

THE HIGH COURT

COMMERCIAL

Record No. 2020/3857P

BETWEEN

NICHOLAS STEWART WOOD

(TRUSTEE IN BANKRUPTCY FOR JERRY RYAN)

PLAINTIFF

AND

BARRY ENGLISH

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 18th day of October, 2022

INTRODUCTION

1. This is a follow up to the case of *HKR Middle Ease Architects Engineering L.C, Jeremiah Ryan and Patrick Stafford v. Barry English* [2019] IEHC 306 (the “2017 Proceedings”) in which the defendant (“Mr. English”) (in those proceedings and these proceedings) and Mr. Jeremiah (Jerry) Ryan (“Mr. Ryan”) were severely criticised by a High Court judge (McDonald J.) for their roles in attempting to siphon away \$8 million dollars from the creditors of Mr. Ryan, who is bankrupt. In the 2017 Proceedings, Mr. Ryan was seeking to recover the \$8 million dollars from Mr. English, which Mr. Ryan alleged was subject to a trust, which turned out to be a sham, in favour of Mr. Ryan’s children.

2. Since the trust has been held to be a sham, Mr. Ryan’s trustee in bankruptcy (the “Trustee”) is claiming in these proceedings that the \$8 million is in fact the personal property

of Mr. Ryan and he is now seeking its recovery from Mr. English for the benefit of Mr. Ryan's creditors.

3. Certain documents were exchanged between Mr. Ryan and the Trustee in relation to the 2017 Proceedings e.g. a Counsel's Opinion obtained by Mr. Ryan in relation to the consequences for Mr. Ryan of the judgment that was delivered by McDonald J. regarding the failed attempt to recoup the \$8 million from Mr. English. Despite legal advice privilege clearly attaching to documents such as this Opinion, Mr. English claims that this privilege was waived by Mr. Ryan's disclosure of this Opinion and other documents to the Trustee. On this basis, Mr. English is claiming in these proceedings that he is entitled to have those documents disclosed to him. However, the Trustee disputes this claim and he says that, as he had a common interest with Mr. Ryan in the 2017 Proceedings against Mr. English, the privilege was not waived by the disclosure by Mr. Ryan of the documents to him. On this basis, he says these documents should not be disclosed to Mr. English.

4. This is the primary issue to be dealt with in this preliminary application which has come to court as a result of the Notice to Produce issued by Mr. English on 17th June, 2022 in relation to three tranches of documents. Before considering these three tranches of documents, it is necessary to give some further background to the application and in particular the common interest which existed between the Trustee and Mr. Ryan in relation to the 2017 Proceedings.

BACKGROUND

5. In the 2017 Proceedings, Mr. Ryan and other plaintiffs (the "2017 Plaintiffs") took the unsuccessful proceedings against Mr. English for the recovery of the \$8 million. It is also relevant to note that these 2017 Proceedings have not come to an end as a number of matters remain to be finalised arising from McDonald J.'s judgment.

The commencement of the common interest between the Trustee and Mr. Ryan

6. Before the Trustee became aware that the trust in favour of Mr. Ryan's children was a sham designed to keep Mr. Ryan's money away from his creditors, the Trustee had an active involvement and interest in the 2017 Proceedings and indeed appeared as a witness in those proceedings. This was because the Trustee had concluded a Deed of Settlement in 2017 (the "Deed of Settlement") with the 2017 Plaintiffs. Under this Deed of Settlement, the Trustee was to get the either \$500,000 or 22.5% (whichever was the greater) of any monies awarded in the 2017 Proceedings. The Deed of Settlement also provided that the 2017 Plaintiffs would consult with the Trustee, who would provide reasonable assistance in the conduct of the 2017 Proceedings. It is not disputed by Mr. English that at this stage the Trustee and Mr. Ryan had a common interest in the recovery of \$8 million from Mr. English.

7. However, in light of the damning judgment of McDonald J. regarding the trust being a sham, the Trustee issued these proceedings against Mr. English on 28th May, 2020, in which he is seeking to recover the \$8 million from Mr. English for the benefit of the creditors of Mr. Ryan.

