APPROVED **[2023] IEHC 649**

THE HIGH COURT

2020 6087 P

BETWEEN

VICKI PURTILL

PLAINTIFF

AND

AER LINGUS LTD

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 November 2023

INTRODUCTION

1. This judgment is delivered in respect of an application for the discovery of documents. The proceedings take the form of a personal injuries action. The Plaintiff asserts that, during the course of her employment as a flight attendant with Aer Lingus, she suffered injuries as a result of what she describes as a "*hard*" or "*abrupt*" landing. More specifically, it is asserted that the aircraft upon which she had been working during a transatlantic flight on 28 June 2019 made an abrupt and/or hard landing at Boston Airport, as a result of which she sustained personal injuries.

NO REDACTION REQUIRED

2. One of the principal areas of dispute between the parties centres on whether it is appropriate to direct discovery of records of flight data monitoring and cockpit voice recordings. The resolution of this dispute requires consideration of Regulation (EU) No 996/2010 on the investigation and prevention of accidents and incidents in civil aviation.

PART I

OVERVIEW OF PRINCIPLES OF DISCOVERY

Relevance

3. The question of whether a category of documents is relevant falls to be determined by reference to the pleadings. The scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 57)).

4. The position has been put as follows by the Court of Appeal in *O'Brien v. Red Flag Consulting Ltd* [2021] IECA 172 (at paragraph 27):

> "[…] A document is relevant if it may reasonably form the basis of a line of enquiry which may lead to the discovery of information that will advance the case of the seeker and/or weaken that of the party against whom it is sought. It is sufficient that a document may contain such information. It is not necessary to prove that it will. Relevance is determined on the basis of the pleadings and not the evidence. A plea must be taken at its high watermark and it is generally not the role of the court to embark on an enquiry as to the strength of the case or the probability of proving a pleaded fact. However, it is not open to a party to submit a bare and unparticularised plea in the hope of using discovery to obtain evidence in support of a claim that is not particularised. In particular, a document cannot be sought for the purposes of demonstrating the existence of a claim where there is no other evidence to suggest that one exists. Discovery may be permitted for the purposes of evidencing

> a sparsely particularised claim where the impugned activity is alleged to have been committed in a surreptitious and clandestine fashion."

Necessity and confidential documents

5. The fact that a document may be confidential is something which goes to the question of whether an order for discovery is necessary. Where an application for an order for discovery is made in respect of confidential documentation, the court should only order discovery in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 42)). A court will adopt appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings (*ibid*, at paragraph 44).

6. The approach to be taken to an application for the discovery of confidential documents has recently been considered by the Court of Appeal in *Ryan v. Dengrove DAC* [2022] IECA 155 and in *A.B. v. Children's Health Ireland (CHI) at Crumlin* [2022] IECA 211.

7. These judgments emphasise that the court must engage in a balancing exercise as follows (*Ryan v. Dengrove DAC* at paragraph 67(7)):

> "In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. A confidential document (and particularly one that is highly confidential) should not be directed to be discovered unless the court is satisfied that there is a real basis on which it is likely to be relevant at the hearing. The more material the document appears to be — the greater the likelihood that the document will have '*some meaningful bearing on the proceedings*' — the more clearly the balance will be in favour of disclosure. Such an assessment necessarily

> requires the court to look beyond the threshold test of *Peruvian Guano* relevance. The '*nature and potential strength of the relevance*', and the degree to which the document is likely to advance the case of the requester, or damage the case of the requested party, are appropriate considerations in this context."

8. The Court of Appeal indicated (at paragraph 67(9)) that an incremental approach to the discovery of confidential material may be appropriate as follows:

> "It must always be remembered that contested issues of discovery are almost always addressed in advance of trial. The court must assess issues of relevance and necessity on the basis of the pleadings. At that stage, it will be difficult to predict the course of the trial. As proceedings move closer to hearing, some issues will loom larger and other will recede in significance. At the hearing of a discovery application, it may be very difficult to confidently assess the extent to which a document or category of documents (which, generally, the court will not have reviewed) will bear upon the resolution of any of the issues in dispute. The court will be concerned to adopt the approach that involves the least risk of injustice. Accordingly, where there appears to be any material risk that refusing discovery could give rise to unfairness, the court should generally err in favour of directing discovery (if necessary, on terms)."

