[2007] IEHC 315

THE HIGH COURT

[2006] 5953 P

BETWEEN

BRIAN BYRNE AND MORGAN LEAHY

PLAINTIFFS

AND

SHANNON FOYNES PORT COMPANY AND THE MINISTER FOR TRANSPORT

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 7th September, 2007.

1. Introduction

1.1 These proceedings concern a most acrimonious dispute that has arisen in relation to the position of two senior officers of the first named defendant ("Shannon Foynes"). The first named plaintiff ("Mr. Byrne") is the Chief Executive Officer and, as a result of holding that office, a board member of Shannon Foynes. The second named plaintiff ("Mr. Leahy") was, when these proceedings were commenced, a member of the board of Shannon Foynes.

1.2 As a result of certain allegations made concerning the manner in which both plaintiffs carried out their respective duties, an inquiry was directed by the board of Shannon Foynes to be conducted by a committee ("the Guilfoyle committee") under the chairmanship of an independent chairperson, a Mr. Michael Guilfoyle. The plaintiffs contend that certain aspects of the manner in which the Guilfoyle Committee was established and has carried out its duties are in breach of law and have sought to restrain any further conduct of the inquiry by that Committee. It should be emphasised that the plaintiffs do not dispute but that the Board is entitled to enquire into the matters concerned. Both plaintiffs maintain that they are entirely innocent of any wrongdoing. Their complaints, which are on the basis of a number of allegations which it is not necessary to detail at this stage, concern the circumstances and manner in which the relevant committee was established and has conducted its business.

1.3 The application with which I am currently concerned relates to discovery of documents. However before going on to outline the unusual issues which arise on this application it is necessary to say something about the procedural history of the case to date.

2. Procedural History

2.1 The plaintiffs, immediately on issuing proceedings, sought an interlocutory injunction seeking to restrain the continuance of the inquiry then being conducted by the Guilfoyle Committee. I was persuaded that the plaintiffs had made out a case for such an interlocutory injunction and made an order restraining the further conduct of the Guilfoyle Committee pending the trial of the action.

2.2 Having regard to the urgency of the issues which involve, as they do, the status of senior officers of Shannon Foynes, I determined that it would be appropriate to case manage the proceedings with a view to seeking to procure an early hearing of the substantive issues which had arisen. While the precise issues which arise in these proceedings are relatively wide ranging it is fair to say that at the heart of the case made by the plaintiffs is a contention that the allegations against them have been manufactured by persons within Shannon Foynes who do not agree with important policy positions which both of the plaintiffs have adopted. It is equally fair to say that that allegation is strenuously denied. The truth or otherwise of such a contention is a matter which could only ever have been determined at the full trial of the action.

2.3 It also has to be the subject of comment that the proceedings have been conducted with a significant degree of acrimony by the parties. It would be neither possible nor appropriate for me at this stage to attempt to place any blame for that state of affairs on one or other or both sides. However it is fair to say that a number of the procedural issues which have arisen between the solicitors instructed for the respective parties have been pursued in correspondence which has, by times, been expressed in strong terms even by the standards of contentious litigation. This situation has not, I suspect, been helped by the fact that one of the contentions made in these proceedings by the plaintiffs is that the solicitor dealing with the matter in the firm representing Shannon Foynes (and who had, in that capacity, an involvement in the events giving rise to these proceedings) has a personal bias against Mr. Byrne. The merits, or otherwise, of that contention are, again, a matter that will have to await a full hearing.

2.4 The matter has been further complicated by the fact that Mr. Byrne continues to be the subject of ongoing investigation on the part of Shannon Foynes. Despite attempts to arrange for an alternative inquiry into the matters which were the subject of the considerations of the Guilfoyle Committee it has not, as I understand it, proved possible, as of this stage, to make any appropriate arrangements in that regard. In addition, however, further matters have been raised as contentions against Mr. Byrne which have, in the course of this litigation, come to be described as the so called "management concerns". These matters are the subject of ongoing consideration by Shannon Foynes and its agents. It is again contended on the part of Mr. Byrne that the so called management concerns are themselves contrived and lack bona fides. I mention these latter matters for the purpose of noting that, in addition to the ongoing conduct of the existing litigation between the parties, there is a parallel, and equally acrimonious, set of issues being dealt with within the company involving largely the same personnel including the legal advisors on both sides.

