THE HIGH COURT

COMMERCIAL

Record No. 2023/5036P

[2024] IEHC 627

BETWEEN

KATHERINE WACHMAN, JOHN PAUL MAGNIER AND JOHN MAGNIER

PLAINTIFFS

AND

BARNE ESTATE LIMITED, IQ EQ ONE (JERSEY) LIMITED, IQ EQ TWO (JERSEY) LIMITED, RICHARD THOMSON-MOORE AND IQ EQ (JERSEY) LIMITED

DEFENDANTS

JUDGEMENT of Mr. Justice Twomey delivered on the 5th of November, 2024

SUMMARY

1. The third named plaintiff ("**Mr. Magnier**") does not want to disclose ten documents ("**Documents**") that are relevant to his claim against the defendants, presumably because he believes they will undermine his case. In his case against the defendants, he claims that he agreed to purchase from them certain lands in county Tipperary ("**Barne Estate**").

2. However, what is most unusual about this application is that in order to prevent the disclosure of the Documents, Mr. Magnier makes a very serious claim against his *current* adviser Mr. Eugene McCague ("**Mr. McCague**").

Mr. Magnier's serious claim against *his own adviser*

3. Mr. Magnier claims that Mr. McCague gave him legal advice, which is contained in those Documents, even though Mr. McCague did not have a solicitor's practising certificate at the time. The reason this is a very serious claim is because it is a criminal offence for someone, without a practising certificate, to act as a solicitor under s. 55 of the Solicitors Acts, 1954 ("**1954 Act**"). (Thus, if a court were to hold that the giving of legal advice by a person without a practising certificate is one and the same as *'acting as a solicitor'* without a practising certificate, then the person giving legal advice, without a practising certificate, commits a criminal offence). Accordingly, while Mr. Magnier is not claiming that Mr. McCague committed a criminal offence, by claiming that he gave legal advice without a practising certificate, he is, in effect, claiming that Mr. McCague *could* have committed a criminal offence. Indeed, it seems clear to this Court that Mr. Magnier is well aware that he is making a very serious claim about his own adviser, in order not to have to disclose the Documents to the defendants.

4. To avoid disclosing the Documents, Mr. Magnier also makes a second claim which relates to Mr. McCague. Mr. Magnier claims that he believed that Mr. McCague held a practising certificate when he gave the advice in question. However, under s. 56 of the 1954 Act a person, without a practising certificate, who pretends to be a solicitor or makes a representation implying that he is a solicitor, is guilty of a criminal offence. Thus, if Mr. Magnier's claim is correct, and depending on how Mr. Magnier was led to believe that Mr. McCague had a practising certificate, there *could* be issues for Mr. McCague under this section as well.

Mr Magnier's aim is to prevent disclosure of Documents, not implicate his own adviser

5. Despite these significant claims which Mr. Magnier has made regarding Mr. McCague, it seems clear to this Court that Mr. Magnier's intention is not to allege that a criminal offence might have been committed by Mr. McCague. Rather it seems clear to this Court that his only purpose in alleging that he got legal advice from McCague, is to ensure that the Documents are privileged, and so are not disclosed to the defendants, while at the same time not implicating Mr. McCague.

6. This seems clear to this Court because all that Mr. Magnier is prepared to do in support of his application, is to make a *claim* that legal advice was given by Mr. McCague, without a practising certificate, and make a *claim* that he believed that Mr. McCague had a practising certificate. He is not willing to provide *evidence*, which he could easily have provided, to show that the Documents did or did not contain legal advice. Nor is he prepared to provide direct evidence, which he could have easily provided, that he believed that Mr. McCague held a practising certificate.

7. In other words, Mr. Magnier is prepared to make a serious claim, in effect, that a criminal offence *might* have been committed, in order to prevent the Documents being disclosed. However, he is not prepared to provide evidence which would either support such claims (but could lead to a criminal prosecution) *or* disprove such claims (which would mean the Documents had to be disclosed).

8. This became clear to this Court because of the lengths Mr. Magnier went to support his claims about Mr. McCague, but without providing evidence which might implicate Mr. McCague. Indeed, on the morning of this application, Mr. Magnier went to the trouble of

having an affidavit sworn which stated that Mr. McCague remains[1] Mr. Magnier's *'longstanding and valued advisor'*.

9. It is important to point out that no criticism is made of Mr. Magnier (or indeed of Mr. McCague) for how this application has been made. Mr. Magnier is perfectly entitled to decide which evidence he wishes to provide to the Court to support his application. That is his prerogative.

10. However, it is a different matter entirely how this Court should treat his application. In this regard, it is important that his application be seen for what it is, namely it is an *unsubstantiated claim* that, in effect, a criminal offence *may* have been committed, in order that Mr. Magnier does not have to disclose Documents which presumably are not helpful to his case (since he does not want them disclosed).

11. However, the reasons these are unsubstantiated claims is because Mr. Magnier, for tactical or other reasons, is unwilling to provide *evidence* which would support or disprove those claims, even though, as noted below, the evidence is available to Mr. Magnier.

12. It is significant to note that if Mr. Magnier provided the evidence that is available to him, there are only two possible conclusions:

(i) There would then be evidence that Mr. Magnier's '*longstanding and valued advisor'* did in fact provide legal advice, which *could* be a criminal offence, or

(ii) There would be evidence that Mr. McCague did not provide legal advice and the Documents must be disclosed.

