[IE] Channel 4 entitled to claim journalistic privilege

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On 5 October 2017, the Irish High Court ruled that the broadcaster Channel 4 was entitled to claim “journalistic privilege” over sources for an edition of its investigative television programme series “Dispatches”, broadcast in August 2013. The airline company Ryanair brought an action in defamation against the broadcaster over its "Secrets from the Cockpit" programme, which dealt with a number of criticisms of Ryanair over its fuel policy, passenger safety, and pilot working conditions.

In 2014, an order for discovery of documentation and material used in the making of the programme was made in the High Court and that order was subsequently appealed to and varied “to a limited extent” by the Court of Appeal (see IRIS 2015-9/18). Following the Court of Appeal order, an affidavit of discovery was sworn by Channel 4 objecting to producing the documents or portions of those documents that had been redacted or withheld, “on the basis of journalistic source protection privilege and/or legal advice and/or litigation privilege and/ or irrelevance.” Overall “some 2 400 documents were discovered.” In January 2016, Ryanair served a “notice to produce” requiring Channel 4 to produce for inspection the documents listed in the affidavit of discovery and shortly after, Ryanair served a “notice to inspect documents.” Following Channel 4’s objection to making the documentation available for inspection, Ryanair issued a notice seeking an order directing Channel 4 to make available for inspection the documents listed in the affidavit of discovery.

Justice Meenan, in the High Court, ruled that Channel 4 was entitled to claim both journalistic and legal advice/litigation privilege. In citing a number of authorities, Justice Meenan held that journalistic privilege is not absolute and may be displaced following a balancing exercise carried out by the court between, on the one hand the right to freedom of expression and, on the other hand, a legal right such as a person’s right to a good name. However, a heavy burden rests on the person who seeks disclosures of journalistic sources, and the court must be satisfied that such disclosure is justified by the overriding requirement in the public interest or is essential for the exercise of a legal right.

In carrying out the ‘balancing test’ with regard to journalistic privilege and the right to a good name, Justice Meenan stated that “there can be no doubt that the safety of passengers, crew and those on the ground beneath is a matter of the most serious public interest.” He stated that not only passengers and crew “but

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also the wider general public have a clear public interest in knowing that an airline, such as Ryanair, operates in accordance with the appropriate safety standards." The judge stated that Ryanair seeks to vindicate its good name and that clearly the identification of Channel 4's sources, in particular, the four (anonymised) pilots, would be of assistance to Ryanair. However, it was not submitted nor was it established that the identification of these sources was essential for Ryanair to vindicate its name at the hearing of the actions. Justice Meenan stated that, given that Channel 4 had pleaded the defence of 'truth' pursuant to the Defamation Act 2009, the burden of the defence rests with Channel 4 so it would seem "inevitable" that pilots John Goss and Evert Van Zwol, identified in the programme, "would be called to give evidence" at the trial and hence "be the subject of cross-examination by Ryanair." The judge added that it was clear that Ryanair intended to rely upon reports of a number of aviation authorities in respect of flying incidents. Furthermore, it did not appear to Justice Meenan to be necessary for Ryanair to know the identities of Channel 4's sources to establish the appropriateness of the airlines work/employment practices. In conclusion, Justice Meenan found the balance lay in favour of Channel 4's assertion of journalistic privilege and accordingly, the judge would not direct either the production or inspection of documents over which such privilege is being claimed.

Ryanair Limited v Channel 4 Television Corporation & anor [2017] IEHC 651, 5 October 2017

http://www.bailii.org/ie/cases/IEHC/2017/H651.html

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