2.5 Matters have, therefore, been complicated by the fact that the dealings between the parties and their advisors since these proceedings commenced have related not just to the conduct of this litigation but to those additional matters as well. It has, on occasion, been difficult to deal with the case management which arises within the four walls of the existing proceedings without one or other party raising issues concerning that parallel process.

2.6 Finally it should be noted, because it is of some relevance to the issues which arise on this discovery motion, that the parties did, apparently, engage in significant discussions with a view to ascertaining whether the differences between the parties could be resolved. Those discussions would appear to have taken place at a time when the dates for the swearing of affidavits of discovery had been fixed. It does appear that, for entirely understandable reasons, the attention of the legal advisors on both sides (and indeed, doubtless, the parties themselves) was directed to those discussions while they were ongoing. It would not, however, appear that any agreement could be reached. It would also appear that the parties agreed on an extended period for the swearing of the relevant affidavits of discovery to reflect the time that had been devoted to those discussions.

Against that background it is now necessary to turn to the legal issues which arise concerning the discovery sworn on behalf of Shannon Foynes.

3. The Issues

3.1 The affidavit of discovery on behalf of Shannon Foynes was sworn by its company secretary Frank Lynch and is dated 9th May, 2007. It is clear on the evidence that, as is common practice, the affidavit was drafted by the solicitor having carriage of the

proceedings on behalf of Shannon Foynes. It is also manifestly clear that quite a significant number of documents in respect of which privilege could properly have been claimed were included in the First Part of the First Schedule and, therefore, no privilege was claimed in respect of them. The documents include correspondence and emails between solicitors and client and solicitors and counsel which are manifestly connected with the giving of legal advice.

3.2 Shannon Foynes maintains that the failure to make a claim of privilege in respect of the relevant documentation was in error and now seeks to be permitted to claim privilege by, in practice, swearing a revised affidavit of discovery which would include the relevant documentation in the Second Part of the First Schedule and would maintain a claim of privilege in respect of that documentation. In its Notice of Motion dated the 28th May, 2007, Shannon Foynes seeks orders directed to permitting such a course of action and requiring the return of the documents in question. The first application which I have to consider is, therefore, an application on the part of Shannon Foynes to do just that.

3.3 The plaintiffs make a number of complaints concerning the adequacy of the discovery made on behalf of Shannon Foynes. However because of the protracted nature of the hearing which gives rise to this judgment, it has only proved possible to hear the parties on one aspect of the plaintiffs complaint which directly stems from the inclusion of the potentially privileged documents in the unprivileged portion of Shannon Foynes' affidavit of discovery. The plaintiffs maintain that privilege has been waived in respect of the relevant documentation. On that basis they resist the application by Shannon Foynes to be allowed to now claim such privilege. However the plaintiffs go further. They state that the relevant documentation has now been "deployed" in the proceedings and that they are entitled, therefore, to discovery of other connected privileged documentation on the basis that it would be unjust to allow Shannon Foynes to claim privilege in respect of some but not all of the connected privileged documentation.

3.4 Thus, in substance, Shannon Foynes claims to be entitled to row back from what it states was an erroneous position of not claiming privilege in respect of the relevant documentation. The plaintiffs contend that privilege not having been claimed in respect of that documentation, privilege must be taken to now be waived and that the plaintiffs are, therefore, entitled further to all other connected privileged documentation. The primary issues which arise are legal questions concerning privilege and discovery and I, therefore, turn to the legal issues.

4. The Law – privilege not claimed
4.1 The first issue which needs to be considered is the status, in relation to privilege, of a document included in a schedule to an affidavit of discovery in respect of which no claim for privilege is, in fact, made. It is clear, from *Re Briamore Manufacturing Limited* (1986) 1 WLR 1429 and *Guinness Peat Properties Limited v. Fitzroy Robinson Partnership* (1987) 1 WLR 1027 at 1045, that the inclusion of a privileged document in the first part of the relevant schedule should not be treated as a waiver of privilege. It follows that if a document is mistakenly so included, the court should ordinarily permit the party whose document it is, to amend the schedule at any time before inspection has taken place.

