THE HIGH COURT

COMMERCIAL

Record No. 2017/10124P

BETWEEN:

KELLAND HOMES LIMITED

PLAINTIFF

AND

BALLYTHERM LIMITED

AND

CLONDALKIN BUILDERS PROVIDERS LIMITED

JAMES MCMCAHON (DUBLIN) LIMITED

AND

COVESTRO B.V.

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on 10th day of May, 2019

1. This judgment relates to an application by the First Named Defendant ("Ballytherm") for an order pursuant to Order 31, rule 18 of the Rules of the Superior Courts, requiring the Fourth Named Defendant ("Covestro") to produce for inspection eight emails in respect of which the Covestro asserts a claim of litigation privilege. The emails are listed in the revised Privilege Schedule, Second Part to the Affidavit of Discovery sworn on behalf of Covestro by Mr. Frank Schaefer on 24 November, 2018. Covestro has refused to disclose the emails and contends that same came into existence in contemplation of litigation.

2. The action is listed for hearing on 21 May, 2018.

Background

3. The Plaintiff, ("Kelland Homes"), is the developer of Elder Heath, a residential development at Kiltipper, Tallaght, Dublin 24. Ballytherm is the manufacturer of an insulation product, referred to hereinafter as the "Ballytherm insulation", which was used by the Plaintiff in the Elder Heath Development. The Second ("Clondalkin Builders") and Third Named Defendants ("James McMahon") are suppliers of building products to the construction industry and were responsible for selling insulation to Kelland Homes. Covestro B.V., is a Dutch company, which supplied Ballytherm with a pre-mixed foam system containing a chemical referred to as a polyol blend. Prior to 2014 the polyol was Baymer PIR3003. In 2014 it was replaced by Baymer PIR3009. Ballytherm used this foam system in the manufacture of its insulation panels.

4. In or about September, 2016, Kelland Homes became aware that some of the houses were experiencing settlement or sinking of the ground floor slabs in the houses resulting in the floors sinking below the level of the skirting boards. Kelland Homes claims that this sinking was due to defects in the Ballytherm insulation. Some of the affected houses were already occupied, and Kelland Homes undertook a remediation scheme. Kelland Homes claims that the total cost of this scheme was in the order of €2.2 million and that its costs and losses in this regard continue to rise. It further claims that Ballytherm used a chemical supplied to it by Covestro, Baymer PIR3009, which caused and/or contributed to the failure of the Ballytherm insulation.

5. Ballytherm claims that any defects which may have been present in the Ballytherm insulation was caused by defects in Baymer PIR3009, for which Covestro is liable. Covestro denies this claim and asserts that any loss or damage sustained by Kelland Homes was caused by Ballytherm. Ballytherm, Clondalkin Builders and James McMahon have served a Notice of Indemnity and Contribution on Covestro.

6. Kelland Homes claims that in March, 2017, Ballytherm agreed to meet the cost of the remediation programme and seeks an Order for specific performance of that agreement. In the alternative, Kelland Homes claims against all the defendants damages for negligence, breach of duty, including breach of statutory duty, nuisance, breach of warranty and breach of contract.

7. Kelland Homes further claims that both Ballytherm and Covestro are "producers" of the Ballytherm insulation within the meaning of the Liability for Defective Products Act 1991, as amended, Ballytherm, as the manufacturer of the Ballytherm insulation, and Covestro, as the manufacturer of a component part of the Ballytherm insulation.

8. The history of the matter and of the proceedings are set out fully in a judgment I delivered on 31 January, 2019 in respect of certain motions for further and better discovery and for supplemental discovery. It is not necessary to repeat that history here.

9. On 23 July, 2018, the First, Second and Third Defendants, all represented by Messrs Good & Murray Smith, each served a Notice of Indemnity and Contribution on Covestro.

