

THE HIGH COURT

COMMERCIAL

[2011 No. 4336 P.]

BETWEEN

CIARA QUINN, COLETTE QUINN, BRENDA QUINN, AOIFE QUINN, SEÁN QUINN JR., AND PATRICIA QUINN WAECHTER
PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED AND

KIERAN WALLACE

DEFENDANTS

AND

SEÁN QUINN, DARRAGH O'REILLY AND LIAM MCCAFFREY

THIRD PARTY

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 19th day of May, 2015

1. This is an application for further and better discovery. Very extensive discovery has already been made between the parties in these proceedings which are listed for hearing on 3rd June and are expected to last for between four and six months.
2. The issue surrounding the disputed documents in this motion is a claim of privilege made by the defendants. The defendants accept that as they are raising the issue of privilege, the burden is on them to establish that right. They also accept that they must establish that the dominant purpose for the creation of the documents in issue was the contemplation of further litigation or for the purpose of two investigations, one by the Financial Regulator and the other at the instigation of the Office of Director of Corporate Enforcement. The first defendant became aware of the investigation by the Financial Regulator sometime in the middle of 2008 and from 19th December, 2008, it became aware of the ODCE investigation. It claims privilege in relation to documents generated for the purpose of dealing with inquiries and issues arising out of these investigations.
3. The court was referred to the case of *Ahern v. Mahon* [2008] 4 I.R. 704, as authority for the proposition that privilege can be claimed in respect of such inquiries or investigations and that privilege can be asserted over documents created for the purpose of those investigations. The first defendant asserts that from 19th December, 2008, it was entitled to assert what it called litigation or investigatory or regulatory privilege in respect of any documents brought into being for the dominant purpose of engaging with those regulatory and investigative processes. I accept that submission. It does not follow that all documents created after that date are privilege but merely those generated for the dominant purpose that I have outlined above.
4. The original number of documents in dispute was approximately 3,200 but after engagement between the solicitors for the plaintiffs and the defendants, these were reduced to approximately 170 documents plus eleven newly challenged documents. Having discussed with counsel the most efficient methodology for dealing with the issue of privilege it was agreed that counsel for the defendants would take me through the documents in dispute outlining in general terms what they were and enabling me to look at each document as counsel put it in context. Counsel for the plaintiff would not, in any event, have been able to look at the documents if I had reviewed them in my chambers. But he was in a position to hear the exchanges between counsel for the defendants and the court as to why, in each case, privilege was asserted. In any event, a detailed schedule of the documents and the reasons for the privilege claims has already been furnished by the solicitors for the defendants to the plaintiffs' solicitors.
5. There were a number of documents in respect of which I held that a further affidavit should be delivered. These are documents set out in Tab 109, 147, 148 and 153, in the book of documents furnished to the court and also an email from Mr. David Drumm of 14th April, 2008. It was also agreed that I would look at the other eleven documents furnished in a separate book and decide on whether or not they are privileged having regard to the issue set out above.
6. I will deal with the general documentation first. That is the documentation other than those to be found in Tab 109, 147, 148, 153 and the book containing eleven documents. I am satisfied having looked at those documents and considered the basis for the assertion of privilege by the defendants that they are documents which were generated for the dominant purpose of engaging with the regulatory and investigative processes involving the Financial Regulator and the ODCE and that, therefore, the defendants are entitled to assert privilege over those documents.
7. I have read the eleven additional documents which were furnished in a separate file and I have considered the detailed explanation of each of these documents and the reason for the privilege claim set out in the supplemental affidavit of Ms. Karyn Harty sworn on 15th May, 2015. Having considered the documents and the explanations set out in that affidavit, I am also satisfied that the defendants are entitled to assert privilege over those eleven documents for the reasons set out in the affidavit.
8. The affidavit of Ms. Harty also deals with five documents in respect of which the court requested further information. I am satisfied for the reasons set out in her affidavit that the privilege asserted is maintainable. I note that in respect of a small number of documents, privilege is no longer being maintained as is set out in paras. 25, 26 and 27 of her affidavit.