4.2 However after inspection has taken place the general rule is that the privilege has gone. See for example *Briamore Manufacturing, Guinness Peat and Pizzey v. Ford Motor Company* (The Times, 8th March). The authors of *Matthews and Malek* on *Disclosure* suggest, correctly in my view, that that position is a *fortiori* if copies have been supplied.

However, again as noted in *Matthews and Malek*, that latter proposition is not absolute. The authors put it, again correctly in my view, in this way:-

> "Thus where such circumstances occur in the context of an inspection of documents, such as procuring inspection of the relevant document by fraud or realising the mistake on inspection but saying nothing, the court will in effect allow the mistake to be corrected, and refuse to permit the opposing party to use the privileged document. The test is in two stages:
>
> > (1) Was it evident to the solicitor seeing privilege documents that a mistake had been made?
> >
> > (2) If not, would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake? If the answer to either is yes then, before the CPR, the court would normally restrain the solicitor if he did not give the documents back and might restrain him from acting further if he had read the documents and it was impossible for the advantage to be removed in any other way."

4.3 In *Shell E &P Limited v. McGrath and Others* [2006] IEHC 409 (Unreported, High Court, Smyth J., 5th December, 2006) Smyth J. reviewed many of the authorities which are cited by the authors of *Matthews and Malek* in the passages to which I have referred. In particular Smyth J. approved a passage from the judgment of Aldous J. in *Pizzey* to the effect that the court should ask itself, as Smyth J. put it, "whether in the light of the evidence and the surrounding circumstances it had been proved on the balance of probabilities that the disclosure of the document will be seen by the reasonable solicitor to have been disclosed by mistake". Smyth J. also approved of the rejection by Aldous J. of the argument of the plaintiffs in that case to the effect that the test should be applied subjectively with a focus on what the recipient solicitor actually thought and quoted with approval a passage which said the following:-

> "The court must adopt the mantle of the reasonable solicitor. The evidence of what a solicitor thought at the time can be relevant. However the decision is for the court. The court must decide whether it is satisfied, on the balance of probabilities, that the reasonable solicitor would have realised that privilege had not been waived".

4.4 On the facts in *Shell*, Smyth J. was satisfied that, on the balance of probabilities, a reasonable solicitor would have realised that the document in question had come to him in error.

4.5 I will return, in due course, to the second legal issue which arises in the context of the disclosure of some but not all privileged documentation. However it is appropriate now to move to a consideration of the application of the principles which I have just identified to the facts of this case.

5. Application to this Case
5.1 It is clear that the test that should be applied is, for the reasons which I have sought to analyse, a two stage test. Firstly, the court must consider whether the solicitor seeing the document or documents concerned realised that a mistake had been made. Secondly, and perhaps most importantly on the basis of the authorities, the court must put itself in the position of a reasonable solicitor and consider whether, on the balance of probabilities, such solicitor would have taken the disclosure to have been as a result of a mistake.

5.2 Firstly it needs to be noted that the disclosure in this case occurred by reason of the provision of copies of the documents concerned by the solicitor on behalf of Shannon Foynes to the solicitor acting on behalf of the plaintiffs. As noted by *Matthews and Malek* the implied waiver applies a *fortiori* in such circumstances.

5.3 Secondly the solicitor who received the documents concerned on behalf of the plaintiffs has sworn an affidavit in which he deposes to the fact that, when he received the relevant documentation, he considered that there had been a deliberate waiver of privilege in respect of those documents. The stated basis for that view was also deposed to. The issues raised are matters which I will, necessarily, have to consider in determining what an objective viewpoint should be.

5.4 However, at this stage, I should confine myself to indicating that I accept the evidence of the plaintiffs' solicitor and must, therefore, conclude that the first of the two questions identified in the passage from *Matthews and Malek* which I have adopted must be answered in the negative. That is to say it does not appear to me that it was, in fact, evident to the receiving parties' solicitor that a mistake had been made.