PART II

REGULATION (EU) NO 996/2010

9. The disclosure of records relating to civil aviation safety investigations is constrained by Regulation (EU) No 996/2010 on the investigation and prevention of accidents and incidents in civil aviation ("***EU Regulation***"). The EU Regulation reflects the provisions of Annex 13 of the Convention on International Civil Aviation signed in Chicago on 7 December 1944 ("***Chicago Convention***") which lays down international standards and recommended practices for aircraft accident and incident investigation.

10. The EU Regulation is directly applicable in the domestic legal order. Certain administrative details in respect of the precursor to the EU Regulation are addressed under the Air Navigation (Notification and Investigation of Accidents, Serious Incidents and Incidents) Regulations 2009 (S.I. 460 of 2009). These regulations provide that the authority concerned with the conduct of an investigation shall not make certain prescribed records available to any person for purposes other than such an investigation unless the High Court directs disclosure. (See, generally, *Ryanair Ltd v. Besancon* [2021] IECA 110).

11. The restrictions on disclosure are, for the most part, directed to records in the possession of, or prepared by, the safety investigation authority. These include, for example, statements taken by the safety investigation authority in the course of the safety investigation, and drafts of preliminary or final reports or interim statements.

12. The position in respect of flight data monitoring records and cockpit voice and image recordings is different. The disclosure of such records is precluded without reference to the identity of the entity in whose possession the records are held. Put otherwise, the preclusion on disclosure is not directed solely to the safety investigation authority. This, presumably, is intended to reflect the particular sensitivity of records of this type: the records are protected irrespective of whose hands they are in.

13. Article 14 of the EU Regulation, in relevant part, reads as follows:

> 1. The following records shall not be made available or used for purposes other than safety investigation:
>
> (g) cockpit voice and image recordings and their transcripts, as well as voice recordings inside air traffic control units, ensuring also that information not relevant to the safety investigation, particularly information with a bearing on personal privacy, shall

> be appropriately protected, without prejudice to paragraph 3.
>
> 2. The following records shall not be made available or used for purposes other than safety investigation, or other purposes aiming at the improvement of aviation safety:
>
> (a) all communications between persons having been involved in the operation of the aircraft.
>
> […]
>
> Flight data recorder recordings shall not be made available or used for purposes other than those of the safety investigation, airworthiness or maintenance purposes, except when such records are de-identified or disclosed under secure procedures.

14. The preclusion on disclosure is subject to the following proviso at Article 14(3) of the EU Regulation:

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

15. This proviso allows for the possibility of a court directing the discovery of, *inter alia*, flight data recorder recordings and cockpit voice and image recordings. The proper approach to be taken in this regard has been summarised by the High Court in *McCormack Pittion v. Aer Lingus Group plc* (Unreported, High Court, Kearns P., 2 February 2015). This judgment is discussed, by reference to the equivalent category of documents sought in the present case, at paragraph 22 below.

16. For completeness, it should be observed that the factors relevant to balancing the competing public interests in the administration of justice and in air safety,

respectively, have recently been considered by the Supreme Court of Canada in *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48. This consideration arose in the context of domestic legislation implementing the Chicago Convention but has a resonance for the similarly worded EU Regulation. The Supreme Court of Canada put the matter as follows (at paragraph 111):

> "The ultimate balancing requires the court or coroner to identify the relevant factors and decide whether, in light of all of the circumstances, the public interest in the administration of justice commands production and discovery of the [cockpit voice recorder], notwithstanding the weight accorded to the privilege by Parliament. When measuring the public interest in the administration of justice, the decision-maker should consider the recording's relevance, probative value and necessity to resolving the issues in dispute as factors that point to the importance of the recording to a fair trial. On the privilege side of the scale, the decision-maker should consider the effect of release on pilot privacy and on transportation safety, as fostered by free communications in the cockpit. […]"

PART III

DISPUTED CATEGORIES OF DOCUMENTS

Cockpit voice recordings

17. The Plaintiff has sought discovery of the cockpit voice recordings in respect of the flight during the course of which she is alleged to have been injured. Aer Lingus resists discovery, primarily, by reference to the EU Regulation.