Neither of these conclusions are particularly attractive from Mr. Magnier's perspective. Accordingly, instead of providing this evidence, Mr. Mangier wants this Court to make an order based on unsubstantiated claims and an incomplete picture. Yet, the order that he is seeking,

[1] Sworn evidence was given, on behalf of Mr. Magnier, by his accountant on the first day of the hearing that Mr. McCague '*is'* Mr. Magnier's adviser.

based on unsubstantiated claims, could not be more serious. This is because it would deprive the Court (and the defendants) of access to Documents which are relevant to the dispute and so are necessary to enable the Court '*to establish the truth'* and are necessary '*to enable [the Court] to do justice between the parties'*.[2] Mr. Magnier's application therefore, to avoid disclosing documents, which he must believe will weaken his case (since why else would he not want them disclosed), goes to the very heart of the administration of justice. Yet he wants this Court to decide his application based on unsubstantiated claims, rather than evidence.

13. A question for this Court is whether it should make an order granting privilege, when this Court does not have the full picture and the person, in order to get the order, is willing to make a very serious claim that, in effect, a criminal offence may have been committed, but he is not prepared to provide further evidence to prove/disprove that fact?

14. In this instance, Mr. Magnier's application can be decided on the more substantive point (i.e. on whether legal advice, which is *not* provided legitimately, can ever be privileged). Nonetheless, the manner in which this application was presented raises an issue of more general application for the courts.

15. A plaintiff wants to stop a court getting to the truth of a dispute with the defendants by *preventing evidence being disclosed* to the Court (by claiming privilege), but that person is *not prepared to provide evidence* to support that application. Instead, to support his application, he is prepared to allege, *without evidence*, that in effect, a criminal offence may have been committed. In these circumstances, should a Court allow itself to be used in this manner, particularly where the consequences of the order being sought are so serious to the administration of justice?

[2] Per Irvine J. in *Colston v Dunnes Stores* [2019] IEHC 59 at para 42.

ANALYSIS

16. The communications, which Mr. Magnier alleges are privileged, are contained in emails to and from Mr. McCague. Mr. McCague is a retired managing partner in the solicitors' firm Arthur Cox. He did not hold a practising certificate at the time and the emails are from his personal email address. While Mr. McCague was on the roll of solicitors at the time, it is important to note that, for the purposes of s. 55 of the 1954 Act (the prohibition on an unqualified person acting as a solicitor), a retired solicitor on the roll of solicitors is an *'unqualified person'*, just as much as any other person without a practising certificate. Thus, he is prohibited from '*acting as a solicitor'.*

Mr. Magnier is seeking to walk a very fine line

17. In order to keep the Documents secret, Mr. Magnier is making claims which, if true, raise the *possibility* that his current adviser, Mr. McCague, has committed a criminal offence. It appears to this Court therefore that Mr. Magnier is seeking to walk a very fine line in order to keep the Documents secret. This becomes clear when one analyses the claims and evidence that was put before this Court (and more importantly the evidence which *was not put before* this Court). When one does, it appears to this Court that Mr. Magnier is seeking to have the *benefit* of a finding by this Court that Mr. McCague gave legal advice without a practising certificate (so that the Documents are not disclosed) but without the *burden*, or logical consequence, of such a finding, namely that Mr. McCague could be accused of having committed a criminal offence. The fine line Mr. Magnier is seeking to walk, in making this application, is clear for a number of reasons.

(I) Mr. Magnier does not ask court to review Documents to see if legal advice given

18. Firstly, it is clear from the fact taht Mr. Magnier is merely *claiming* that legal advice was provided by Mr. McCague but without *evidence* to that effect, even though Mr. Magnier could have easily provided evidence to this Court to establish whether it was legal advice or

not. This is evidenced by the fact that Mr. Magnier has asked this Court to review certain *other* documents to determine if they contain legal advice or otherwise are privileged (e.g. the Pat Whelan/Murray Consultants,[3] the MSN5 documents, the Indemnities etc). However, he has conspicuously not asked this Court to review the Documents to see if they contained legal advice, even though he wants this Court to determine that it was legal advice in order to keep the Documents secret.

19. This would have been the simplest thing for Mr. Mangier to have done, but instead he wants this Court to accept his unsubstantiated claim that it is legal advice and, on this basis, restrict the trial court's ability to '*establish the truth'*. (It might also be noted that Mr Magnier did not provide sworn evidence from the person who is best placed to say whether the advice was legal advice or not, i.e. his *current* adviser, Mr. McCague. This is despite the fact that he instructed his *current* solicitor, his *current* accountant, and his *current* barrister to provide sworn evidence and/or submissions to support his application. While the absence of this evidence from Mr. McCague is understandable (since it would involve Mr. McCague swearing that he provided legal advice without a practising certificate), it nonetheless does mean that Mr. Magnier's failure to ask this Court to review the Documents is particularly glaring).

20. It seems to this Court that the failure by Mr. Magnier to ask the Court to review the Documents is because Mr. Magnier wants the benefit of an *assumption* by this Court that the Documents contain legal advice (based on his *unsubstantiated claim* that it is legal advice) without the burden of a *finding* by this Court that it was legal advice, based on factual *evidence* (namely the Court's review of the Documents) – which, unlike an assumption, could lead to a claim that Mr. McCague could have committed a criminal offence.