5.5 The issue in this case, therefore, turns on whether, objectively speaking, it would have been obvious that the inclusion of the relevant documents in the file supplied had occurred as a result of a mistake.

5.6 In that context it is important to start with the evidence tendered on behalf of Shannon Foynes. The solicitor concerned gave affidavit evidence to the effect that the relevant documentation had been, by error, included in the wrong part of the first schedule. I have no reason to doubt the veracity of that evidence. However I do have to note that the explanation given as to how the error could have occurred is far from satisfactory.

5.7 It is stated that due to the time constraints involved in preparing the affidavit of discovery it did not prove possible, as had been intended, to consult with the experienced junior counsel who has been instructed on behalf of Shannon Foynes. I am happy to accept that that situation did, in fact, occur, and I am also happy to accept that it is highly likely that the events which did occur would not in fact have occurred had junior counsel been consulted. However that is not the end of the matter. The problem stems from the fact that the number of documents concerned is quite significant and relate to a range of different categories. In addition it is correct, as was pointed out by counsel for the plaintiffs, to note that connected documents seem to have been the subject of a claim of privilege in some cases but no claim of privilege in others.

5.8 While accepting that there was, in fact, an error, the test, for the reasons which I have set out, is not to that effect. Rather the test is as to whether, objectively speaking, a solicitor receiving the documents concerned would have obviously realised that they had been included by mistake. It is against that background, and to assist in answering that question, that the explanation for the mistake needs to be assessed. If there is an obvious explanation for the mistake (which should, itself, have been obvious to a receiving solicitor) then the objective test would be met and the documents would have to be returned. If, even with the benefit of affidavit evidence, there is no satisfactory explanation for the mistake, then it follows that the thinking of the hypothetical objective solicitor would necessarily have been influenced by that absence.

5.9 I should start by emphasising that discovery has become a difficult and frequently voluminous process in much modern litigation. All practitioners whether solicitors, at the bar, or on the bench, will have frequent experience of minor discovery errors. This is hardly surprising given the large volume of documentation which frequently has to be disclosed and given the often difficult judgment calls that have to be made in relation to relevance and issues such as privilege. It seems to me that any reasonable solicitor would know that mistakes can and do happen and that such mistakes can be expected even where the discovery has been prepared by competent and diligent advisors. Indeed modern developments have led to situations where such mistakes are even more likely to occur. A frequent difficulty arises in respect of emails. As all will be aware email strings frequently involve a whole series of "documents" which increase incrementally as each subsequent reply is added to a previous sequence. Sometimes some of the relevant e-mails in the string have attachments. In those circumstances it is easy to see how a proper claim of privilege in respect of one aspect of a long string may be missed or, indeed, privilege in respect of an attachment which finds it way into a whole series of email strings may also be missed. Any reasonable solicitor would, in my view, know that such errors can be expected.

5.10 However the difficulty in this case concerns the sheer volume of the matters in respect of which privilege could have been, but was not, claimed. This is not a case where a single document (or a small number) "slipped through the cracks" and where a receiving solicitor ought reasonably have concluded that an error had occurred.

5.11 The hypothetical receiving solicitor, would, in my view, have found it difficult to accept that such a large number of disparate documents had been the subject of an inadvertent failure to claim privilege. That hypothetical solicitor would know that the affidavit of discovery had been prepared by an experienced advisor and would, therefore, in my view, have been justifiably sceptical as to whether such a significant number of errors could have occurred in those circumstances.

5.12 It is also, of course, necessary to consider what view the hypothetical receiving solicitor would have taken as to whether there would have been any reason for a failure to claim privilege in respect of the documents concerned. It is fair to say that almost all of the documents are clearly privileged. They are not, therefore, documents in respect of which one might conclude that it was necessary to exercise a difficult judgment call as to whether they were privileged or not (or indeed whether they were relevant or not). This point does, of course, cut both ways. If the disputed documents were ones in respect of which a fine judgment had to be made as to whether they should be included in the affidavit of discovery and/or whether privilege should be claimed in respect of them, then it would be easy to understand the explanation given concerning the difficulties that were encountered in ensuring that counsel's advice was taken prior to the swearing of the affidavit and the handing over of the documents. The very fact that most of the documents are clearly privileged would, in my view, have influenced a hypothetical objective solicitor to be sceptical as to whether an error on that scale could have been made.