18. Discovery of the cockpit voice recordings is refused for the following reasons. First, aside entirely from the EU Regulation, the Plaintiff has failed to demonstrate that discovery of this category is necessary in circumstances where *other* categories of documents are being made available which will allow the Plaintiff to pursue her allegation that there was negligence in the manner in

which the aircraft was landed. More specifically, the Plaintiff is to be provided with records of flight data monitoring which will indicate parameters such as landing forces for a period of time five seconds before and five seconds after touchdown. It is unnecessary to supplement this data by also providing the Plaintiff with the cockpit voice recordings. The content of same is unlikely to add to the Plaintiff's knowledge of the circumstances of the landing. Having regard to the confidential nature of cockpit voice recordings, an order for discovery is not justified. The content of the cockpit voice recordings is unlikely to have "*some meaningful bearing on the proceedings*" (to borrow the language of *Ryan v. Dengrove DAC*). The Plaintiff's case will largely stand or fall on what is established by the records of the flight data monitoring.

19. Secondly, the disclosure of the cockpit voice recordings is not justified by reference to the proviso under Article 14(3) of the EU Regulation. The disclosure would be of no obvious benefit to the Plaintiff in circumstances where she is to be provided with records of the relevant flight data monitoring.

20. There is thus nothing to weigh in the balance against the adverse domestic and international impact that the directing of disclosure may have on future safety investigations. A perception that the Irish Courts are willing to direct the disclosure of cockpit voice recordings even in the absence of any compelling justification might well have a chilling effect. Pilots might be more circumspect in their communications, and, in the case of private aircraft, in particular, pilots might choose not to install or operate voice recording equipment.

21. Accordingly, discovery is refused in respect of category (c), and the wording of category (d) is modified by the inclusion of the following qualifying words: "*This category excludes cockpit voice recordings*".

22. This decision to refuse discovery of the cockpit voice recordings is consistent with the approach taken in *McCormack Pittion v. Aer Lingus Group plc* (Unreported, High Court, Kearns P., 2 February 2015). Kearns P. held as follows:

> "Article 14(3) of the Regulation permits of an exception where it is in the interest of justice that the data be disclosed but the key point here is that the Plaintiff says that she suffered injury on landing because the forces on landing were excessive and the Defendant denies this and says the forces on landing were not excessive.
>
> Consequently, the issue in the case is what were the extent of the forces on landing. Given the sensitivities that would arise on disclosure of the material, the Court would have to be satisfied as to the necessity for which discovery of the documentation is sought. In this case, the Court is not satisfied that the discovery is necessary.
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> […]
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> The Plaintiff does not require the additional information to make out her case and she will also be assisted by the fact that she will receive further discovery of other items including the air safety report form, the cabin safety report form, the technical log and the cabin defect log."

Records of flight data monitoring

23. The next area of dispute between the parties centres on records in respect of flight data monitoring. The Plaintiff has sought discovery of the following category of documents:

> "Category (b):
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> All notes, records, charts, reports, film, correspondence and other document or part thereof whether stored in electronic or digital format or otherwise touching, concerning or relating to the flight report and/or flight log prepared in respect of the flight the subject matter of the within proceedings including all documentation relating to the nature of the landing and the relevant landing parameters, and all documentation relating to any measured

> acceleration/deacceleration and/or landing forces, in both vertical and horizontal directions."

24. Aer Lingus has offered to discover any entries in the flight log referring to the landing in issue. Aer Lingus has also agreed to provide the relevant data for a period of five seconds before, and five seconds after, touchdown ("***the ten second window***"). Aer Lingus has filed an affidavit of an expert which confirms that the operational flight data monitoring data for the point of touchdown will contain relevant information regarding the aircraft performance and the G-forces it experienced at the point of touchdown. The expert further explains that the approach and after touchdown data does not add to the analysis of the forces acting on the aircraft (and thereby its occupants) during the point of touchdown. This affidavit has not been contradicted by an expert on behalf of the Plaintiff.

25. Having regard to the confidentiality attaching to records of flight data monitoring, I am satisfied that an order which confines discovery to five seconds before, and five seconds after, touchdown is reasonable and proportionate. A longer timeframe does not seem necessary to allow the Plaintiff to advance her case. This timeframe is consistent with that tacitly approved of by the Court of Appeal in *Lawless v. Aer Lingus Group plc* [2016] IECA 235.

26. Accordingly, the latter part of this category is revised to read as follows:

> "[…] records of the flight data monitoring for a period of five seconds before, and five seconds after, touchdown of the aircraft. This category is to include records of the landing parameters, any measured acceleration/deacceleration and/or landing forces, in both vertical and horizontal directions."