8. In the Statement of Claim in these proceedings, the Trustee claims that the Trustee entered the Deed of Settlement in reliance on the averments contained in an affidavit dated 10th July, 2017 sworn by Mr. Ryan for the purpose of the 2017 Proceedings regarding, *inter alia*, the \$8 million being subject to a trust. At para. 20 of the Statement of Claim, the Trustee states:

"In the 2017 Proceedings (and as set out more fully below) the High Court (Mr Justice McDonald) has found, in essence, that the contents of the said Affidavit sworn on 10 July 2017 were false and untrue. Accordingly, the [Trustee] has rescinded the Deed of Settlement."

9. At para. 24, the Trustee goes on to claim that, in view of McDonald J.'s judgment, Mr. Ryan is the owner of the \$8 million, which therefore forms part of the bankruptcy estate of Mr. Ryan, which he is therefore seeking from Mr. English in these proceedings.

10. In Replies to Particulars dated 11th December, 2020 in these proceedings, the Trustee replied as follows to the following Notice for Particulars dated 26th November, 2020:

“(ii) Please specify the date that the Deed of Settlement was rescinded.

10 May 2019

(iii) If the rescission of the Deed of Settlement was by way of written notice or by other instrument in writing, please specify the date such notice or written instrument was provided by the [Trustee] and provide a copy of such document. This request is made pursuant to the provisions of Order 31, Rule 15 of the Rules of the Superior Courts.

This is not an appropriate matter for particulars. It is a matter for discovery and/or evidence at the trial of the action.

Without prejudice to the foregoing, a true copy of the written notice issued to [Solicitors for Mr. Ryan] on 10 September 2019 is enclosed herewith.”

11. Although it does not appear to have been attached to the Replies to Particulars, this notice was in the form of a letter from the Trustee dated 10th September, 2019 to Mr. Ryan's solicitors, which was opened to the Court without objection and it states, *inter alia*, that:

“Rescission of the settlement agreement

As a result of Mr Ryan's fraudulent misrepresentations, we are writing to confirm that the Trustee has exercised his right to rescind the Settlement Deed with effect from 10 May 2019, the date of the Irish Court Judgement (the Rescission).”

12. One other Notice for Particulars and Reply which is relevant is:

“(vi) Please confirm whether any other oral or written agreement or arrangement has been entered into between the [Trustee] and [the 2017 Plaintiffs] and/or their representatives and/or associates and/or agents relating to the 2017 Proceedings and/or the present proceedings. If such agreement was made in writing, please provide a copy of such document. This request is made pursuant to the provisions of Order 31, Rules 15 of the Rules of the Superior Courts.

No other a written agreement arrangement has been entered into between the [Trustee] and Jerry Ryan and/or [the 2017 Plaintiffs] and/or their representatives and/or associates and/or agents relating to the 2017 Proceedings and/or the present proceedings.”

13. In Answers to Interrogatories in these proceedings dated 1st June, 2021, which were replied to on 6th July, 2021, the Trustee states at para. 29:

“Since the purported rescission of the Deed of Settlement, has the [Trustee] engaged in any negotiations or discussions with Mr Ryan – whether acting on his own behalf, or on behalf of any corporate entity or trust – relating to HKRME or the monies transferred from HKRME to Sunvit International Ltd?

No.”

14. It is against this background that this Court will address the claims of privilege, and in particular the claim that documents exchanged between the Trustee and Mr. Ryan, which might otherwise be privileged under litigation privilege/legal advice privilege, did not in fact lose that privilege as a result of their disclosure because of common interest privilege. On this basis, it is claimed they should not be produced to Mr English.

The law relating to common interest privilege

15. There was no dispute between the parties regarding the relevant law. The following principles can be extracted from the case law i.e. *Hansfield Developments v. Irish Asphalt Limited* [2009] IEHC 420 (in particular at paras. 35, 38 and 48), *Redfern Limited v. O'Malley* [2009] 3 I.R. 583 (in particular at paras. 11 and 17) and *Moorview Developments Limited v. First Active plc* [2009] 2 I.R. 788 at (in particular at p. 821):

- Common interest privilege is not a freestanding privilege but rather a way in which legal advice privilege/litigation privilege is not lost where there is limited disclosure to a party with a common interest.
- It follows, therefore, that when common interest privilege is claimed there are two steps to be undertaken:
 - First, one must ask whether the documents in the hands of the first party would have the benefit of privilege in the first place.
 - Secondly, where those documents have been released to a second party, one must ask whether the release was on foot of a common interest in the relevant litigation or advice.
- It is clear that factors in determining whether the disclosure to the second party will lead to a loss of privilege are whether there is an intention on the part of the first party to abandon privilege as well as considering the purpose and breadth of the disclosure and the relationship between the parties.
- It is possible for two parties to have a common interest, for the purposes of preserving common interest privilege, even where they are antagonistic towards each other.