5.13 However, the other aspect of this point concerns the view which the notional solicitor would take as to whether there might have been a reason for the absence of the claim of privilege being made in relation to documents in respect of which privilege could clearly have been claimed.

5.14 It should be noted that there are types of litigation where it is far from unusual to find privilege being waived. In particular cases where the *bona fides* of a party or the reasonableness of its actions are concerned such cases frequently involve the reliance by such a party on the fact that it acted on legal advice as part of its case. In such litigation it is not unusual to find a clear waiver of privilege in respect of documents relevant to legal advice so that the party can maintain in the proceedings that it acted *bona fide* and/or reasonably because it took and followed appropriate advice.

5.15 A review of the disputed documents in this case does not lead to a clear conclusion one way or other under this heading. Some

of the documents are anodyne in the extreme and it is difficult to see precisely why discovery might be considered to have been waived in respect of them. However there is no doubt but that these proceedings are of the category were the *bona fides* and reasonableness of Shannon Foynes is challenged. Against that background it seems to me that a hypothetical receiving solicitor would be likely to conclude that there was at least a basis upon which privileged documentation might nonetheless be disclosed.

5.16 Taking all of those factors into account I have come to the conclusion that, on the balance of probabilities, a hypothetical receiving solicitor would not have concluded that the absence of a claim to privilege was due to an error. In coming to that view I am particularly influenced by the volume of the documentation concerned and the fact that privilege seems to have been claimed in respect of some but not all of what appeared to be sequences of documentation. While accepting that this occurred as a result of an error (on the basis of the affidavit evidence tendered), I am not satisfied that an objective and hypothetical solicitor would have reached such a conclusion on receiving the documents, for I feel that such a solicitor would have found it hard to see how so many and fundamental errors could have occurred by inadvertence. Some, though not very great, additional weight can be derived in favour of that proposition from the fact that this is a category of case in which the *bona fides* or reasonableness of Shannon Foynes is clearly an issue.

5.17 For those reasons it seems to me that it would not be appropriate to allow Shannon Foynes' application to now claim privilege in respect of the documents which have already been disclosed. In that context it is necessary to move to the second question as to whether, in the light of that ruling, the plaintiffs are entitled to additional documentation in respect of which privilege was claimed and which might be said to be connected to the documents now disclosed. It is appropriate to turn first to the legal principles involved.

6. The Law – Deployment of Document

6.1 In *Hannigan v. D.P.P.* [2001] I.E.S.C. 10 Hardiman J. speaking for the Supreme Court stated the following:-

> "Apart from these observations, the status of the document from the point of view of privilege or immunity from disclosure, changes once it has been referred to in pleadings or affidavit. *Matthews and Malek's Discovery* (London 1992) at para. 9.15 stated:-
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> > 'The general rule is that where privileged material is deployed in court in an interlocutory application, privilege in that and any associated material is waived …'
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> The basis of this rule is discussed in *Nenea Karteria Maritime Company Limited v. Atlantic and Great Lakes Steamships Corporation* (No. 2) [1981] Com. L.R. 139 as follows:-
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> > '… the opposite party … must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question.'"

On the facts of the case in question Hardiman J. was satisfied that the document, the entirety of which was sought to be disclosed, had been deployed.

6.2 However, it is important to note that the test is to the effect that the document concerned was "deployed". It is clear from *Marubeni Corporation v. Alafouzof* (Unreported, November 6, 1986, C.A., per Lloyd L.J.) that a mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and that this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test. Properly speaking, the test is whether the contents of the document are being relied on rather than its effect.

6.3 As thus put, the test is as to whether the party concerned has placed reliance on the content of the document concerned. It does not seem to me that the mere disclosure of the existence of the document without claiming privilege in respect of it in an affidavit of discovery can be said to amount to the placing of reliance on the document in the proceedings so as to, properly speaking, suggest that the document has been deployed. Obviously, if the document is relied on as to its contents in an interlocutory application, or a *fortiori*, at trial, then it follows that it has been deployed.