Discovery

10. Discovery was exchanged between the parties on a voluntary basis by 26, October, 2018. On 13th November, 2018, Ballytherm's solicitors, Messrs. Good and Murray Smith wrote to Covestro's solicitors, Messrs. Kennedys identifying what they claimed were deficiencies in the First Schedule, Second Part (privileged section) of the Affidavit of Discovery sworn by Mr. Frank Schaefer, Managing Director of Covestro B.V. In response, a revised privilege schedule was delivered by Covestro on 30 November, 2018. It listed, inter alia, the eight emails the subject of this motion brought by the First Defendant, those being:

a) Email from Rob Groot Rouwen to Sabrina Hessel dated 8/8/2017 DOC-000005210,

b) Email from Rob Groot Rouwen to Sabrina Hessel dated 8/8/2017 DOC-000005223,

c) Email from Rob Groot Rouwen to Sabrina Hessel dated 8/8/2017 DOC-000005236,

d) Email from Rob Groot Rouwen to Sabrina Hessel dated 8/8/2017 DOC-000005244,

e) Email from Rob Groot Rouwen to Sabrina Hessel dated 8/8/2017 DOC-000005252,

f) Email from Rob Groot Rouwen to Sabrina Hessel dated 8/8/2017 DOC-000005255,

g) Email from Rob Groot Rouwen to mtjallema@cl-nl.com DOC-000005358 (dated 21/8/2017),

h) Email from Rob Groot Rouwen to mtjallema@cl-nl.com DOC-000005400 (dated 21/8/2017).

11. Mr. Kennedy avers at paragraph 22 of his affidavit that the seventh and eighth documents are in fact the same email. Thus, only seven documents are at issue in this discovery motion, at most, because some of the first six are also duplicates.

12. Of the eight emails the subject of this motion, the first six were sent within a timeframe of eight minutes on 8 August, 2018 between Ms. Sabrina Hessel and Mr. Rob Groot Rouwen. Ms. Hessel is the Corporate Insurance Expert with Covestro A.G. and the point of contact between Covestro and its insurers, HDI Global. Mr. Groot Rouwen is Technical Sales Manager at Covestro and with HDI's insurance advisers, Cunningham Lindsey Nederland B.V.

13. The remaining two emails dated 21 August, 2017, are from Mr. Groot Rouwen to Mr. Marten Tjallema. Mr. Tjallema, is a Major and Complex Loss Expert with Cunningham Lindsey Nederland B.V., and was instructed by HDI Global to investigate the matter.

14. In the affidavit grounding this application, Mr. John Durcan says that because Covestro did not put a "litigation hold" in place until 12 December, 2017, it cannot now claim that the litigation was in contemplation at the time of the emails at issue, i.e. 8 and 21 August, 2017. In Covestro's response in correspondence it said firstly that it was maintaining that privilege was correctly asserted, and secondly that certain of the documents sought were not responsive to the categories of discovery requested.

15. Mr. Durcan's affidavit continues by referring to further correspondence in which he has sought explanations as to

(a) The basis on which Covestro contends that there was a reasonable apprehension of litigation on 8 and 21 August, 2017, notwithstanding that the litigation hold was not put in place until 12 December, 2017; and

(b) The basis on which Covestro contends that the emails were sent for the dominant purpose of apprehended litigation.

16. Mr. Hugh Kennedy, solicitor, swore an affidavit in reply He refers to the various communications before August 2017 based on which he states that all parties knew by that time that litigation was inevitable. In particular, he refers to emails of 2 June, 2017, in which Mr. Goldsbury, Ballytherm's loss adjuster and insurance agent, claimed compensation on behalf of his client and expressly threatened litigation. He says that in that email Mr. Goldsbury advised Covestro to contact its insurers "for the purpose of the litigation".

17. In relation to the email of 8 August, 2017, Mr. Kennedy says that

"As the Court will see from examining the email exchanges and that I am so advised by Mr. Groot Rouwen these emails were clearly created not only in anticipation of litigation but for the dominant purpose of use in litigation to both enable legal advice to be sought or given and to seek and obtain evidence and information to be used in or in connection with the litigation and to provide any information to Covestro's insurers directly relating to matters arising in the litigation. Inter alia that emails demonstrate Mr. Groot Rouwen providing a background to the events leading up to the claim from Ballytherm for compensation along with a discussion of the arguments being relied on by Ballytherm in support of its case against Covestro." [emphasis added]

18. In relation to the email on 21 August, 2017, Mr. Kennedy says at paragraph 22:

"Marten Tjallema was appointed by Covestro's insurers and the meeting they had(apparently on 16 August, 2017) which is referred to in the email was in the context of the litigation having been threatened by Mr. Goldsbury on behalf of Ballytherm which prompted Covestro to notify its insurers who in turn appointed Mr. Tjallema. The email sends Mr. Tjallema information that he requested during that meeting and as appears from those attachments, inter alia, some are labelled "Claims list", "Re Kelland Homes", "FW: Ballytherm Corporation", "Compensation Draft", "Chronological overview". I am advised by Mr. Groot Rouwen those emails were created not only in anticipation of litigation but for the dominant purpose of enabling advice to be sought or given and to seek and obtain evidence and information to be used in or in connection with the litgation."