16. There are three tranches of documents to be considered in this case.

First tranche of documents: Emails of 13th – 14th June, 2019

17. The first tranche is a series of emails dated 13th June, 2019 and 14th June, 2019 between Mr. Ryan and the Trustee. Mr. English accepts in his written submissions, on the basis of the

description provided by the Trustee, that, had Mr. Ryan not shared these documents with the Trustee, they would be subject to legal advice privilege. Thus, one can skip to the second step in the analysis and ask whether there was a common interest between the Trustee and Mr. Ryan when these emails were sent? Another way to ask this question is when was this common interest, which Mr. English accepts did exist, fractured?

When was the common interest fractured?

18. Mr. English claims that, when these documents were shared by Mr. Ryan, he no longer had a common interest with the Trustee, since these emails were sent after the 10th May, 2019, which is the date stated by the Trustee in the Replies to Particulars as the date the Deed of Settlement was rescinded.

19. Mr. English claims that the common interest between the Trustee and Mr. Ryan was fractured by virtue of McDonald J.'s judgment (of 10th May, 2019) since that judgment clarified that the representations, upon which the Trustee had relied to enter the Deed of Settlement, were false. He puts particular emphasis on the fact that in the pleadings (i.e. the Replies to Particulars), the Trustee states that the Deed of Settlement was rescinded on 10th May, 2019 and that the Trustee is stuck with his own pleadings and that this therefore is the date the common interest came to an end. On this basis, Mr. English claims that these documents are not privileged.

20. However, the key question for this Court is not the date the *Trustee gives in the Replies to Particulars* as the date upon which the Deed of Settlement was rescinded. Rather the key question for this Court is whether, in this Court's view, on the dates of these emails, there *existed a common interest* between the Trustee and Mr. Ryan.

21. In any case, it is relevant to note that in the very same Replies to Particulars, upon which Mr. English relies so strongly, it is made clear that the notice of rescission only issued by letter dated 10th September, 2019, *albeit* that the notice in this letter sought to have retrospective

effect. However, whether it is possible for an agreement to be rescinded retrospectively is another question entirely. In any case, it is not a matter that needs to be decided in these proceedings, since it is not this Court's task to determine whether the Deed of Settlement was retrospectively rescinded. Instead, its task is to determine when the common interest came to an end. Nonetheless, this Court can observe that if one had to consider on the 15th June, 2019 (i.e. before the letter of 10th September, 2019 issued) the privileged status of the emails of the 13th and 14th June, 2019, on what basis could it be said that the Deed of Settlement had been rescinded? Yet because we are considering this matter after the letter of 10th September, 2019, it is claimed by Mr. English that on 15th June, 2019, the Deed of Settlement had in fact been rescinded.

22. However, in many ways, the retrospective rescission of the Deed of Settlement is a side issue, since the key question is whether on the 13th and 14th June, 2019, the Trustee and Mr. Ryan had a common interest or whether, as suggested by Mr. English, that common interest had been fractured.

23. As is clear from the case law, parties can retain a common interest, even where they are antagonistic towards each other, which no doubt the Trustee and Mr. Ryan were, after McDonald J.'s conclusion that Mr. Ryan's trust was a sham.

24. Furthermore, when one considers the contents of the email of 13th June, 2019 (document 167) from the Trustee to Mr. Ryan, it is clear that the purpose of this email is to work in a consensual fashion (and so still, it seems, with a common interest) through the consequences of McDonald J.'s judgment. This includes the Trustee providing, in this email, details of legal advice he has received.

25. The remaining emails, bar one, i.e. documents 168, 169, 171 and 172, are simply follow ups on this primary email and so are part of that same communication.