21. This is not a particularly appealing position for this Court to find itself in, namely being asked in these circumstances to make such a significant decision (i.e. preventing the trial court

[3] Transcript, Day 2, p 91, lines 1 to 13.

having access to documents which will help to establish the truth of Mr. Magnier's claim against the defendants). However, that is not the only example of the lengths which Mr. Magnier has gone to, in order to make a *claim* that the documents are privileged, while conspicuously not providing the Court with *evidence* which he could easily provide to back up those claims.

(II) No sworn evidence from Mr. Magnier of belief his adviser had practising certificate

22. The second example of Mr. Magnier's failure to provide *evidence* of his claims relates to the allegation that *he believed* that Mr. McCague held a practising certificate. What is remarkable about Mr. Magnier's approach in this regard, is that he has no issue providing sworn evidence in this case when it suits him (just as he has no issue asking this Court to review documents for privilege, but *not* the Documents, when it suits him). For example, in his affidavit of 25 June 2024, he gave sworn evidence in relation to his engagement on the discovery process with the defendants. Yet, when it came to Mr. Magnier providing sworn direct evidence that *he believed* that Mr. McCague had a practising certificate he conspicuously fails to do so, and no reason was provided for his failure. Instead, he appeared to this Court to go to great lengths to provide this Court with anything but the simplest and most obvious piece of evidence of Mr. Magnier's belief that Mr. McCague held a practising certificate, i.e. sworn evidence *from Mr. Magnier himself* to that effect. Instead:

- Mr. Magnier instructed a third party, his counsel, to make *submissions that Mr. Magnier believed* that Mr. McCague had a practising certificate, which do not amount to evidence upon which a court can rely;
- Mr. Magnier instructed another third party, his solicitor in Arthur Cox (Mr. Twomey), to swear an affidavit stating *his belief* that Mr. Magnier '*believed in good faith that [Mr. McCague] held a practising certificate for the year 2023'*;

- Mr. Magnier instructed Mr. Twomey to swear a second affidavit doubling down on the claim that Mr. Magnier believed that Mr. McCague held a practising certificate. In that second affidavit Mr. Twomey swears that he '*understood that Mr McCague held a practising certificate at the time'*. This second affidavit was sworn when the defendants quite reasonably pointed out that the averments of Mr. Twomey regarding *his* beliefs are not relevant to the state of mind of the person seeking privilege (Mr. Magnier); and
- Mr. Magnier instructed another third party, his accountant, Mr. Edward Irwin, to swear an affidavit that he*, Mr. Irwin, 'believed'* that Mr. McCague held a practising certificate, even though it is Mr. Magnier seeking the privilege, not Mr. Irwin.

Indeed, the more attempts Mr. Magnier made to keep the Documents secret, by getting third parties to say that *they believed that he believed,* or that *they believed,* that Mr. McCague held a practising certificate, the more glaring was Mr. Magnier's failure to simply swear an affidavit that he believed that Mr. McCague held a practising certificate.

23. The more glaring this became, the clearer it became to this Court that, in order to keep the Documents secret, Mr. Magnier was prepared to use the Court to get the order he wanted, by making a *claim* that, in effect, a criminal offence *might* have been committed by his valued adviser, but he was not prepared to provide *evidence,* which he could have easily provided, to support his claim, which evidence would support a claim that Mr. McCague could have committed a criminal offence *or* would prove that no criminal offence was committed (and so the Documents had to be disclosed). Thus, he wanted the benefit of claiming that, in effect, a criminal offence may have been committed by Mr. McCague, but without the burden or logical consequences for Mr. McCague of having such an allegation made against him, based on evidence.

24. In summary therefore, Mr. Magnier *avoided providing evidence* that Mr. McCague gave legal advice (e.g. he could simply have asked this Court to review the Documents, like he did

for other documents.) He also went to considerable lengths to *avoid providing evidence* that Mr. Magnier himself believed that Mr. McCague had a practising certificate (he could have simply provided an affidavit to that effect). Instead, he provided *claim after claim*, from his solicitor, his accountant and his barrister, that the advice was legal advice and that he believed that Mr. McCague held a practising certificate. There are only two possible conclusions:

- the Documents do not contain legal advice, but Mr. Magnier does not want this Court to examine the Documents, as this would mean that they would have to be disclosed to the defendants, or
- the Documents do contain legal advice and Mr. Magnier wants this Court to make a very serious court order impacting on the administration of justice on the basis of *unsubstantiated claims* that he was given legal advice, but he is not prepared to provide *evidence* of that claim, as it may lead to a claim that a criminal offence has been committed.

25. Neither is a very attractive position. In either case, this Court is being asked to make a very significant decision which will impact on the trial court's ability '*to do justice between the parties'.* Since doing justice between the parties is the *raison d'être* of the courts, there can be few more significant procedural decisions than a request not to disclose a *relevant* document because it is *allegedly* privileged. This is why it would be preferable, to say the least, if Mr. Magnier was coming to Court asking this Court to restrict its ability to get to the truth of the dispute between the parties, on the basis of documentary and sworn direct evidence, rather than on the basis of unsubstantiated claims, particularly when one is dealing with an allegation that, in effect, a criminal offence may have been committed.