19. Finally, in paragraph 24, Mr. Kennedy says:

"… there can be little doubt that the proximity of these emails to the time when Ballytherm commenced seeking compensation from Covestro and threatening litigation, that those documents were created in anticipation of and for the dominant purpose of anticipated litigation. I say and believe that the genesis of the documentation in issue arises directly out of the claims for compensation and threatened litigation by Ballytherm in June and July s2017, which were articulated by its own insurance agent and loss adjustor, Mr. Tony Goldsbury."

Litigation privilege

20. The principles concerning litigation privilege set out by the House of Lords in *Waugh v. The British Railways Board* [1980] A.C. 521 were adopted by O'Hanlon J. in *Silverhill Duckling Limited v. Minister for Agriculture* [1987] I.R. 289. In that case, O'Hanlon J summarised the test applicable as follows:-

"…that the dominant purpose for the document coming into existence in the first place should have been the purpose of preparing for litigation then apprehended or threatened."

21. The onus of proving that documents in respect of which privilege is claimed have come into existence for the dominant purpose of preparing for litigation rests on the party asserting it. This onus will not be discharged by a bald assertion in an affidavit that litigation is the dominant purpose for the creation of a document. The court must apply an objective test. This was made clear by Finlay Geoghegan J. in Woori Bank v. KDB Ireland Limited [2005] IEHC 451 at p 6 where she said:-

> *"I accept the submission that the decision of the Supreme Court in Gallagher v. Stanley [1998] 2 IR 267 means that the purpose of the document is a matter for objective determination by the court in all the circumstances and does not only depend on the motivation of the person who caused the document to be created. Further …the court should not make a finding that the dominant purpose of the document is litigation based upon a bald assertion, even on affidavit, of such motivation or intention [on the part] of the creator of the document".*

This approach has been reiterated on numerous occasions since, most recently in the High Court in *Artisan Glass Studio Ltd v The Liffey Trust Ltd* [2018] IEHC 278 and by the Court of Appeal in *Colston v Dunnes Stores* (2019) IECA 59.

22. In *Colston v Dunnes Stores*, Ms. Justice Irvine summarised the case law, albeit in relation to what she describes as cases where when a challenge is made to a claim of privilege over documents which predates either notification of an intended claim or the commencement of proceedings as follows:-

> *(1) "Every application for inspection of documents in respect of which litigation privilege is claimed, must be decided on its own facts.*
>
> *(2) The Court must be satisfied, on the evidence, that the party claiming privilege has demonstrated that they reasonably apprehended litigation when the documents were created. This is an objective test and is one to be decided on the basis of the evidence.*
>
> *(3) If the documents in respect of which principle is claimed were created for more than one purpose, the Court must be satisfied that the evidence demonstrates that apprehended litigation was the dominant purpose for the creation of the documents."*

23. The Court must be satisfied that the dominant purpose of the creation of the documents in dispute was pending or threatened litigation. If there were other purposes for the creation of the document and if it is unclear if litigation was the dominant purpose then the documents may not attract privilege.

24. In determining the "dominant purpose" of the eight emails at issue, the observations of Lord Wilberforce in *Waugh v. British Railways Board* [1980] AC 521 are relevant:-

> *"It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in Order that the Defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle, I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation…"*

25. In *Artisan Glass Studio Limited v The Liffey Trust Limited & Ors* [2018] IEHC 278 Mr. Justice McDonald stated:-

> *"The fact that litigation was apprehended at the time of creation of these reports is not of itself determinative that they are protected by litigation privilege. While the apprehension of litigation is an essential element of the requirements to establish litigation privilege, it is not the end of the analysis if it transpires that the reports in question were created for more than one purpose."*

26. Irvine J. made the observation in *Colston v Dunnes Stores* [at par. 46] that the absence of proof of an alternative purpose to the documents does not cure a weak argument that the documents were created for the dominant purpose of reasonably apprehended litigation:-

> *"More importantly, if the affidavits submitted in order to demonstrate the requisite motivation and/or intention do not discharge the burden of proof which is upon the party claiming privilege, then the absence of other concrete purposes or intentions does not cure this shortfall in the appellant's case. In other words, if a party cannot establish that the purpose of the documentation is litigation or that they were created in apprehension of litigation, it is irrelevant that there is no evidence establishing other definitive motives and intentions. A weak evidential basis for the claim of privilege, so minimal that it cannot be challenged, will not suffice to establish the claim."*

Was the litigation reasonably apprehended at the time of the creation of the eight emails?