26. The one email in this tranche that is not a follow up to the 13th June, 2019 email is document 174, which is dated 14th June, 2019, from Mr. Ryan to the Trustee in which Mr. Ryan provides the Trustee with suggestions of the solicitors and counsel that he recommends that the Trustee use to proceed against Mr. English, again emphasising the common interest which existed.

27. Furthermore, in relation to all these emails, there is no indication of any intention to abandon the privilege on the part of Mr. Ryan (or indeed the Trustee) in these emails.

28. For these reasons, this Court concludes that the common interest which existed between Mr. Ryan was fractured when it was communicated by the Trustee to Mr. Ryan on the 10th September, 2019 and that this common interest was not retrospectively fractured as of the 10th May, 2019, as claimed by Mr. English.

29. As such, this Court is of the view that the Trustee and Mr. Ryan retained a common interest at the time these emails were sent and so these emails are privileged.

Second tranche of documents: Counsel's Opinion of 30th May, 2019

30. The next tranche contains just one document, document number 490 and it is a Counsel's Opinion obtained by Mr. Ryan from Mr. Nathy Dunleavy BL and Colm Ó hOisín SC dated 30th May, 2019 regarding the consequences for Mr. Ryan of the judgment of McDonald J. in the 2017 Proceedings.

31. Again, Mr. English accepts that the Opinion was covered by legal advice privilege when provided to Mr. Ryan. However, he claims that, as it was shared by Mr. Ryan after 10th May, 2019, the date when the Deed of Settlement was allegedly retrospectively rescinded, this amounts to a waiver of the privilege which originally attached to it, which is not saved by the common interest.

32. It is not clear when the Opinion, which is dated 30th May, 2019, was shared by Mr. Ryan with the Trustee. However, in the third tranche of documents there is an email dated 10th

June, 2019 from the Trustee's office stating that he has '*received counsel's comments relating to the Irish judgment*' which may be a reference to this Opinion. In any event, no claim was made by Mr. English that it was shared after the date of the notice of the rescission of Deed of Settlement on 10th September, 2019.

33. Since this Court has already concluded that there was a common interest between the Trustee and Mr. Ryan in June 2019, in the context of the first tranche of documents, this Court concludes that the sharing by Mr. Ryan of the 30th May, 2019 Opinion was done when there was a common interest between the Trustee and Mr. Ryan. On this basis, the Opinion remains privileged.

34. In addition, it is to be noted that the Opinion deals with the ramifications of the judgment of McDonald J. in which both the Trustee and Mr. Ryan had a common interest. It is also important to point out that there is no evidence of any intention on the part of Mr. Ryan to waive the legal advice privilege which attaches to that Opinion, in circumstances where, if the Opinion was to lose privilege, this would involve Mr. English seeing the legal advice Mr. Ryan had received on the ramifications of the judgment of McDonald J. in the very case which Mr. Ryan had taken against Mr. English, when that case has not been finalised. Even to state this shows just how consequential the application is, which Mr. English is making. To achieve it would require a very clear intention on the part of Mr. Ryan that he was waiving the privilege attaching to the Opinion, which does not exist.

Third tranche of documents: Correspondence from 10th June, 2019 to 8th September, 2020

35. The final category of documents is correspondence between 10th June, 2019 and 8th September 2020 between Mr. Ryan and/or his solicitor on the one hand and the Trustee's office and/or his solicitor on the other hand. Privilege is being claimed on the basis that the documents are subject to litigation privilege and also on the basis of without prejudice privilege.

Is the dominant purpose of emails the apprehended litigation?

36. While Mr. English accepts in his written submissions that these documents were created when the present proceedings were apprehended, he claims, *inter alia*, that the dominant purpose for which these documents were created was not the threatened or apprehended litigation, in order for litigation privilege to apply (as required by the judgment of Finlay Geoghegan J. in *UCC v. ESB* [2014] 2 I.R 525 at para. 4).

37. The first email is document 503 and is dated 8th September, 2020, from the Trustee's office to Mr. Ryan's solicitor, and so was sent after these proceedings issued (on 28th May, 2020). The email relates to the quantum of indebtedness and so it seems clear to this Court that its dominant purpose was to allow the Trustee's solicitors prosecute the claim and so it is privileged.

38. The second email, document 504, is also dated 8th September, 2020 and is from the Trustee's office to Mr. Ryan's solicitor and is part of the same issue and so is also similarly privileged.

