Neutral Citation: [2014] IEHC 135

THE HIGH COURT

COMMERCIAL

[2012 No. 129 P]

[2012 No. 6 COM]

BETWEEN

UNIVERSITY COLLEGE CORK - NATIONAL UNIVERSITY OF IRELAND

PLAINTIFF

AND

THE ELECTRICITY SUPPLY BOARD

DEFENDANT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 21st day of March 2014

1. This judgment is given on the issues raised in two notices of motion heard together. The plaintiff seeks inspection of certain documents and the defendant seeks to assert privilege over the same documents. There is potentially a further issue arising by reason of the mistaken disclosure by the defendant of three of the relevant documents.

2. The proceedings issued by plenary summons in January, 2012 make a claim for damages for negligence, breach of duty, nuisance and pursuant to the rule in *Rylands v. Fletcher* arising out of a flood which occurred in the River Lee on the night of 19th November, 2009.

3. The documents at issue in these applications may be divided into two categories. The first, those created since the 2009 flood, and secondly, those created in relation to three earlier floods. The documents have all been discovered by the defendant as relevant and have been given to the Court for the purpose of deciding the application. The relevant documents are:

Post-2009 Flood

(i) An email from Liam (William) Buckley to Glenn Pope dated 11th February, 2010 at 4:59pm with subject heading 'Statement of flood events 19th Nov 2009 not final version' ("the Liam Buckley email").

(ii) The attachment to the Liam Buckley email - statement on flooding events of 19th November 2009.

(iii) Email from Tom Browne to Liam (William) Buckley c.c. Glenn Pope dated 10th March 2010 4:54pm subject 'Witness Statements' ("the Tom Browne email").

(iv) The attachments to the Tom Browne email: Ger Keeley Statement; James Hegarty Statement; Jerry Browne Statement; Liam Buckley Statement; and Michael Shine Statement.

The first three documents above have been disclosed by mistake to the plaintiff. The attachments to the Tom Browne email have not been disclosed to date to the plaintiff.

Prior Reports

(v) Report of Jack O'Keeffe created circa 1990 ("the 1990 report").

(vi) Report of Robert Cullen created circa 1997 ("the 1997 report").

(vii) Report of Robert Cullen created circa 2000 ("the 2000 report").

The first issue is whether the four documents created after the 2009 flood are privileged by reason of the principles relating to litigation privilege.

Post-2009 Documents

4. There was no real dispute about the principles applicable to the defendant's claim to litigation privilege, though counsel for the respective parties emphasised different aspects of the relevant judgments. The relevant principles may be summarised as follows:

(i) Litigation privilege constitutes a potential restriction and diminution of a full disclosure, both prior to and during the course of legal proceedings which is desirable for the purpose of ascertaining the truth and rendering justice. As such, it must be constrained. *Smurfit Paribas v. AAB Export Finance* [1990] 1 I.R. 469 per Finlay C.J. at p. 477.

(ii) The purpose of litigation privilege is to aid the administration of justice, not to impede it. In general, justice will be best served where there is candour and where all relevant documentary evidence is available. *Gallagher v. Stanley* [1998] 2 I.R. 267 per O'Flaherty J. at p. 271.

(iii) The document must have been created when litigation is apprehended or threatened.

(iv) The document must have been created for the dominant purpose of the apprehended or threatened litigation; it is not sufficient that the document has two equal purposes, one of which is apprehended or threatened litigation. *Gallagher v. Stanley* [1998] 2 I.R. 267 at p. 274 approving the test propounded by the House of Lords in *Waugh v. British Railways*

Board [1980] A.C. 521.

(v) The dominant purpose of the document is a matter for objective determination by the Court in all the circumstances and does not only depend upon the motivation of the person who caused the document to be created. *Gallagher v. Stanley* and *Woori Bank & Hanvit LSP Finance Ltd. v. KDB Bank Ireland Ltd.* [2005] IEHC 451.

(vi) The onus is on the party asserting privilege to prove, on the balance of probabilities, that the dominant purpose for which the document was brought into existence was to obtain legal advice or enable his solicitor prosecute or defend an action. *Woori Bank* and *Downey v. Murray* [1988] N.I. 600.

Evidence of Defendant

5. The defendant's claim to privilege is grounded upon two affidavits of Ms. Davis, a solicitor employed in the legal department of the defendant, who, since December 2009, is the solicitor with primary responsibility for the litigation arising out of the 2009 flood.