27. The Plaintiff will have liberty to apply to seek further and better discovery in the event that the records of the flight data monitoring for the ten second window disclose that the landing was harder than would normally be expected and an

expert indicates that events prior to the touchdown are relevant to assessing whether the landing was negligent. This reflects the incremental approach to the discovery of confidential material as explained by the Court of Appeal in *Ryan v. Dengrove DAC*. If the Plaintiff can demonstrate, by reference to the material discovered, that records of the flight data monitoring outside the ten second window will have some meaningful bearing on the proceedings, then she may be entitled to additional discovery.

Repairs to seat, floor beams or safety harness

28. The Plaintiff has sought discovery of the following category of documents:

> "Category (e):
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> All notes, records, charts, reports, films, correspondence and other document or part thereof whether stored in electronic or digital format or otherwise touching, concerning or relating to any structural repairs carried out to the seat and/or the floor beams directly under and adjacent to the seat and/or the safety harness before or after the flight on which the Plaintiff was injured."

29. This category is relevant: if the records demonstrate that either the seat occupied by the Plaintiff or the surrounding area had been subject to repair, then this may assist the Plaintiff in establishing her plea that Aer Lingus failed to maintain properly the equipment for use by employees.

30. Aer Lingus has offered to make discovery of documents within this category but limited to a period of 24 hours before and after the flight in question. In the course of submissions, it was suggested by counsel for Aer Lingus that a longer period would be problematic because the aircraft was subject to a wet lease. This is not, however, substantiated on affidavit. I am satisfied that a longer period of one week, either side, is appropriate. A 24 hour timeframe is unreasonably short.

It is possible that the operator of the aircraft might not have been able to attend to a repair in such a short timeframe: a seven day period seems more realistic.

31. The Plaintiff has also sought discovery of the following category of documents:

> "Category (g)
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> All notes, records, charts, reports, films, correspondence and other document or part thereof whether stored in electronic or digital format or otherwise touching, concerning the make, model, and year of manufacture of the aircraft, the seat number and/or position, and safety harness type and configuration (3-point, 4-point, etc.) used on which the Plaintiff was injured for flight El135 Shannon to Boston on or about the 28th Day of June, 2019. If it is determined that it was a 3-point safety harnesses configuration, was the safety harness draped over the left or right shoulder?"

32. Subject to the modifications below, my understanding is that this category is now agreed:

> "Documentation recording the make, model, and year of manufacture of the aircraft used for flight EI 135 Shannon to Boston on 28 June 2019; the seat number and/or position occupied by the Plaintiff; and safety harness type and configuration (3-point, 4-point etc.). If it is determined that it was a 3-point safety harness configuration, was the safety harness draped over the left or right shoulder?"

Other cabin crew injuries

33. The Plaintiff has sought discovery of the following category of documents:

> "Category (i):
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> All notes, records, charts, reports, films, correspondence and other document or part thereof whether stored in electronic or digital format or otherwise touching, concerning or relating to the seating locations of the other cabin crew members who were apparently injured on the same flight."

34. Aer Lingus has sought to resist making discovery of this category on the grounds that it is "*speculative*" and not relevant. With respect, it is expressly pleaded in the personal injuries summons that other crew members were also apparently injured on the same flight. If it transpires that other cabin crew members are

also claiming to have been injured, that would be relevant to the assessment of the Plaintiff's claim. It might be taken by the trial judge as tending to indicate that the force of the landing was severe. Accordingly, discovery is ordered of documentation which identifies the seating locations of the other cabin crew members on the flight in question.

PART IV

CONCLUSION AND PROPOSED FORM OF ORDER

35. This judgment addresses the areas of disagreement between the parties in relation to discovery. For the reasons explained, discovery is ordered in respect of categories (b), (d), (e), (g) and (i) in the modified terms indicated. Discovery is refused in respect of category (c). The Plaintiff will have liberty to apply to me to seek further and better discovery: see paragraph 27 above.

36. I understand that the other categories have been agreed between the parties. Accordingly, the parties are requested to prepare an agreed draft order and to submit same for approval within three weeks of today's date.

37. As to costs, my *provisional* view is that each party should bear its own costs of the motion for discovery. This provisional view is predicated on the fact, first, that neither party were entirely successful, and, secondly, that the expert affidavit relied upon by Aer Lingus was only filed shortly before the hearing. If either party wishes to contend for a different form of order than that proposed, they should contact the registrar and arrange to have the matter listed on a Monday morning convenient to both sides.

Appearances

Andrew Walker SC and Donal O'Rourke for the plaintiff instructed by Holmes O'Malley Sexton
Paul Sreenan SC and Graham Quinn for the defendant instructed by Flynn O'Driscoll

Approved