

THE HIGH COURT

COMMERCIAL

[2014 No. 2473 P.]

[2014 No. 36 COM]

BETWEEN

JAMES PATRICK FLANNERY AND LEXINGTON SERVICES LIMITED

PLAINTIFFS

AND

MORTIMER JOHN WALTERS, BRIAN O'CONNELL, ACTIVITY MONITORING SOLUTIONS LIMITED, CATHARSIS TECHNOLOGIES LIMITED, ASHLEY TRUST LIMITED AND ASHLEY NOMINEES LIMITED

DEFENDANTS

AND

CATHARSIS TECHNOLOGIES LIMITED

COUNTERCLAIM PLAINTIFF

AND

JAMES PATRICK FLANNERY, BRUCE BASHEER AND SHEAF-2 LIMITED

COUNTERCLAIM DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 4th day of November, 2015

1. This is an application by the defendant for further and better discovery of two categories of documents designated as category 47 and category 56, and for certain ancillary orders.

2. Category 47 comprises:-

"All documents relating to the preparation of audited accounts of the second named plaintiff for 30 June, 2013 and 30 June 2014, evidencing or relating to payments from the first named defendant to the second named plaintiff to include a copy of the audit file(s) prepared by Mr. Mark Azzopardi Holland as statutory auditor of the second named plaintiff (the auditor) in relation to any such payments from the first named defendant to the second named plaintiff and all documents relating to communications between the auditor and Rachel Flannery and/or Ellen O'Donohue and/or Jonathon Corrieri and/or Michael Clifford and/or Silvio Cilla and/or the first named plaintiff and/or any other party regarding correspondence received by the auditor from the first named defendant objecting to the content of the audited accounts of the second named plaintiff."

3. Category 56 relates to:-

"All documents evidencing or relating to the legal and beneficial ownership of the interest to be acquired by the third named counterclaim defendant under the Compromise Agreement including but not limited to nationalities and countries of residence of the said legal and beneficial owners of those interests. To the extent that any legal or beneficial ownership of the said interest was held by a body corporate, please identify the person or persons who had legal authority to control the activities of that entity on 7th September, 2013, including but not limited to nationalities and countries of residence of the legal and beneficial owners of those shares."

4. The plaintiffs have declined to make discovery on the grounds of legal advice, privilege and litigation privilege. So far as the latter is concerned, the date from which the plaintiff contemplated litigation is stated to be 26th April, 2013 and there is no evidence before me that would call that into question.

5. The plaintiffs have made extensive discovery but has declined to make further discovery in regard to categories 47 and 56. The plaintiffs raise legal advice privilege with regard to the sister of the first named plaintiff, Ms. Ellen O'Donohue. The defendants maintain that since she is not a lawyer, the plaintiff is not entitled to maintain such privilege. The onus is on a party asserting legal professional privilege to prove that such a claim is justified. *Miley v. Flood* [2001] 1 ILRM 489.

"Litigation privilege can extend to communications between a lawyer or the lawyer's client in a third party where they are prepared for the purposes of litigation. Communications between a party and a non-professional agent or employee or third party are only privileged if they are made both (1) in answer to inquiries made by the party with the agent for and at the request or suggestion of his solicitor, or without any such request, but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice or of enabling him to prosecute or defend an action, or prepare a brief; and (2) for the purposes of litigation existing or in contemplation at the time. Both these conditions must be fulfilled in order that privilege may exist." (*Halsburys Laws of England*, Vol. 11 (2009) paragraph 565)

6. Mr. Andrew Lenny of Arthur Cox, Solicitors, for the plaintiff has sworn on affidavit on 22nd October, 2015, in which he unequivocally stated that Ms. O'Donohue is a qualified accountant and acts as agent for the first named plaintiff in dealings with his legal advisers in connection with this litigation. Mr. Lenny is perfectly well placed to evaluate her role and legal status in the

negotiations and I accept his evidence. I refuse the defendants' application for further and better discovery insofar as it involves communications between Ms. O'Donohue and the first named plaintiff and his advisers.

7. So far as the plaintiffs' accountant is concerned, the plaintiff satisfied me that an auditor's working papers are not within the procurement of his client and in any event, Mr. Lenny in his affidavit of 22nd October, 2015, states that he has received a letter from the plaintiffs' accountant who confirms that he has not released his working papers to his clients but having reviewed his files they do not contain any documents evidencing or relating to payments from the first named defendant to the second named plaintiff.

8. Mr. Lenny's evidence is sufficient to discharge the onus on the plaintiff asserting legal professional privilege in respect of communications between Ms. O'Donohue and the first named plaintiff and his advisers. The defendants have not refuted that evidence other than to call it into question nor are they in a position to refute it. I refuse the defendants' application for further discovery on that issue.

9. The only remaining issue affecting the two categories of discovery concerns the plaintiffs' claim of litigation privilege over certain communications with various non-lawyers. Once litigation is in prospect or pending, communications between a client and his solicitor or agent or between one of them and a third party is privileged if it comes into existence for the sole or dominant purpose of giving or getting legal advice for the purpose of the litigation or collecting evidence for that purpose. The third parties concerned for the purpose of the application are Ellen O'Donohue, Michael Clifford, Cathal O'Donovan, Bruce Basheer, Judith Hill, Adam Lewinsky, Roisin Flannery and Rose-Marie Flannery. In fact, no claim of privilege has been maintained over correspondence from Barry Forrest, Adam Lewinsky or William Bell, although a contrary assertion is made on behalf of the defendants on affidavit. The plaintiffs have established to my satisfaction that the claim of litigation privilege over communications with the other relevant third parties above is legitimate. The plaintiffs were entitled to claim litigation privilege from 26th April, 2013, in respect of all communications between the plaintiffs and their solicitors or agent, or between one of them and a third party.

10. I refuse the defendants' application for discovery under this heading.

11. In reaching my decision, I have had regard to the legal authorities which have been outlined to the court and to the affidavits and other documentary evidence which establishes the extent to which discovery has been made by the parties in this case. I cannot ignore the fact that the case is listed for hearing on 10th November, 2015 and this application came before the court on 23rd October, 2015.

12. I refuse the defendants' application for further and better discovery.