6. Ms. Davis deposes that following the flood, litigation was threatened as early as the week commencing 23rd November, 2009. I accept that the defendant has established as a matter of probability that litigation, in the form of claims arising out of the flood, was apprehended or threatened from that date.

7. Ms. Davis deposes that she had a meeting with Mr. Glenn Pope and others on 10th December, 2009, and requested him to obtain detailed statements from all the Lee station staff that had an active role in the flood management reporting to him. She deposes that where information is sought from within the ESB by the legal department, it is done through the relevant line manager. She also deposes that her dominant intention in seeking the information was to prepare for litigation.

8. The evidence adduced on behalf of the plaintiff is by affidavit of Ms. Gilroy, a solicitor with Mathesons, the solicitors on record for the plaintiff. In relation to Mr. Tom Browne, she deposes that the discovery made by the defendant indicates that from at least August 2009, he was the engineering and technical risk manager within ESB power generation. This is not disputed by the defendant. Ms. Davis deposes, in relation to Mr. Browne's email, that he "had assumed the role of principal point of contact between the legal department and ESB as client". She also deposes that he was actively engaged, at her request, in the gathering of information including witness statements and that her dominant purpose in seeking such information from Mr. Browne was to prepare for litigation.

9. On the above evidence, I am satisfied that the defendant has established that a purpose of the preparation and transmission of the statement attached to Mr. Buckley's email and the statements attached to Mr. Browne's email was apprehended or threatened litigation. In accordance with the above principles, such a finding does not entitle the defendant to claim privilege. It must also satisfy the Court, as a matter of probability, on the evidence before it, that the apprehended or threatened litigation was the dominant purpose for which the statements were prepared and transmitted.

10. On the evidence before the Court, there are two other potential purposes for which the statements attached to Mr. Buckley's email and Mr. Browne's email may have been prepared and transmitted. Firstly, representatives of the defendant, including Mr. Glenn Pope and Mr. Tom Browne, appeared before the Joint Oireachtas Committee on the Environment, Heritage and Local Government on 23rd February, 2010, in relation to the events of 19th November, 2009. At para. 18 of her first affidavit, Ms. Gilroy observed "[i]t appears, therefore, that an investigation of events was required for the purposes of this presentation, in addition to an initial understanding of the events that led to the flood". In para. 18 of the replying affidavit, Ms. Davis simply confirms that representatives of the ESB appeared before the Joint Oireachtas Committee on 23rd February, 2010.

11. Mr. Buckley's email is dated 11th February, 2010. The defendant has not adduced evidence as to whether or not the statement forwarded on that day by Mr. Buckley to Mr. Pope was used for the purpose of the presentation by representatives of the defendant, including Mr. Pope, to the Joint Oireachtas Committee. Those facts are within the knowledge of the defendant. On the facts before the Court it appears, as a matter of commonsense, one of the purposes of the statement prepared by Mr. Buckley, as station manager, and forwarded to Mr. Pope on 11th February, 2010, was its use by the representatives of the defendant in their presentation to the Joint Oireachtas Committee on 23rd February, 2010. On the facts before me, and having regard, in particular, to the relevant dates, this appears, at minimum, to have been an equal purpose in the preparation and forwarding of Mr. Buckley's statement with the email of 11th February, 2010, to the purpose of use in any apprehended litigation. Accordingly, I am not satisfied that the defendant has established, as a matter of probability, that the dominant purpose of the creation of the statement by Mr. Buckley and its transmission to Mr. Pope by email on 11th February, 2010, was apprehended or threatened litigation. I have concluded that at least an equal purpose of this statement and its transmission was the presentation to the Joint Oireachtas Committee. It may also have had a further purpose in relation to the report to be prepared by ESB International ("ESBI") next referred to.

12. The second purpose raised by the facts before the Court is the preparation by ESBI of a report following the November 2009 flood. Exhibited to Ms. Gilroy's first affidavit is a letter dated 2nd July, 2010, from Mr. Browne, as engineering and technical risk manager, generation operations, ESB Energy International, to the Clerk of the Joint Oireachtas Committee on the Environment, Heritage and Local Government. The opening paragraph reads:

> "ESB attended hearings of the Committee's review into the severe weather events of last winter and has provided detailed information to the Committee. We now submit the attached report 'Lee Flood of November 2009 - Preliminary Report', which has been compiled by ESB International (ESBI). It is usual practice for ESB to engage ESBI to prepare a report following a major flood event such as that which occurred in November 2009. A final ESBI report on the November 2009 Lee Flood will be prepared in due course."