26. However, whether this Court can rely on the unsubstantiated claims of Mr. Magnier is a decision, which is not made in a vacuum. It is made in the context of Mr. Magnier's novel

legal claim that legal advice obtained from a retired solicitor, who did not have a practising certificate, might be privileged. This issue will be considered next.

IS ADVICE FROM A RETIRED SOLICITOR PRIVILEGED?

27. In order to seek to prevent the disclosure of the Documents, Mr. Magnier makes the claim that Mr. McCague, someone who he correctly does *not* describe as his solicitor, but his *'advisor*',[4] nonetheless gave him legal advice, such that the Documents should be privileged. This is a novel claim since this Court is not aware of any Irish case where it has been held that 'legal' advice could be privileged where it is provided by a person who does not have a practising certificate.

28. It is important to bear in mind, in considering Mr. Magnier's application, that Mr. Magnier is seeking to prevent the defendants, and more importantly this Court, having access to his communications with Mr. McCague, even though these are relevant to his claim that he had a binding agreement for the purchase of the Barne Estate.

These are simply claims against Mr. McCague

29. As a preliminary point it is important to note that this is an application for the Documents to be treated as privileged. In order to obtain that privilege, Mr. Magnier has made claims about his current adviser, Mr. McCague. In deciding whether the Documents should be treated as privileged, this Court has had to consider, in the earlier part of this judgment, the implications of Mr. Magnier's claim that Mr. McCague provided legal advice and his claim that Mr. Magnier believed that he had a practising certificate.

30. It is important to note that if, and only if, Mr. Magnier's claims, which are made without evidence, are correct, then Mr. McCague *might* be guilty of a criminal offence. It is crucial to

[4] Or more accurately, Mr. Magnier instructed Mr. Irwin to swear an affidavit, in which Mr. Irwin described Mr. McCague as Mr. Magnier's 'advisor'

note that there is no evidence, and so no basis, for this Court to conclude that Mr. McCague provided legal advice without a practising certificate, or that he was pretending to be a practising solicitor. Mr. Magnier's claims are just that: claims, which he has chosen to make in order to seek to prevent the disclosure of the Documents. Accordingly, even though this Court has, for the purpose of its analysis, dealt with the *possibility* of Mr. McCague having given legal advice without a practising certificate, there is no suggestion by this Court, as distinct from Mr. Magnier, that he did do so or that he is guilty of a breach of the 1954 Act.

Legal basis for claim that legal advice from an unqualified person is privileged

31. In order to support his claim that the Documents are privileged, Mr. Magnier relies on his interpretation of the old English case of *Calley v Richards* (1854) 52 ER 406. This case is authority in England for the principle that where a client had engaged a practising solicitor, and *'if the solicitor forgot during the progress of the cause or matter to take out his [practising] certificate'*, then the communication between the person and his client is nonetheless privileged if the client believed he held a practising certificate.

32. Mr. Magnier claims that this principle in *Calley* applies to his situation, where a person who was not a practising solicitor (Mr. McCague) had dealings with a third party (Mr. Magnier), so that if Mr. Magnier believed that Mr. McCague held a practising certificate, then their communications are privileged, if it amounts to legal advice.

33. In order to fall within this principle, Mr. Magnier claims that the advice he got from Mr. McCague was legal advice (since it must be legal advice to be privileged) and he claims that he believed that Mr. McCague had a practising certificate. The first questions for consideration therefore are whether Mr. Magnier has provided sufficient evidence to this Court:

(i) that Mr. McCague provided legal advice; and

(ii) that Mr. Magnier believed that he had a practising certificate.

34. Based on the analysis earlier in this judgment, this Court concludes that the *unsubstantiated* claim that Mr. McCague provided legal advice, and the *absence of sworn direct evidence* from Mr. Magnier regarding his belief that Mr. McCague held a practising certificate, means there is an insufficient basis for this Court to find that Mr. McCague gave legal advice or that Mr. Magnier believed that he had a practising certificate. Thus, even if the *Calley* case applied to his circumstances, Mr. Magnier has failed to provide sufficient evidence for the principle in that case to apply to him.

If this Court is wrong and Mr. Magnier has provided sufficient evidence?

35. If this Court is wrong regarding the sufficiency of the evidence, this Court would then have to consider whether legal advice obtained from Mr. McCague, when he did not have a practising certificate, could be privileged. This raises the question of whether legal advice could be privileged, even though it is given by a retired solicitor without a practising certificate, who *could* be committing a criminal offence under s. 55 of the 1954 Act? To consider this issue, it is necessary to refer again to the *Calley* case upon which Mr. Magnier relies.

36. The *Calley* case involved *a solicitor in practise* who omitted to renew his practising certificate. The court in *Calley* held that a client, who did not know that the solicitor had failed to renew his practising certificate, and who believed that he still held one, was entitled to have the relevant communications treated as privileged.

37. However, it seems to this Court that the *Calley* case is of no assistance to Mr. Magnier. This is because the principle to be derived from *Calley* is that a client, who engaged with a *practising solicitor* before the expiry of his practising certificate, may be able to benefit from privilege regarding his communications, after the expiry of his practising certificate, if the client believed that he still had a practising certificate at the time.

