

THE HIGH COURT

[2013 No. 1182 P]

BETWEEN

DOMHNALL Mac A'BHAIRD

PLAINTIFF

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

DEFENDANTS

Judgment of Mr. Justice David Keane delivered on the 6th February 2015**Introduction**

1. This is a challenge to an assertion of legal professional privilege over certain documents discovered in the course of the above-entitled action.

The proceedings

2. The plaintiff, as vendor, seeks specific performance of an agreement for the sale of certain commercial or industrial premises in Glanmire, County Cork to the defendants, as purchasers, which agreement was made on or about the 4th November 2011. The defendants admit the agreement for sale and it is common case that a completion notice issued dated the 23rd November 2012, which was originally due to expire on the 2nd January 2013 but which was extended by agreement between the parties to the 4th January 2013. The defendants contend that the plaintiff failed to complete the sale within the period covered by the said completion notice, as extended, such that the defendants were entitled to elect to rescind the sale, which election was communicated to the plaintiff's solicitors by letter dated the 9th January 2013. The defendants counterclaim for the return of their deposit.

3. A plenary summons issued on the 5th February 2013. A memorandum of appearance was entered on behalf of the defendants on the 13th February 2013. A statement of claim was delivered on the 30th April 2013. After particulars were raised and replies received, a defence and counterclaim was delivered on the 18th November 2013, following which a reply to defence and counterclaim was delivered on the 18th November 2013.

Discovery

4. Although it was not produced in court, I am told that Gilligan J. made an Order for discovery on the 17th July 2014, in response to which Mr Gerard Gleeson swore an affidavit of discovery on behalf of the defendants on the 27th August 2014.

5. In that affidavit, the defendants claim privilege over a number of documents set forth in the Second Part of the First Schedule to that affidavit. The grounds advanced in support of that assertion of privilege in the body of Mr Gleeson's affidavit are:

"The said documents are privileged because they contain or consist of requests for legal advice by or on behalf of the [defendants] herein and/or contain the provision of legal advice by their legal representative, and/or that the said documents contain or consist of requests for legal advice by or on behalf of [the State] and/or contain the provision of legal advice by [the State's] legal representatives in general and further in connection with anticipated litigation between the plaintiff and [the defendants] herein. In further of the above the said advices relate to legal advices and/or correspondence to and from counsel in connection with such advices and/or notes of meetings and/or memoranda discussing or recording or noting said advices and/or include or incorporate documents relevant to [the] seeking or giving of such advices, all of which are privileged on grounds of legal professional privilege and/or litigation privilege."

6. Accordingly the defendants are claiming both "legal advice privilege" and "litigation privilege."

The present application

7. A motion issued on behalf of the plaintiff on the 20th October 2014 seeking, in relevant part, "a determination that privilege does not attach to the documents identified in the schedule hereto or if it did that such privilege has been waived and an Order directing the defendants to make full discovery of such documents and to provide the same for inspection...."

8. Unusually, the issuing of the motion does not appear to have been preceded by the service of a notice to produce the disputed documents. However, no point was taken in that regard on behalf of the defendants and, accordingly, nothing turns on that fact.

9. The list of documents scheduled to the plaintiff's motion corresponds with the following extract from the list of documents, set out in tabular form, in the second part of the first schedule to the defendant's affidavit of discovery:

Category	Description	From	To	Date
2	E-mail requesting instructions	CSSO	OPW	10.02 on the 02/01/2013
2	E-mail instructing the CSSO to proceed with the purchase	OPW	CSSO	11.16 on the 02/01/2013
2	E-mail instructing the CSSO to proceed with the purchase	OPW	CSSO	14.22 on the 02/01/2013

2	E-mail noting OPW instructions	CSSO	OPW	14.36 on the 02/01/2013
2	E-mail confirming instructions	OPW	CSSO	15.26 on the 02/01/2013
2	E-mail requesting instructions	CSSO	OPW	20.05 on the 03/01/2013
2	E-mail instructing the CSSO to proceed with the purchase on the 04/01/2013	OPW	CSSO	09.46 on the 04/01/2013
2	E-mail noting instructions	CSSO	OPW	09.58 on the 04/01/2013

The arguments

10. In challenging the defendants' claim of privilege, a number of arguments were advanced on behalf of the plaintiff. First, the plaintiff contends that it is not clear whether litigation privilege is being claimed, in addition to legal advice privilege. Second, the plaintiff argues that the documents in the schedule can be divided into two categories, namely, those comprising requests for, or the provision of, legal advice, on the one hand, and those comprising requests for, or the provision of, instructions, on the other. The plaintiff submits that only the former category attracts privilege. Third, the plaintiff contends that, in identifying the instructions actually given ("to proceed with the purchase") as part of the description of certain of the communications over which privilege is asserted, the defendants have, effectively, waived that privilege by purporting to disclose the contents, rather than the nature, of those communications.

11. No authority was cited on behalf of either party in respect of these arguments. Rather, the Court was invited to exercise its jurisdiction under Order 31, r. 20(2) of the Rules of the Superior Courts, and did so. O. 31, r. 20(2) provides:

"Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding as to the validity of the claim for privilege."

Conclusion

12. Having inspected the documents at issue, I am satisfied that they are capable of attracting both litigation privilege and legal advice privilege and that, accordingly, the defendants' claim of legal professional privilege has been made out.