13. It was submitted on behalf of the plaintiff that, having regard to the "usual practice" of the defendant referred to, to engage ESBI to prepare a report following an event such as the 2009 flood, that at least an equal purpose of the witness statements appended to Mr. Browne's email of 10th March, 2010, was the preparation of the ESBI report. The defendant has not adduced any evidence as to whether or not the statements appended to Mr. Browne's email were or were not intended (when signed) to be furnished to ESBI and used for the purpose of the preparation of their report.

14. Of the five reports appended to Mr. Browne's email dated 10th March, 2010 two are dated 16.02.10 and the remaining three undated. All are being sent for checking and signing. The Court has read the documents. The nature of the documents must form part of the objective determination by the Court. Each of the documents is headed 'Privileged and Confidential' and followed by a statement "this statement is prepared for the purpose of consideration by ESB's legal advisers in contemplation of proceedings against ESB". It is accepted that such a statement is not determinative of the purpose or purposes of the preparation of the statements.

They are statements from the plant manager, plant controllers, one of whom was also the safety officer, and the hydrometric officer. They are detailed statements of fact, including all relevant recordings as to what occurred at Inniscarra and Carrigadrohid between 14th November and 20th November, 2009.

15. As it appears to have been normal practice for the defendant to engage ESBI to prepare a report following an incident such as the 2009 flood, and as these statements are detailed statements of fact from the relevant personnel operating the plants at the time which contain the primary and basic information from those directly involved, I have concluded that one of the purposes of the preparation of these detailed witness statements must have been to give them to ESBI in connection with the report being commissioned from them. No proper report on the flood event could be prepared without such primary and basic information. I have further concluded that the defendant has not established on the facts before the Court that the other purpose identified, namely, for use in apprehended or threatened litigation was the dominant purpose. Rather, I have concluded on the facts before the Court, that the furnishing of such statements to ESBI for the purposes of the preparation of its report was an equal purpose with the use in apprehended or threatened litigation. The basic and primary factual information from those working in the plants on the relevant dates was clearly essential information for ESBI in carrying out a review in accordance with the usual practice of the defendant.

16. It follows from the above conclusions that the defendant is not entitled to claim privilege over the two emails of Mr. Buckley and Mr. Browne and the attachments thereto and that the plaintiff is now entitled to an order for the production for inspection of the attachments to the email of 10th March, 2010, from Mr. Browne.

17. By reason of the above conclusion, it is unnecessary to consider the consequences made by the prior disclosure in error of the two emails and the attachment to Mr. Buckley's email on behalf of the defendant.

Prior Reports

18. The defendant claims privilege over the prior reports upon the basis of litigation privilege arising from apprehended, threatened or then existing litigation relating to the earlier floods. The plaintiff objects to the claim to privilege on two separate grounds. Firstly, that the defendant has not discharged the onus of establishing that as a matter of probability apprehended, threatened or existing litigation was the dominant purpose for which each of the reports was created and secondly, even if that was the position that the litigation privilege no longer subsists.

19. Copies of the three prior reports at issue have been produced to the Court for the purpose of the Court determining this application. The copies of the three reports are stated to have been found on historic files at the defendant's premises at Inniscarra, County Cork. Ms. Davis has deposed that the copies "have all the signs of being created contemporaneously to the original documents being in the company of other documents in chronological order and lying in undisturbed storage for many years".

20. Applying the principles already set out to each of the three reports, I have concluded that the defendant has established, by the evidence adduced, that as a matter of probability, the dominant purpose of the 1990 report was Circuit Court proceedings brought by a Mr. Scully against the ESB. This report was prepared by a Mr. O'Keeffe, Station Manager. Whilst the report is undated, there is a covering note to the Legal Services Division dated 9th October, 1990, in which the subject is recorded as "Dennis Martin Scully v. E.S.B.". It refers to memos from the legal services division, including that of 14th June, 1990 and encloses a report "on the above as requested". The claim in the Circuit Court proceedings was for damage to a carrot crop. The short report makes reference to Mr. Scully and his carrot crop. A copy of the Civil Bill has been produced with an attached memo to the Lee Station Manager dated 14th June, 1990, seeking "a report on this matter . . . so that we can have a Defence filed".