39. The next email is document 514 and it is dated 22nd October, 2019 and is from Mr. Ryan's solicitor to the Trustee's office. It is a one-line email, which in the normal course of events might be privileged, since it is headed 'without prejudice'. It is also clear to this Court that the one-line in the body of the email would in the normal course of events be deemed to be without prejudice communication. However, Mr. English has argued that in the Trustee's Answers to Interrogatories, he stated 'No' to the question of whether the Trustee had negotiations with Mr. Ryan since the '*purported rescission of the Deed of Settlement*'. Mr. English interprets this question as asking was there any communication with Mr. Ryan after the 10th May, 2019. Accordingly, he claims that the Trustee is stuck with this answer as the Trustee has not sought to explain on affidavit that there was in fact without prejudice communication after that date. On this basis, Mr. English states that the Trustee is stuck with

his pleadings and he must disclose this communication, even though it is headed without prejudice.

40. However, this does not seem to this Court to be as clear as Mr. English claims. This is because the Interrogatory asks '*since the purported*' rescission of the Deed of Settlement, has there been negotiations. It does not state '*since the 10th May, 2019*' has there been negotiations. In light of the manner in which the rescission of the Deed of Settlement was communicated to Mr. Ryan (by letter of 10th September, 2019), it seems to this Court that it was open to the Trustee, and/or his legal adviser, to interpret this Interrogatory as referring to the 10th September, 2019 as the purported rescission of Deed of Settlement. It is certainly not as clear as Mr. English claims.

41. In those circumstances, this Court does not believe that there are cogent enough grounds for this Court to find for Mr. English on this pleading point so that this explicitly flagged 'without prejudice' email would be deprived of privilege.

42. The next email is document 515 dated 22nd October, 2019 from Mr Ryan's solicitor to the Trustee's office and is simply a follow-up on the previous email and therefore is subject to the same privilege.

43. The next document is document 516 and it is a letter dated 6th August, 2019 from Mr. Ryan's solicitor to the solicitors for the Trustee and it is headed without prejudice and appears to concern the consequences of McDonald J.'s judgment and so is subject to litigation privilege. This letter was sent before the common interest was fractured and, for the reasons set out previously, this Court cannot see how Mr. English could be entitled to see a copy of a letter from Mr. Ryan's solicitor relating to Mr. Ryan's proceedings taken against him, unless there was a clear intention on the part of Mr. Ryan to waive this privilege, which there is not. Accordingly, the privilege attaching to this document has not been waived by its disclosure to the Trustee.

44. The next document is document 584 and it is an email dated 10th June, 2019, setting up the time for a call from Mr. Ryan's solicitor to the Trustee's office, in light of the Trustee's receipt of counsel's comments on the Irish judgment (which may be a reference to the Opinion, to which reference has already been made). It seems clear that this email is subject to litigation privilege and is before the fracturing of the common interest. Accordingly, it is privileged.

45. The next email is document 585 and it is dated 15th June, 2019 from the Trustee to Mr. Ryan and is part of the same chain of communication as document 584 and is similarly privileged.

46. The next email is document 587 and it is dated 25th March, 2020 and is from Mr. Ryan's solicitor to the Trustee's office relating to these proceedings and so is subject to litigation privilege.

47. The next email is document 588 and it is dated 23rd March, 2020 from Mr. Ryan's solicitor to the Trustee's office and is part of the same chain of communication as document 587 and is similarly privileged.

48. The final email is document 589 and it is dated 25th March, 2020 and is from Mr. Ryan's solicitor to the Trustee's office referring to court hearings and is clearly in contemplation of these proceedings and so is privileged.

CONCLUSION

49. For the reasons set out above, this Court concludes that all of the documents set out are privileged and therefore do not require to be disclosed by the Trustee to Mr. English.

50. In particular, this Court finds that the Trustee and Mr. English retained a common interest which was fractured on the 10th September, 2019 when the rescission of the Deed of Settlement was communicated by the Trustee to Mr. Ryan. This Court has concluded that this common interest was not retrospectively fractured, notwithstanding that the letter of 10th

September, 2019 purports to retrospectively rescind the Deed of Settlement with effect from 10th May, 2019.

51. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention a week from the date of delivery of this judgment at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).