue of open windows.

123. Ryanair makes two complaints about this. The first is that the trial judge had made a final ruling on the matter to the effect that the open windows issue could be dealt with by an address at the appropriate time. The judge, it is said, then proceeded to entertain and allow an appeal by the respondents from his first ruling by making a different second ruling. I think there is little substance in this argument. In the ordinary cut and thrust of litigation, judges frequently make comments and express provisional views about matters. There is nothing untoward about that.

124. It is generally of assistance to parties to know as a result of exchanges with the court how the judge may, at any particular stage of the proceedings, be viewing the case. That often prompts further argument and debate which may persuade the judge that an earlier provisional view expressed was wrong. That goes to the essence of the trial process and the function of the advocate. The expression of such views by a judge is not a pre-determination of anything. Judges are not entirely blank canvases, either before or during the hearing of a case. It is, in my view, quite unreal to suggest that because the trial judge in this case expressed a view, even one not stated to be provisional, that this precluded him from hearing fuller argument and coming to a different conclusion.

125. Ryanair's second argument on this issue is that the trial judge's decision to exclude what was clearly relevant evidence was disproportionate and ultimately resulted in an unfair trial to Ryanair. In their submissions, counsel for Ryanair suggest that they were spancelled by this ruling in the context of the Tesco email which referred to "close periods" and showed that a plan was being hatched to accuse Ryanair of selling in the

closed period. There was however, no evidence of such a plan given in the course of the trial.

126. It is important to note that Ryanair made no complaint in its pleadings about share dealings occurring outside the open windows, either in the context of the defamatory meaning of the Pilot Update or the malice of the respondents. As previously noted, Ryanair pleaded extensive particulars of malice shortly before the commencement of the trial and nowhere was it suggested that the respondents had failed to check the dealing window which amounted to recklessness and therefore, went to the respondents' malice. If this issue was, as is now suggested, of such importance that its exclusion led to an unfair trial, it is surprising, to say the least, that no mention is made of it in the pleadings.

127. It is obvious that referring the jury to the open windows question carried with it a very significant risk that the jury could consider that the Pilot Update should be taken to suggest that Ryanair managers acted unlawfully by selling shares in "late June" outside the dealing window. Such a suggestion was therefore highly prejudicial to the respondents to a degree that far outweighed any potential probative value it might have as part of the "factual matrix". The trial judge was, therefore, quite justified in the exercise of his discretion in ruling out any further reference to "open windows" and the suggestion that this led to an unfair trial is without foundation. Indeed, it seems to me that a much greater risk of an unfair trial would have arisen by the admission of such evidence.

The Evidence of Darrell Hughes

128. Mr. Hughes was the director of HR Strategy and Operations in Ryanair and was called to give evidence on its behalf. He was asked about his knowledge of the evolution of RPG activities including the production of updates in 2012 and 2013. He said that Ryanair started to see the focus of the RPG attack move from industrial relations issues into safety issues and continued (Transcript Day 7 pp. 50-51): -

> "Yes, I mean, there was the focus on safety for quite some time and then, I suppose, really, we see what happens within the September update, which is the subject matter of this case where we see it as an attack on our financial prudence or our financial behaviour, which is a different approach again, and in parallel, we know that members of the RPG, the defendants, were briefing investors, they have made those statements themselves."

129. This was immediately objected to by counsel for the respondents in the presence of the jury who said: -

> "That is something not pleaded and quite impermissible for this witness to say, it shouldn't be done and it is quite improper. Utterly improper… and extraordinary it is dropped in now."

130. When this objection was made, counsel for Ryanair asked that the stenographer read back what had been said but before that happened, the trial judge said: –

"I think a better way to deal with this is just to expunge the last answer in its entirety."

131. Counsel for the respondents then remarked: –

> "My friend is doling out particulars as long as your arm and more, and not a word of such a thing is either said or true."

132. The trial judge said "I am ruling in your favour Mr. O'Higgins".

133. These exchanges took place before the jury.

134. Before the return of the jury the next morning, counsel for Ryanair asked the judge to review his ruling (although I note in passing that Ryanair argued that such a procedure was impermissible under the "open windows" ground above).

135. He took particular issue with the statement of counsel for the respondents that the suggestion that they denigrated Ryanair to investors was untrue. In support of the application, counsel for Ryanair gave to the judge an article from *The Times* newspaper of the 25th September, 2004, referring to the fact that Captain Van Zwol had met with investors to brief them. He also complained of the fact that Mr. Hughes had been accused of lying in front of the jury, when in fact what he had said was true. What followed was a rather elaborate discussion between counsel and the judge concerning the meaning of the words "in parallel". The trial judge offered the view, which I think most people would share, that he understood the reference by Mr. Hughes to "in parallel" as equating to "at the same time". He felt there was certainly at least a risk that the jury would understand it that way and if so, it was certainly incorrect, as it was not until a year later that the RPG were involved in briefing investors.

136. The judge ultimately ruled that he would not permit Mr. Hughes to give this evidence or that *The Times* article could be put to him. He accepted the respondents' argument that the evidence was relevant to the issue of publication and could be understood by the jury as meaning that the Pilot Update was published to investors as well as to pilots, which was untrue, and thus could not be led. Ryanair's counsel accepted that it was not its case that the Pilot Update had been published to investors. The trial judge subsequently ruled that Ryanair was entitled to pursue the issue insofar as it related to malice. Ryanair complains that Mr. Hughes was, in front of the jury, accused of being a liar. I do not think that is a fair characterisation of what was said. Counsel for the respondents merely noted that the statement made by Mr. Hughes, in the sense that any reasonable person would have understood it, was untrue. The respondents cannot be blamed for the fact that this was said in front of the jury because counsel for Ryanair had previously said that there was no need to send the jury out:-

> "Sorry, judge, I just need to be clear what was said. I don't want to have to send the jury to their room, judge, but perhaps the stenographer could just read back what was said."