21. The position in relation to the other two reports is different. Those are reports referred to as the 1997 report and the 2000 report. Each is stated to have been prepared by Mr. Cullen, the then Station Manager. There is no evidence before the Court of any request for same. I am not satisfied, on the evidence before the Court, that the defendant has discharged the onus of establishing that as a matter of probability, the dominant purpose of the preparation of either of these reports was apprehended or threatened litigation. Each report is a detailed report on the management of flood on the River Lee during a specified period, *i.e.*, 16th February to 20th February, 1997, and 28th November, 2000 to 30th November, 2000. In the introduction to the 1997 report, it is stated "[t]his report is prepared to detail the events of the period 16th–20th February, 1997 and ESB's operations of its works on the River Lee". The 2000 report, in its introduction, states "[t]his report is prepared to detail ESB's operations of its works on the River Lee and to detail the events of the period 27th November–30th November, 2000 incl.". Both reports, by their detail, suggest they were prepared within a short period of the relevant flood. Neither report is addressed to the legal advisers or solicitors to use for litigation or contain any reference to any specific claim against the ESB. The 2000 report does make reference to the fact that "[t]he placing of road signs, or advice to motorists, in the event of road flooding is not the responsibility of ESB". The Court has noted that the copy District Court summons produced in respect of the claim brought by Mr. Desmond (but dated 29th November, 2001, *i.e*. one year after the flood) relates to a claim for damage to the plaintiff's motor car on the public highway in the vicinity of the dam. The 2000 flood appears to have included flooding on the public road and I accept that the defendant has established as a matter of probability that litigation may have been apprehended when the 2000 report of Mr. Cullen was prepared. Similarly a copy civil summons dated 28th July 1997 making a claim in relation to the 1997 flood had been produced and again I accept litigation may have been apprehended in relation the 1997 flood when Mr Cullen prepared the 1997 Report.

22. Nevertheless, it appears to me from the nature of the reports that as a matter of probability, they were reports prepared by the Station Manager, in normal course, to detail the precise facts relating to the flood events at the relevant periods. Having regard to the nature of the documents, where the copies were found and the evidence in relation to the usual practice of the defendant to engage ESBI to prepare a report following a major flood event, I have concluded that such a report by ESBI or an internal report by ESB was at least an equal purpose of the preparation of the 1997 and 2000 reports by the Station Manager to a purpose of apprehended litigation. Accordingly, I am not satisfied that apprehended or threatened litigation was the dominant purpose of the preparation of either the 1997 or 2000 reports.

23. It follows that the defendant is not entitled to claim privilege over the 1997 and 2000 reports and the plaintiff entitled to orders for the production for inspection of same.

24. Having regard to my conclusion on the 1990 report, it is necessary to consider the second ground upon which the claim to privilege for the 1990 report in these proceedings is challenged, namely, that the privilege no longer subsists.

Duration of Litigation Privilege

25. The dispute of principle between the parties is net. The defendant submits that the 1990 report, being privileged from disclosure in the litigation for which it was procured, remains privileged for all time. The defendant contends that the maxim "once privileged always privileged" applies. The plaintiff seeks to distinguish the duration of legal advice privilege and litigation privilege. It submits that the preferred view is that the maxim "once privileged, always privileged" whilst applying to legal advice privilege, does not apply to

litigation privilege. It submits that a report which is entitled to litigation privilege in one set of proceedings only remains privileged in a subsequent set of proceedings if there is a sufficient connection between the parties and/or subject matter of the two sets of proceedings in which privilege is claimed.

26. It is not in dispute between the parties that there now exists, both in this jurisdiction and England, two categories of legal professional privilege: legal advice privilege and litigation privilege. Malek (ed.), *Phipson on Evidence*, 17th ed., (London, 2010) at p. 646, para. 23-18 summarises the position as follows:

> "The two categories of privilege are legal advice privilege and litigation privilege. Legal advice privilege is narrower in ambit but can be claimed more widely. It protects communications between client and lawyer which are part of the continuum of the giving and getting of legal advice. It does not require the existence or contemplation of legal proceedings. Litigation privilege only applies where adversarial proceedings are in reasonable contemplation but is wider in ambit. It protects communications which come into existence for the dominant purpose of gathering evidence for use in proceedings, and will include communications with third parties if they come into existence for that dominant purpose."

McGrath, *Evidence*, 1st ed., (Dublin, 2005), at para. 10-08 explains the two categories and their interconnection in the following terms:

> "The existence of these two sub-categories of legal professional privilege, commonly termed 'legal advice privilege' and 'litigation privilege' respectively, is now generally recognised, though some uncertainty about their precise parameters and degree of overlap remains. In particular, it is uncertain whether communications between a client and his or her legal adviser regarding litigation in being or anticipated are protected only by legal advice privilege or by both. For the reasons articulated below, the better view is that such communications are more properly protected by legal advice privilege alone and that litigation privilege should be regarded as applied to third party communications and work product only."