38. *Calley* is not authority for the principle that a third party, such as Mr. Magnier, can benefit from privilege by claiming that he believed that a person, who was *not* a practising

solicitor but a solicitor who had *retired* from practice, had a practising certificate at the time. Accordingly, the principle in *Calley* does not apply to a person such as Mr. McCague, who was not a practising solicitor at the relevant time, as he was a retired solicitor. The fact that he was a retired solicitor is clear from the sworn evidence of Mr. Twomey, who averred that Mr. McCague had *'chosen not to renew his practising certificate'*. It is to be noted that this evidence was not given directly by Mr. McCague. However, Mr. Magnier provided sworn evidence on the morning of the application that Mr. McCague continued to be his adviser in relation to this matter and there was no suggestion that Mr. McCague objected to this evidence being provided on his behalf by Mr. Twomey.

39. Furthermore, it is clear from the High Court case of *Lyons v O'Mahoney* [2017] IEHC 649 at para 5 per Gilligan J., that for privilege to arise there must be a professional legal relationship:

> *"The third feature of legal advice privilege is that the communication was made either to or by a lawyer* ***during the course of a professional legal relationship****."* (Emphasis added)

In this regard, it is clear that the privilege which Mr. Mangier is claiming did not arise during the course of a professional legal relationship. In the sworn evidence that was provided on behalf of Mr. Magnier, Mr. McCague was *not* stated to be 'his solicitor' for the very good reason that Mr. McCague did not have a practising certificate. Rather he was described as a *'valued advisor'*. Therefore, whatever relationship Mr. McCague had with Mr. Magnier at the time, it was not *a 'professional legal relationship'*, which is required for legal advice privilege to arise, as is clear from *Lyons v O'Mahoney*. This therefore is another reason why the Documents arising from that relationship are not privileged.

40. The other reason *Calley* is of limited assistance to Mr. Magnier is because it is from a different jurisdiction, and so not binding on this Court, and from 175 years ago (*albeit* that it was referenced in a more recent English case of *Dadourian v Simms* [2008] EWHC 1784 at

para 123 and in an Australian case of *Global Funds Management v Rooney* [1994] 36 NSWLR 122), while there is a recent Irish case, which is binding on this Court.

The defendants rely on a recent Irish case dealing with loss of privilege

41. This is the case of *Hussain v Commissioner of An Garda Síochána* [2016] IEHC 612. Significantly, it deals with the issue of whether privilege applies where there is a failure by an lawyer practising in Ireland to comply with codes of conduct, which is similar to the issue in this case (i.e. an alleged failure by a lawyer to comply with the law).

42. *Hussain* concerned a barrister who was claiming privilege over files taken from him by the Gardaí under a search warrant. Mr. Hussain was a practising barrister and a member of the Law Library and so subject to its code of conduct. However, in breach of that code he had provided legal services to the public directly without the involvement of a solicitor.

43. Despite the fact that he was in breach of the code of conduct, he claimed that he was providing *'legal advice to clients'* such that the material seized, which related to those third parties, should be subject to privilege. Thus, it is similar to the claim in this case, *albeit* that in *Hussain* the claim of privilege was being made by the lawyer, while here the claim is being made by a third party (Mr. Magnier). However, it is to be noted that in the *Hussain* case, the legal advice was given in breach of a code of conduct (which, Noonan J. noted, may not even have been unlawful). In this case, it is much more serious, since the legal advice, if it was given, could have amounted to a breach of statute and, if so, *would* have been unlawful.

Privilege may not be available where lawyer is not acting legitimately

44. *Hussain* does however vividly illustrate how privilege may not be available where a lawyer, in that case a barrister, does not comply with a code of conduct. This is because in that case, for the barrister to be granted privilege it would have involved an acceptance by the Court that he had acted outside of the barrister's code of conduct (by acting for a client, without the

involvement of a solicitor). Since this would mean that he was not *'legitimately'* representing clients, Noonan J. held that privilege did not apply in those circumstances. At para 36 he stated:

> *"The applicant by his own admission is providing a service to 'clients' without the intervention of a solicitor and as such,* ***he clearly does so outside the ethical parameters of the profession of which he is a member****. While this might not be unlawful, it is difficult to see how he could* ***legitimately claim to be representing 'clients' in a professional capacity in such circumstances****. This of course is a prerequisite to a claim of privilege as explained in the authorities to which I have referred."* (Emphasis added)

45. Similarly in this case, for Mr. Magnier to be granted privilege, it would mean that Mr. McCague gave legal advice, since this is a *'prerequisite'* to a claim of privilege. However, if Mr. McCague gave legal advice (as claimed by Mr. Magnier), then Mr. McCague would have done so without a practising certificate. This would raise, not *merely* a breach by a lawyer of a code of conduct, as occurred in *Hussain,* and which was sufficient to lead the loss of privilege in that case, but the *possibility* of Mr. McCague committing a criminal offence.

46. Applying the underlying principle in *Hussain* therefore (that privilege does not arise where the lawyer was not *legitimately* representing the client), there is an even stronger case for the privilege not to exist in Mr. Magnier's case than in Mr. Hussain's case. Adopting the wording of Noonan J., this Court believes that if Mr Magnier's claim is correct, then it is unlikely that Mr. McCague would have *'legitimately'* provided that legal advice to Mr. Magnier, since he did not have a practising certificate. (This is on the basis of this Court's view that it is *likely* that a court, in considering this issue, will conclude that a person giving legal advice is deemed to be acting as a solicitor.) Accordingly for this reason also, this Court rejects Mr. Magnier's claim that the Documents are privileged.