137. Insofar as Ryanair now complains that counsel was prevented from responding to the objection by having it read back by the stenographer, counsel for Ryanair expressly disavowed any complaint in this regard the next day when he said (Transcript Day 8 pp. 39-40): -

> "And again, I am not seeking to rely on this, but I did at the time say that it wasn't clear to me what Mr. Hughes had said, I asked that the stenographer repeat what he had said so that I could consider it. And I am not complaining, judge, because in the heat of the moment the court ruled and we moved off. But I didn't have an opportunity to be heard on the matter. But anyway, I have been heard on the matter now, judge, so I am not making any complaint in relation to that."

138. Accordingly, having acquiesced in the issue, it seems to me that it cannot now be complained of on appeal and the dicta of Keane C.J. in *Cooper Flynn* above referred to are apposite in that regard.

Was the verdict perverse?

139. I think it is fair to say that this ground of appeal was not pursued with great vigour by Ryanair as it was not referred to in either Ryanair's written or oral submissions.

140. The first argument advanced by Ryanair is that the allegation of market manipulation, found by the jury, was so serious that it could not have been published other than maliciously. The jury's issue paper had been agreed by both sides. The issues of meaning and malice were dealt with separately. Ryanair now suggests that, in effect, the two could not be separated which is self-evidently an untenable position.

141. The second complaint is that the verdict could only have been reached by the jury accepting incredible evidence of the respondents' intentions in publishing the Pilot Update. This argument is tenuous to say the least. The law concerning perverse verdicts was reviewed by the Supreme Court in *McDonagh v. Sunday Newspapers Limited* [2017] IESC 46 where Charleton J., having examined the relevant case law, says (at para. 27): -

> "Having reviewed those cases, it can be stated that circumstances exist where it may be necessary to overturn a jury verdict in a defamation case because all of the evidence tendered at trial pointed in one direction, notwithstanding the respect that must generally be afforded to such verdicts. Such a decision will not be reached lightly and could only occur in exceptional circumstances."

142. Ryanair have not pointed to any such exceptional circumstances in this case. Where it is suggested that the evidence is only capable of one conclusion, as it is here, the onus lies on the party making that case to seek to have the issue either withdrawn from the jury or the jury directed as to the answer. In *Dunne v National Maternity Hospital* [1989] I.R. 108, Finlay C.J. stated: -

> "If in a trial in a civil case had with a jury the evidence on any particular fact adduced by one of the parties, having regard to other uncontroverted evidence is incapable of being believed even though sworn to, it is as a matter of law the duty of the judge to withdraw from the jury that particular issue of fact or to direct the manner in which the jury must answer it. Having regard to that proposition, I can see no logic in a contention that an issue of fact could properly be left by a trial judge to the determination of a jury and then in the event of the jury deciding it in one particular way their verdict could be set aside by an appellate court which was satisfied that it was proper to have left that issue."

143. Finally, it is suggested that the jury must have misunderstood the law in relation to malice in reaching the conclusion they did and if they did, that was as a result of misdirection by the trial judge. However, no requisitions were raised in this regard following the re-charge by the judge and so, on that basis also, this ground must fail.

Summary and conclusions

144. I am satisfied that the trial judge correctly exercised his discretion in refusing to discharge the jury and that Ryanair failed to establish a real risk of an unfair trial. Any ostensible prejudice accruing to Ryanair by virtue of the late production of the Tesco email was effectively eliminated by the trial judge allowing further cross-examination of all the relevant witnesses and giving appropriate directions to the jury.

145. The trial judge's ruling that Mr. Duffy was not the servant or agent of the respondents and that the Tesco email was not discoverable by them was correct as a matter of law. All matters of relevance to that email were fully ventilated during the course of the trial. Ryanair was not deprived of the opportunity to sue Mr. Duffy or to plead at any relevant stage that the respondents were vicariously liable for his actions. Even if there was malice on Mr. Duffy's part, the mere fact that he was a joint tortfeasor did not mean that his malice infected the respondents. In any event, this does not arise because Ryanair chose not to plead that the respondents were responsible for his malice on any basis.

146. The trial judge's ruling on the issue of qualified privilege was in my view correct in law and the findings of fact made by him in reaching that conclusion cannot be disturbed by this court. The judge's rulings during the course of the trial on the "open windows" issues and the evidence of Darrell Hughes were, in my opinion, entirely appropriate.

147. A number of Ryanair's grounds of appeal arise out matters that occurred during the trial which were the subject of charge and re-charge by the trial judge without further requisition or complaint. They cannot now be raised in this court on appeal as I have explained, in the absence of Ryanair demonstrating that they resulted in a manifest miscarriage of justice. It has not done so.

148. Finally, it is to my mind clear that when all matters are taken into account and the trial viewed in the round, Ryanair has not established that the trial was unfair. I would accordingly dismiss this appeal.

149. As this judgment is being delivered electronically, Whelan and Haughton JJ. have indicated their agreement with it.