6.4 I am, therefore, satisfied that, where reliance is placed upon the contents of the document in either an interlocutory application or at trial, the party concerned will be taken not only to have waived any privilege that might attach to that document, but also to any other documents which are connected to the document in question in such a manner as would make it unjust to allow the document concerned to be deployed in that fashion without also disclosing the content of the other documentation concerned.

6.5 I am not, however, satisfied that the fact that one privileged document is deployed necessarily leads to the conclusion that all other privileged documentation in the hands of the party concerned must be taken to have had privilege waived. It is illustrative to note that the only matter in issue in *Hannigan* was whether a document that had been relied on at an interlocutory application ought to be disclosed in full. Doubtless, in the context of the criminal proceedings which underlay the matter under consideration, there were many other privileged documents, such as advices by counsel on the proofs for the trial. It cannot be said that the mere fact that one privileged document was disclosed and relied on would make it unjust to permit the party concerned to maintain a claim of privilege in respect of wholly unconnected documents. The test, in my view, must be as to whether there is a sufficient nexus between the document deployed and the document or documents whose disclosure is sought, so as to render it unjust to permit the one to be deployed without disclosing the content of the others.

6.6 However, for the purposes of this case the key issue relates to documents where no particular reliance has been placed on same other than that their contents have been disclosed in the discovery process in circumstances where privilege has not been claimed.

7. Conclusions on Deployment

7.1 It cannot be said that any of the documents which are in contention in this case have been deployed in these proceedings. No reliance has been placed upon them at an interlocutory hearing to date. I am driven, therefore, to the conclusion that the documents cannot, as yet, have been said to have been deployed and that the consequences of their deployal (that is to say that other connected documents may be open to disclosure) has not arisen.

7.2 However, the facts of this case do, it seems to me, raise squarely the question of what is to be done in circumstances where some but not all of a connected set of privileged documents are disclosed in the course of the discovery and inspection process without claiming privilege but are not deployed. In my view, the logical and just approach to such a situation is to rule that it is legitimate, in such circumstances, for the receiving party to raise with the disclosing party the question of whether it is intended at trial to place any reliance on the documents concerned. It does not seem to me to be appropriate to wait until the trial to deal with this question. If that were to occur, and it were to transpire that the disclosing party were to place reliance on the documents

concerned, then it would, in practice, be too late for the receiving party to obtain an effective order for the discovery of any connected documentation. To avoid a trial becoming immersed in unnecessary complicated procedural issues it seems to me that it is important, in such circumstances, that the intention of the party concerned relating to whether it is proposed to rely on the documents be clarified as soon as their existence be disclosed without a claim of privilege.

7.3 However, it seems to me to follow that, in the event that the party who has disclosed privileged documentation indicates that it does not intend to place reliance upon them at trial (and, if necessary, if the party is prepared to give an undertaking to that effect), then no injustice could conceivably be caused to the receiving party by refusing to order any further discovery.

7.4 On the facts of this case I am, for the reasons which I have analysed above, satisfied that it is now too late to reverse the inadvertent disclosure by Shannon Foynes of the documents in dispute. However, those documents have not been deployed. Having regard to the attitude adopted, in both of these applications, on behalf of Shannon Foynes, I would infer that Shannon Foynes would be more than willing to give an undertaking that Shannon Foynes does not intend to place reliance upon those documents, or their contents, at the trial in question. In those circumstances, not only have the documents not been deployed but it is also clear that they will not be, in the future, be deployed in these proceedings. In those circumstances it does not seem to me that the plaintiffs are entitled to any further discovery of documents connected with the disputed documents under the deployment principle.

8. Conclusion

8.1 I am, therefore, satisfied that I should refuse Shannon Foynes' application to be entitled to now assert privilege in respect of the contested documents. It is too late so to do. However, on the basis that it becomes clear that those documents, or their contents, will not form the basis of any matter relied upon by Shannon Foynes at the trial, then it would not seem to me that any entitlement to further discovery lies in favour of the plaintiffs on foot of the disclosure of the documents in question.