Public policy reasons why privilege attaches to regulated lawyers

47. Although not determinative of the result in this case, there are also public policy reasons which support this Court's conclusion. This is because, while privilege belongs to a client, in the sense that a client can choose to waive privilege, it is a benefit of a regulated profession. In this regard, it is important to note that privilege goes to the very heart of the administration of justice, since privilege restricts a court's access to relevant documents and so prevents a court from seeking *'to establish the truth'* and restricts a court in its attempts to do *'justice between the parties'*.

48. Thus, lawyers with practising certificates are able to freely hear from their clients and give legal advice to their clients, knowing that they will never be forced to disclose those communications to a court (even if it prevents that Court from getting to the truth and doing justice between the parties). In a democratic society the fact that solicitors and barristers are able to deny the courts access to information, that could be the difference between a guilty or an innocent verdict in a criminal case, or a win or a loss in a civil case, is a very significant intrusion into the administration of justice (*albeit* for good public policy reasons). Because of this powerful intrusion into the administration of justice, it is not a benefit which is available to other professions such as accountants, actuaries, engineers etc. Indeed, in light of its impact on the administration of justice in the State, it is important that persons who have this powerful right of incursion into the power of a court to establish the truth, are subject to the tightest possible regulation.

49. Accordingly, there are good public policy reasons why this benefit is restricted to solicitors *who hold practising certificates*, and not retired solicitors or indeed solicitors who have been struck off the roll. Indeed, it is not just regulation which flows from holding a practising certificate, it is also compulsory insurance, which is a further benefit for the public. This is because to obtain a practising certificate a solicitor must have professional indemnity

insurance,[5] as well as a requirement to undertake continuous professional development/education.

50. It seems clear therefore that there are good reasons why it is only lawyers with practising certificates, and so lawyers who are regulated, who have the power to deprive a court of documents by alleging privilege (and not retired lawyers, struck-off lawyers, McKenzie Friends or other unqualified persons, who decide to provide legal advice).

51. The consequence for those persons who obtain advice from unqualified persons, who are not subject to regulation or insurance, is that the advice they receive is not privileged. If Mr. Magnier wanted to receive advice which was privileged, he had the option of getting that advice from his solicitors at that time, Arthur Cox. However, he chose to get advice from Mr. McCague who was not regulated to give legal advice (*if* the advice he gave was legal advice) and so was not required to be insured in order to protect members of the public seeking advice from him (*if* he gave legal advice).

52. Looked at from a public policy perspective therefore, one could regard the benefit of privilege (attaching to communications between a lawyer and a client) as an incentive for lawyers *providing* legal advice to *ensure* that they have a practising certificate. The resulting benefit for the public is that the providers of legal advice will be properly regulated and insured. Similarly for those members of the public *seeking* legal advice, one could regard the benefit of privilege (attaching to their communications with the lawyer) as being an incentive for those people only to seek legal advice from a person with a practising certificate. In this way, they should only get legal advice from someone who is properly qualified, subject to continuous education, strictly regulated and insured and not from McKenzie Friends, struck-off lawyers or other 'unqualified persons'.

[5] See para 6(2)(b)(ii) of the Communities (Lawyers' Establishment) Regulations 2003 (SI No 732/2003).

OTHER ISSUES REGARDING DISCOVERY

53. There are a number of other issues that arose on the plaintiffs' discovery and on the defendants' discovery that should have been capable of being resolved between the parties and should not have necessitated court involvement if both parties had taken a reasonable and pragmatic approach to the issues. They led to motions for further and better discovery from both sides regarding the documents disclosed thus far by them. These will now be dealt with as briefly as possible.

Are Regan-Burke documents within the scope of the defendants' discovery?

54. The issue here appears to be that Mr. Maurice Regan ("**Mr. Regan**") and his representative, Mr. Pat Burke ("**Mr. Burke**") were listed as custodians of documents by the defendants. However it was submitted by the defendants that this was done in error. On that basis, they are saying that any further discovery from these two individuals is outside the scope of the discovery order and they want the Court to so order.

55. The plaintiffs say that the defendants have identified Mr. Regan and Mr. Burke as custodians and so they are therefore within the scope of the discovery and so there is no basis for the order being sought by the defendants.

56. It appears to this Court that the identification of a person as a custodian or not, is not the key issue. The key issue is whether relevant documentation is within the possession or procurement of the defendants. If it is, then it must be disclosed. This is how the defendants must deal with this issue. They cannot rely on the claim that Mr. Regan is allegedly outside the scope of the discovery order for failing to disclose any relevant documents in their possession or procurement. Hence, this Court agrees with the plaintiffs that this Court will not order that Mr. Regan and Mr. Burke are outside the scope of the discovery order.

The time limits on the discovery to be done by the defendants?