In this judgment, I am not concerned with a communication between the defendant, as the client, and its lawyer regarding litigation and, as already stated, no claim was made to privilege for the 1990 report upon the basis of legal advice privilege. The only claim is made upon the basis of litigation privilege.

27. The defendant for its proposition relies upon the decisions of the High Court in *Bord na Mona v. Sisk* [1990] 1 I.R. 85, *Quinlivan v. Tuohy* (Unreported, High Court, Barron J., 29th July, 1992) which followed the judgments of the English Court of Appeal in *The Aegis Blaze* [1986] 1 Lloyds Rep. 203.

28. The plaintiff in turn relies upon *obiter dictum* in the decision of the Court of Appeal in *Kerry County Council v. Liverpool Salvage Association* [1904] 38 I.L.T.R. 7, and the decisions of the Northern Ireland High Court in *Porter v. Scott* [1979] N.I. 6, and the Supreme Court of *Canada in Blank v. Canada* 2006 S.C.C. 39, [2006] 2 S.C.R. 319. It also relies upon the general principles stated by the Supreme Court per Finlay C.J. in *Smurfit Paribas Bank v. AAB Export Finance Limited* [1990] 1 I.R. 469 at p. 477. The plaintiff submits that both *Bord na Mona and Quinlivan* appear to have been decided without reference to Kerry Country Council and *Porter v. Scott* and that *Bord na Mona* was decided before *Smurfit Paribas Bank*.

29. The first question is whether this Court should simply follow the judgments in *Bord na Mona* and *Quinlivan*, and in particular, for reasons I will explain, the latter, or whether, in accordance with the decisions in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] ILRM 50; in *Re Worldport Ireland Ltd. (In Liquidation)* [2005] IEHC 189; *Brady v. DPP* [2010] IEHC 231, and *B.N.J.L. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 74 (all of which relate to the proper approach of the judge of a High Court where he or she is asked not to follow earlier decisions of the High Court) the Court may now reconsider the issue and decline to follow. Clarke J. in the Supreme Court in *Kadri v. The Governor of Wheatfield Prison* [2012] IESC 27, observed that the aforementioned cases correctly state the proper approach of a High Court judge to earlier decisions of the High Court. In *Worldport*, Clarke J. in the High Court, had stated:

> "I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in *Industrial Services*. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority –v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument."

30. Applying the above principles to the submissions in this case, I have decided that as the judgments in *Bord na Mona* and *Quinlivan* were given more than twenty years ago, as there appears to have been an absence of consideration of earlier authorities and of the purpose of litigation privilege as distinct from legal advice privilege, and the very persuasive subsequent authority relied upon by the plaintiffs of *Blank v. Canada*, that the duration of litigation privilege should be reconsidered in the context of the general principles in relation to discovery set out in the Supreme Court decision in Smurfit Paribas and for the reasons set out I should decline to follow the earlier High Court decisions .

31. The analysis, reasoning and conclusion of the Supreme Court of Canada in *Blank* in the lead judgment of Fish J. in relation, in particular, to the distinctions in the purpose of legal advice privilege and litigation privilege appears to me convincing and consistent with the judgments of our Supreme Court in *Smurfit Paribas*. Whilst it is relevant to note that the issue in *Blank* arose in the context of the Canadian Access to Information Act 1985, the issue before the Court was identified by Fish J. at para. 22 as being "whether documents, once subject to the litigation privilege, remain privileged when the litigation ends". The essential rationale of the judgment is the distinction between the policy considerations underlying legal advice privilege or, as sometimes referred to in the judgment, solicitor-client privilege and litigation privilege and the conclusion that they generate different legal consequences. The distinction between legal advice privilege and litigation privilege, as explained by Fish J., appears similar to the two concepts in this jurisdiction. Having considered certain earlier cases in relation to solicitor-client privilege, Fish J. stated at paras. 26 and 27:

> "26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its

vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."

32. The objective of legal advice or solicitor-client privilege being the effective administration of justice or, as put in *Smurfit Paribas per* Finlay C.J. at p. 477 "the public interest in the proper conduct of the administration of justice" is similar in both jurisdictions. As previously stated, it is not in dispute that such privilege of the client is permanent in duration and, unless waived, lasts forever. It is also important to emphasise that such privilege may arise in the context of litigation between a party to the litigation and his solicitor. However, that is not the basis of the claim to privilege for the 1990 report in this application. This judgment is not concerned with a claim to privilege by the defendant upon the basis of the legal advice privilege.