13. First, it seems to me quite clear, having regard to the express words of Mr Gleeson's affidavit already quoted, that privilege is being claimed "on grounds of legal professional privilege and/or litigation privilege." I do not find any ambiguity in the nature or extent of the privilege being asserted.

14. In *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1990] 1 I.R. 469, the Supreme Court made clear that where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client.

15. In that case, Finlay C.J. considered the historical expansion of legal professional privilege from one solely covering litigation to one covering both litigation and the provision of legal advice. Having done so, he concluded that, for that expansion to be justified, it would be necessary for any legal advice privilege claimed to be closely and proximately linked to the conduct of litigation and the function of administering justice in the courts. He then continued (at p. 478 of the report):

"Where a person seeks or obtains legal advice there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or query as to the correctness or effectiveness of some step which a person is contemplating. Whether such query or challenge develops or not, it is clear that a person is then entering the area of possible litigation."

16. In light of the foregoing and based on my inspection of the documents at issue in this case, I am satisfied that those documents were created for the purpose of obtaining or providing legal advice in anticipation of the possibility of an obvious legal controversy and, hence, of litigation.

17. Second, I do not think that the conceptual distinction that the plaintiff seeks to draw – between legal advice, on the one hand, and a client's instructions, on the other – is a helpful one for the purpose of the decision I have been asked to make, bearing in mind the rationale behind legal professional privilege.

18. The relevant distinction is not one between instructions sought or provided, on the one hand, and legal advice sought or provided on the other; it is one between communications made for the purpose of seeking or obtaining legal advice, on the one hand, and communications made merely for the purpose of seeking or providing legal assistance, on the other.

19. In *Smurfit Paribas*, Finlay C.J. identified "the desirability of the correct and efficient trial of actions" as being the superior interest of the common good that justifies the immunity of communications from discovery in so far as they are made for the purpose of litigation. Finlay C.J. found support for that proposition in the following statement of Jessel M.R. in *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 (at p. 649):

"The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman with whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent and that the communications he so makes to him should be kept secret unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

20. In short, if the privilege is to achieve its intended effect, it must extend to the instructions on foot of which legal advice is provided, as well as to the advice itself. It follows that the argument made on behalf of the plaintiff in this case, that the instructions by reference to which legal advice is sought should be distinguished from the legal advice subsequently provided, and that only the latter should attract legal professional privilege, is misconceived and must be rejected.

21. Third, I do not accept that, by including in the description of certain of the documents over which privilege is claimed the words "*instructing the CSSO to proceed with the purchase*", the defendants have waived the claim of legal professional privilege that they are otherwise entitled to assert over those documents. While it does seem to me that the inclusion of those words in the description of the relevant documents in the affidavit of discovery was unnecessary and might, on one view, be seen to amount to the disclosure of the very instructions over which privilege is being asserted, on inspection of the documents at issue it is evident that the instructions concerned range wider than that description suggests.

22. I would make the same observation in respect of the plaintiff's additional reliance, in asserting that waiver of privilege has occurred, on the further statement made on behalf of the defendants in the *inter partes* correspondence preceding the present application that: "[w]hilst it is not our intention to divulge any of the material in these emails you may note that the option of seeking rescission of the contract was in discussion in the very first of the emails referenced." Again, while it might be suggested that this assertion was unnecessary and could be seen to amount to the disclosure of the broad nature of certain legal advice in respect of which privilege was being asserted, it does not seem to me to amount to a waiver of that privilege.

23. I reach that conclusion for two reasons. First, in *Fyffes plc v. DCC plc* [2005] 1 I.R. 59 (at p. 68), Fennelly J. cited with approval the following dictum of Ebsworth J. in *Kershaw v. Whelan* [1996] 1 W.L.R. 358 (at p. 370):

"Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy."

24. Second, it seems to me that the limited disclosure constituted by the statements quoted above, does not go anything like so far as that which was at issue before the Supreme Court in *Hannigan v. DPP* [2001] 1 I.R. 378, being much closer to that which was found not to amount to waiver by a divisional sitting of the High Court in *Ahern v Mahon* [2008] 4 I.R. 704 (at 729). In other words, neither the inclusion of a reference to an instruction to complete the sale at issue in the description of certain documents over which privilege was being asserted, nor the reference to a discussion in other documents of the issue of the potential rescission of that sale contract, in the context in which those references were made, amounts to the deployment of that material in the present litigation. That is not to say that the defendants would not have done better to avoid making those references in the context of the privilege that they assert. Neither is it to say, if the defendants were to make any attempt to adduce evidence of any such reference at trial, that the conscious and deliberate use of such selected portion of the contents of a privileged document in that way would not at once give rise to an issue of waiver then.

25. Finally, and for the sake of completeness, I should add that I reject the assertion made on behalf of the plaintiff that litigation could not have been in contemplation at any time between the 2nd and 4th January 2014 because the parties were endeavouring to complete the transaction during that period. I do not accept that the former proposition follows from the latter. It is perfectly possible for any party seeking to conclude a transaction where a completion notice has issued to give consideration to the potential for litigation in the event that completion does not occur and to seek appropriate legal advice concerning his or her position in that eventuality.

26. For the reasons I have set out, the plaintiff's application is refused.