57. While most of the categories of the agreed order for discovery had a time limit (e.g. all communications between 1 January 2023 and 1 December 2023), a number of them, i.e. categories 8, 11, 13, 15, and 18, did not have any such limit. As regards the time limits in the other categories, the defendants had sought a tighter time limit, but McDonald J. had agreed with the one proposed by the plaintiffs, which resulted in the time limit of between 1 January 2023 and 1 December 2023.

58. This is the background to the defendants' claim that the same time limit should be applied to the categories that do not have a time limit, as they say that it would be disproportionate to have no time limit in relation to those categories.

59. As noted by this Court in the *Irish Airline Pilots Pension DAC v Mercer (Ireland) Ltd t/a Mercer* [2022] IEHC 22 at para 12, when this Court is dealing with compliance with discovery terms that have been agreed or ordered, it is not the job of this Court to consider whether it would be reasonable or proportionate to make discovery on those terms. This is because this Court is not, at this stage, making a discovery order. Rather the discovery order has already been made/agreed and so this Court's role is simply to interpret those terms.

60. With this in mind, it is to be noted that two teams of experienced lawyers negotiated the length of the time limits for certain categories of discovery, and for other categories of discovery they provided for no time limits. In those circumstances, it is not the role of this Court to seek to amend those agreed/court-ordered terms by inserting time limits in those categories which do not have any time limits. Accordingly, it agrees with the plaintiffs that no time limit should be inserted.

The physical scope of the searches done by the plaintiffs?

61. The defendants complain that the plaintiffs have misunderstood their discovery obligations and that additional searches are required to comply with those obligations. This is how the plaintiffs outline and respond to the issue in the affidavit of their solicitor:

> "The Defendants claim that the Plaintiff have failed to search *"any servers/hard drives at Coolmore House or Coolmore Stud or any of the related entities of Coolmore Stud i.e. no hard drives, no filing cabinets, no mailboxes of persons who provide secretarial services, or John Magnier's secretaries or allied staff*….".

However the Plaintiffs are satisfied that there are no documents contained in mailboxes of those who provide secretarial services, filing cabinets or allied staff […]. It is incorrect to suggest that the Plaintiffs are in some way required to "*search… those persons workplaces"* and I am surprised by the Defendants' suggestion in this regard.

62. Furthermore as the Defendants have averred at paragraph 17, the Plaintiff identified at an early stage that documents marked for [Mr Magner's] attention are sent to [redacted]@coolmoreoffice.com. **However, there is no objective merit in the suggestion that additional email addresses on the coolmoreoffice.com domain should have been searched**. Moreover, other companies in which [Mr Magnier] has an interest are of no relevance to the proceedings or the discovery. In those circumstances, my understanding and belief is that it is highly unlikely that any additional documents responsive to the categories will be found in on the coolmoreoffice.com domain."

63. It is clear from the judgment of Murray J. in *Hireservices & Anor v An Post* [2020] IECA 120 that further and better discovery is ordered where it is shown that there are documents, which should have been discovered, that have not been discovered, or there has been a misunderstanding of the issues in the cases, or a wrong view taken that documents are outside the discovery obligation.

64. It seems to me that this threshold has not been reached in this case. No objective evidence has been provided of documents which should have been disclosed, which were not disclosed, nor has compelling evidence been provided that a search of filing cabinets, workspaces etc is likely to discover documents.

65. This Court does not believe that the approach of the Plaintiffs to the discovery is so unreasonable or fundamentally flawed to lead to a conclusion that the plaintiffs have failed to comply with their discovery obligations, such as to justify an order for further and better discovery. Accordingly, this Court agrees with the plaintiffs and refuses to make any order in this regard.

Additional search terms to be used by the plaintiffs?

66. When search terms for digital data searches of documents etc are being finalised by a party doing discovery, it would be preferrable if the proposed search terms were, at a minimum, notified to the opposing party in advance so that representations could be made by that party. Ideally, at that stage, agreement should be reached on those search terms. However, this does not appear to be the current practice between opposing sets of lawyers when it comes to finalising digital search terms.

67. As a result, in this case, the plaintiffs went ahead and used 28 search terms, without any engagement with the defendants. The search terms they decided to use ranged from references to the agreements which allegedly bind the parties, and which are the subject of this dispute, namely *'Exclusivity Agreement'* and *'Tillage w/5 (agreement OR Licence)'* to technical legal terms such as *'Transfer of Undertakings'* and *'TUPE'*.

68. However, the defendants complain that the term *'Land Agreement'* was not used, even though they say this is the very essence of the dispute, since it is a dispute about whether there is an agreement for the sale of land, i.e. the Barne Estate. Similarly, the defendants complain that the plaintiffs did not use the term *'Option Agreement'* as a search term, even though there is a dispute between the parties as to whether or not they had agreed an option agreement for the sale of the Barne Estate. The defendants also complain that the phrase *'Part Performance'* is not a search term, even though it is an issue in the case as to whether there was part performance of the alleged agreement to purchase the Barne Estate.

69. It seems to this Court that since at the very core of the dispute is the agreement for the sale of land, as well as whether there was an option for that sale, the defendants are correct to say that for proper discovery to be made, a search needs to be done for these terms.

70. This Court does not accept the plaintiffs' claim that these are legal terms which are not used by business people and so would not appear in documents that were exchanged amongst the plaintiffs and their business advisers. A *'land agreement'* or *'option agreement'* could not be described as terms which business people do not use (unlike say much more technical terms such as 'fee simple' or 'fee farm grant' etc).