33. Fish J. further expanded upon the differences in purpose and difference in policy considerations driving litigation privilege and legal advice privilege and considered certain American and English authorities stated, commencing at para. 31:

"31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

32 Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a 'zone' or 'chamber' of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

34 The purpose of the litigation privilege, I repeat, is to create a 'zone of privacy' in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have 'terminated', in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case 'on wits borrowed from the adversary', to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

. . .

37 Thus, the principle 'once privileged, always privileged', so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration."

34. There does not appear to have been any relatively recent consideration in this jurisdiction (or, it would seem, in England) of the purpose of or underlying policy driving litigation privilege as distinct from legal advice privilege. The objective identified by Fish J. of ensuring "the efficacy of the adversarial process" and permitting parties to prepare their contending positions in private, without fear of premature disclosure, is, in my judgment, consistent with the object and underlying principles as understood in this jurisdiction.

35. The doctrine of "once privileged always privileged" was considered, albeit by way of *obiter* remarks in *Kerry County Council v. Liverpool Salvage Association* [1904] 38 I.L.T.R. 7. In that case, privilege was claimed in relation to documents which came into existence in contemplation of earlier litigation. On the facts, the Court of Appeal held that the documents were not made in anticipation of litigation and, hence, there was no privilege. However, two of the judges went on to consider the continued entitlement to privilege in the second set of proceedings. Fitzgibbon L.J. at p. 7, stated:

"The other argument is that the documents would be privileged in the action by Spillane against the Insurance Company, and therefore privileged in the present action. Assuming that they were so privileged in the former action this is not a case of communication between solicitor and client. The person claiming privilege in the second action must, therefore show some connection between the parties or the subject-matter or both. Here there is no such connection between the two actions.

Holmes L.J. said at p. 7:

Even if the documents were privileged in the action between Spillane and the Insurance Company, here we have an action of the Kerry County Council against the Salvage Association. The doctrine of 'once privileged always privileged' merely applies to communications between solicitor and client on grounds of public policy. It certainly would not extend to all cases, whatever might be the change of subject-mater or of parties."

36. There was consideration of the policy underlying litigation privilege in the High Court of Northern Ireland in *Porter v. Scott* [1979]

N.I. 6, by Kelly J. The defendant in that action for damages for personal injuries sustained in a car accident sought the medical report of the plaintiff which had been obtained in prior criminal injury proceedings which had been settled. Kelly J., having referred to the above *obiter dicta* in *Kerry County Council*, then stated:

> "In my view, the rule 'once privileged always privileged' has a limited application to legal professional privilege. It does apply to what has been called, the strict legal privilege, to lawyer/client communications made for professional purposes. It means that such privilege remains and is maintained in all subsequent legal proceedings notwithstanding the nature of the subject-matter of those proceedings or the parties thereto. It remains until it is waived by the client. The rule however does not seem to have general application to the other kind of legal professional privilege, i.e. to communications made between lawyers and third parties which came into existence after litigation is contemplated or commenced and made for the purpose of such litigation. In such cases no privilege attaches to those communications in subsequent proceedings unless their subject-matter is the same.
>
> There is sound public policy in applying this rule 'once privileged always privileged' to strict legal privilege i.e. lawyer/client communications. What a client reveals to his lawyer for professional purposes should not only be secret but is intended to remain permanently so or at least until the client decides otherwise. To reduce or qualify the permanency of the secret would be to inhibit free and unreserved communication and this is essential to our system of law. The element of permanency does not seem to pervade communications made in contemplation of litigation. Such communications are not generally intended to remain unrevealed - indeed, more often than not it is intended that they should be revealed at the appropriate time in one form or another during the course of legal proceedings. They come into existence for the precise and limited purpose of use in contemplated litigation and I do not see on any grounds of public policy or otherwise why they should remain clothed with privilege when the proceedings for which they were made have been disposed of or abandoned."

37. As appears, this judgment is consistent with the approach of the Supreme Court of Canada in *Blank*.

38. The contrary view that litigation privilege does last forever in this jurisdiction, as stated in the High Court judgments in *Bord na Mona* and *Quinlivan*, is based upon the judgment of the English Court of Appeal in *The Aegis Blaze* [1986] 1 Lloyd's Rep. 203. In that case, a surveyor's report which had been obtained in contemplation of a claim in connection with an incident during a voyage in December 1980, in which cargo on the Aegis Blaze was damaged, was sought to be disclosed in subsequent proceedings relating to a claim for damaged cargo in a voyage in 1981. In the High Court, the judge had followed the views expressed in *Kerry County Council* and refused to allow the claim for privilege, holding that the correct principle was as stated in *Kerry County Council* that "a document does not retain its privilege in subsequent proceedings concerning different parties and subject matters". Parker L.J., who delivered the lead judgment in the Court of Appeal, conducted a detailed analysis of the judgments, both at first instance and on appeal in *Kerry County Council* and their consistency with a number of earlier English decisions and then stated:

> "Those cases - *Calcraft v. Guest, Bullock v. Corry* and *Pearce v. Foster* - appear to me to establish clearly that although the privilege which prevailed in the first action may only be claimed in a subsequent action by the person originally entitled to it or his successor, there is no other requirement such as is advanced here by the respondents.
>
> The matter in the end appears to me to stand thus. Unless the party claiming the privilege or his successor is a party to the subsequent action, no question of a clam to privilege will arise. That is established by *Schneider v. Leigh*. If, however, the party claiming privilege in the second action is the person entitled to privilege in the first action, but there is no connection of subject matter whatever, it is most improbable that the question will arise, for in such circumstances the document will not be relevant and will not therefore be disclosable, and there will therefore be no question of production. If, however, there is a sufficient connection for the document to be relevant, then it is, in my view, right that the party entitled to the privilege should be able to assert it in the second action. I accept, of course, that that may mean that the court trying the second action is deprived of full information, but so would the court have been in the first action, and so also may it be in any case where privilege is asserted.
>
> The rule has been stated time and time again over a very long period, and in my view it would not be right to depart from it now even if we are not bound by authority, and even if we desired to change it. For my part I do not desire to change it. I think it is a correct rule, subject to the qualification of course that the privilege may be waived; and if we were to accept the submissions made on behalf of the respondents, it appears to me that there would arise again and again questions of discovery which would involve the court trying to weigh up, in the case of an individual case and an individual document, whether the public interest that parties may resort to their solicitors and their solicitors may obtain information to enable them to advise on litigation and prepare for cases, which is the basis of the privilege here relied on. Such matters should not be open for dispute in interlocutory applications, and I can see no reason whatever in this case to depart from the general rule.
>
> In my judgment, the learned judge read too much into *Kerry County Council v. Liverpool Salvage Association*, and his judgment must be set aside and the respondents' application for production be dismissed."

39. In the second judgment delivered in *The Aegis Blaze*, Croom-Johnson L.J. took the view that the Court of Appeal was bound by the earlier decision of *Calcraft v. Guest* and that the *Kerry County Council* case was not authority contrary to that judgment.

40. Respectfully, it appears to me that the analysis of Parker L.J. does not distinguish between the policy underlying litigation privilege as distinct from legal advice privilege, as those terms are now understood. Nevertheless, it appears that it remains the position in England and Wales that litigation privilege automatically lasts forever, notwithstanding that there appear to have been some subsequent observations suggesting that the matter might be revisited, see Malek (ed.), *Phipson on Evidence*, 17th ed., (London, 2010) at pp. 655 to 656, paras. 23-29 and 23-30.

41. Similarly, it appears to me that neither in the decision in *Bord na Mona* nor in the *Quinlivan* did the High Court judge consider the objective of or policy underlying litigation privilege. The decision in *Bord na Mona* [1990] 1 I.R. 85 presents a number of difficulties. Costello J. appears from the judgment to have been considering an application to disclose documents which were communications between the plaintiff both in the current and earlier proceedings and a defendant in earlier proceedings which were on a "without prejudice" basis, which gives rise to a different form of privilege *i.e.* against being referred to in evidence or before the Court. Hence, the documents in question were not, in the earlier proceedings, subject to litigation privilege which is at issue in these proceedings. Nevertheless, Costello J. did cite with approval from the judgment of Parker L.J. in the *Aegis Blaze* which relates to litigation privilege. The principle, as stated by Parker L.J. set out above was simply cited by Costello J. with approval at pp. 88 to 89 and applied.

42. In the subsequent decision of Barron J. in *Quinlivan* (Unreported, High Court, Barron J., 29th July, 1992), the application did relate to the disclosure of a document in respect of which litigation privilege existed in the first set of proceedings. The document was a medical report obtained by the plaintiff in relation to injuries for the purpose of an earlier action. Barron J. referred to the approval by Costello J. of the decision in *The Aegis Blaze* and identified that "the question was whether the earlier report was discoverable in the latter proceedings" and stated that "it was held in that case that once a document was privileged it remained privileged". He then stated:

> "The real issue in this case arises from the desire of the Defendants to be in as good a position as they can as regards their state of knowledge of the Plaintiff's injuries sustained in the first action and how these proceeded. Clearly as they claim the information is relevant. Equally clearly it seems to me that these reports were privileged and that it would be to the Plaintiff's detriment and contrary to the principles from which the privilege was granted in the first place to allow these reports now to be seen by the Defendants. This is not to say that the information contained in the reports may not perhaps be capable of being obtained by the Defendants by other procedures."