71. While the term 'part performance' would not be in common usage by business people, as much as say an 'option agreement', it is not so technical a term as to mean it would be unlikely to appear in correspondence between business people. This is particularly so when one bears in mind that the plaintiffs felt that it was appropriate to search for the term 'Transfer of Undertakings' and TUPE which in this Court's view. In these circumstances, this Court does not feel that it would be appropriate to refuse to also search for the term 'part performance'.

72. Accordingly, this Court agrees with the defendants that a search using those three search terms should be done.

Sufficiency of description of the privilege claims by the plaintiffs?

73. The defendants complain that the plaintiffs simply label various privileged documents as 'legal advice' and so this does not give the defendants any basis upon which to seek to ensure that the documents are in fact, truly privileged. In particular, the defendants complain that the plaintiffs have failed to comply with the requirements set out in the caselaw regarding how privilege should be claimed.

74. This Court agrees with the defendants and it applies to this case the principles stated by Mahon J. in *IBRC v Quinn* [2015] IECA 84, and in particular at para 49 where he stated:

"[…] I emphasise that the most detailed possible description of each document should be furnished consistent with the non infringement of the privilege asserted"

and at para 51, where he stated:

"I am satisfied that, in addition to the order that a more meaningful narrative be provided in respect of each document over which privilege has been claimed, the court should also make an order directing the solicitor responsible for advising on the discovery process, insofar as the privileged documents are concerned, to swear an affidavit stating that they have inspected each of the documents over which privilege has been maintained and that in their professional opinion each such document has been properly so categorised."

Thus, this Court agrees with the defendants' claim in this regard and would order that the plaintiffs comply with the principles set out in the *IBRC v Quinn* case.

Allegedly privileged documents to be reviewed by the Court?

75. The plaintiffs want the Court to review certain documents described as 'Indemnities' to see if they are privileged, as claimed by the defendants, and the defendants agree with this approach. Similarly, the plaintiffs want the Court to review the documents identified in para 51 of the grounding affidavit to see if they are privileged and the defendants agree with this approach. In addition, the plaintiffs claim that the documents at para 43 and 46-51 of the Addendum Submissions should be reviewed by the Court to see if they are privileged and the defendants agree with this approach.

76. For its part, the defendants are challenging the claim by the plaintiffs of privilege attaching to communications with Mr. Pat Whelan/Murray Consultants and they want the Court to review them, which approach is acceptable to the plaintiffs. Similarly, regarding documents

described as MSN5 documents, the defendants are challenging the privilege claimed by the plaintiffs and both parties want the Court to review the documents.

77. This Court has ordered the parties to engage with each other to see what documents or category of document they cannot agree is privileged. While this Court has indicated that it could review any document, if necessary, it believes that if a reasonable or pragmatic approach is taken by both parties to this issue, it should be very clear whether a document is privileged or not and it should not require any court review.

CONCLUSION

78. On the one hand, Mr. Magnier is asking the courts to establish the *truth* of his claims that he has a binding agreement with the defendants for the sale of the Barne Estate. Yet, he is seeking to deny the courts access to *evidence* (the Documents) which are relevant and will assist the courts in establishing that truth. Crucially:

- he is doing so by *claiming, without evidence,* that the Documents he got from his adviser, who happens to be a retired solicitor, contained legal advice. This is because Mr. Magnier is choosing not to provide the Court with the Documents to prove/disprove his claim that the Documents do contain legal advice, which he easily could have done; and
- he is also doing so by *claiming* that Mr. Magnier believed that he had a practising certificate at the time. However Mr. Magnier is choosing not to provide the Court with his own sworn direct *evidence* of this claim, which he easily could have done.

Thus, in an attempt to keep the Documents secret, Mr. Magnier is prepared to make a serious claim, that his current adviser may have, in effect, committed a criminal offence, but without providing evidence of that claim, and so without implicating Mr. McCague.

79. When one steps back from the application, one can see that Mr. Magnier is seeking to deprive the trial court of access to evidence (the Documents) which would enable the trial court to establish the truth in his dispute with the defendants. However, to support his application, he himself is depriving this Court of evidence regarding his claims that a criminal offence *may* have been committed. Of course, Mr. Magnier is entitled for tactical or other reasons to make his application with whatever evidence he chooses. However, this is not a particularly appealing basis upon which a court would be asked to decide such a significant application. If this Court had to decide the case on this basis, this Court does not believe that it should permit itself to be used in this manner.

80. However, this application can be decided on other grounds, namely that in any event, the legal advice, if given by Mr. McCague, would not, in this Court's view, have been provided *legitimately* by him, as he did not have a practising certificate. For this reason, it could not be privileged and the Documents must be disclosed.

81. This case will be provisionally put in for mention, at 10.30 a.m. a week from its delivery, to deal with any final orders and costs. However, on the assumption that it should not be necessary to expend costs on a further court sitting, and in order to facilitate the parties agreeing all outstanding matters, the parties have liberty to notify the Registrar if such a listing proves to be unnecessary. This is particularly so in light of the clear implication from the Court of Appeal decision of *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para. 94, that there is an onus on lawyers to take a broad-brush approach to costs and not to engage in time consuming and costly '*nit-picking'*.