43. Whilst Barron J. expressed the view that the disclosure of the medical reports in the second set of proceedings would have been "contrary to the principles from which the privilege was granted in the first place", he does not examine or identify the principles according to which the medical reports were privileged in the first set of proceedings which can only have been litigation rather than legal advice privilege.

44. It is relevant to note that the judgment in *Quinlivan* was given prior to the changes in disclosure rules in personal injuries actions brought about by s. 45 of the Court and Court Officers Act 1995, and the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statement) 1998 (S.I. No. 391 of 1998). In accordance with these rules, the disclosure of documents otherwise entitled to litigation privilege occurs prior to the trial of the action. Similarly, in litigation conducted in accordance with the Commercial List rules and other case management in the High Court, witness statements and expert reports, otherwise entitled to litigation privilege, are now routinely disclosed in advance of the trial. Further, in all litigation, documents which may have properly been the subject of litigation privilege may be disclosed, not just to the other party but put into the public arena in the course of a trial. Once this is done, the privilege against disclosure probably comes to an end. These changes underline developments in the approach to disclosure for the fair but, perhaps, more efficient administration of justice in the adversarial system.

45. In *Smurfit Paribas* [1990] 1 I.R. 469, the Supreme Court was not considering a claim to privilege by reason of litigation, but rather, a claim to communications between a client and his lawyer for the purposes of obtaining legal assistance where litigation was not contemplated. The issue was whether such privilege only related to communications for the purposes of obtaining legal advice or also included communications for the purposes of obtaining legal assistance. The principles set out must be considered in that context. Nevertheless, they are relevant to a consideration of the proper limits of any privilege claimed in proceedings. Finlay C.J., who delivered the majority judgment, stated at p. 477:

> "The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view, only be granted by the courts in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts."

46. Applying the principles set out above to litigation privilege, it appears to me that the objective of litigation privilege, which is "in the public interest in the proper conduct of the administration of justice", is the creation of what has been referred to as a "zone of privacy" in the interests of the efficacy of the adversarial system to permit a party in litigation to prepare its position without adversarial interference and without fear of premature disclosure. In current litigation procedures, there may come a time in advance of the actual trial where disclosure is required. In other instances, disclosure may not occur in the course of the litigation *e.g.* if the action settles prior to trial. However, as the objective purpose is to give a party the opportunity to properly prepare its case without premature disclosure or interference from the opposing party, it appears to me that such objective purpose does not require such privilege to automatically continue beyond the final determination of either that litigation or, as has been identified by the Supreme Court of Canada in *Blank*, closely related litigation. Where the second proceedings are not closely related to the first proceedings, there is no objective of the proper conduct of the administration of justice which can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.

47. It is important to emphasise that this conclusion only applies to the disclosure of documents where the claim to privilege is made upon the basis of litigation privilege and not legal advice privilege. Communications between a client and his/her lawyer in the course of, or, in anticipation of litigation may for the most part benefit from legal advice privilege. The boundaries are not for consideration on the facts herein. No claim, based upon legal advice privilege, was made, correctly to the 1990 report which is a factual report from the Station Manager or its covering note. Where the client is corporate, it appears necessary to consider whether the individual making the communication is a person engaged or employed to obtain or receive legal advice on behalf of the client. See McGrath, *Evidence*, 1st ed., (Dublin, 2005), at para. 10-19. A Station Manager does not *prima facie* fall into such a category of employee.

48. My conclusion is that the defendant is not automatically entitled in these proceedings to assert privilege for the 1990 Report by reason of its entitlement to have claimed privilege over it in earlier proceedings relating to the 1990 flood. Further, on the evidence adduced, there is no substantive or close connection between the plaintiff's claim in these proceedings arising out of the 2009 flood and Mr. Scully's claim and other claims arising out of the 1990 flood which entitles the defendant to claim privilege in these proceedings for the 1990 report. Hence the defendant is obliged to produce same for inspection.

Relief

> (1) The plaintiff is entitled to the order for inspection sought at paragraph 1 of its Notice of Motion dated 29th November, 2013.
>
> (2) The defendant's Notice of Motion dated 4th December, 2013 is dismissed.