27. The first question to be considered is whether litigation could be said to be reasonably apprehended at the time of the creation of the documents in question.

28. Covestro was first put on notice by email from Ballytherm dated 8 February, 2017, that a letter of claim had issued from Kelland Homes and that Ballytherm were connecting the problems that had arisen to Baymer PIR3009 supplied to it by Covestro.

29. Mr. Tony Goldsbury, Ballytherm's insurance agent and loss adjuster, informed Mr. Groot Rouwen of Covestro on 21 June, 2017, in an email titled "*Ballytherm Ireland Ltd – Mayer/Covestro – Defective Polyol caused foam insulation to shrink and caused property damage*", that he was investigating several property damage claims relating to policies of insurance that were issued to Ballytherm. Mr Goldsbury stated:-

> *"We write to put you on notice that on behalf of Ballytherm and their underwriters we must pursue Bayer/Covestro for all losses (both insured and uninsured) which Ballytherm has sustained and continues to sustain. We presume you will wish to involve your insurers in this matter. The basis of our action is scientific analysis of Baymer PIR 3009 which your company supplied to Ballytherm between November 2014 and February 2016."*

Mr. Goldsbury details nine categories of compensation which Ballytherm are seeking to pursue against Covestro. He further states that as a demonstration of good faith a payment on account of €5 million would be warranted on behalf of Covestro. Mr Goldsbury states that even upon such a payment by Covestro:-

> *"….we must reserve the right to employ appropriate tactics in the best interests of our principals. Such tactics could include inviting litigation in Ireland from one of the claimants with by arrangement, Ballytherm and Covestro as co-defendant to the litigation. You will appreciate that we simply need to establish a res judicata in single case in Order to establish a good cause of action, with other successful outcomes to follow. In saying this, we strive at all times to maintain matters on a reasonable level and we seek to avoid the commensurate high legal costs which accompany this type of litigation.*
>
> *We expect a speedy response from you and/or your insurers. We certainly expect to hear from you within the next 10 days.*
>
> *Yours truly*
>
> *Tony Goldsbury"*

30. On 26 July, 2017, Covestro notified its insurer, HDI Global, of the claim relating to the shrinkage of insulation manufactured by Ballytherm using PIR 3009. On 26 July, 2017, Mr Goldsbury emailed Alix Uitham of Covestro for an address *"for the purposes of the litigation and the services of the litigation papers"* for

> *"a claim in the region of £200,000 in relation to an 8000ft² luxury home in the English Midlands … Therefore, it seems the first litigation we will face will be in England. Presumably neither Covestro nor your insurers will have any objection if your UK office is named for the purposes of the litigation and the service of the litigation papers." [emphasis added].*

In my judgment of 31 January, 2019, I made no determination as to when precisely litigation was first contemplated by Covestro. I ordered that this be addressed in a supplemental affidavit of Mr. Schaefer, to be delivered by 25 April, 2019. This was done for the purpose of explaining the lateness of the internal litigation hold which was only implemented by Covestro on 12 December, 2017, the court having by then noted that it cannot have been the case that litigation was not contemplated earlier than 12 December, 2017. See paragraphs 88 and 89 of the judgment of this Court delivered on 31 January, 2019.

31. In paragraph 15 of his affidavit in this application, Mr Kennedy, on behalf of Covestro, acknowledges that with the benefit of hindsight, the internal litigation should have been put in place prior to this date. It has not been previously suggested at the hearing of the motion, that litigation was not in contemplation at a much earlier date than that.

32. In light of the emails and communications referred to above I accept that the emails the subject of this application were sent after a date when litigation was apprehended.

The dominant purpose

33. Of central importance in establishing the purpose or purposes of the emails the subject of the application is the email issued on 31 July, 2017, by Ms. Hessel to Mr. Uitham where she says:

> *"As already discussed in the past HDI is asking for more background information regarding EUR 500.000 offer as [sic] gesture of goodwill. In order to fulfil HDI's requirement we would like to ask you to provide us a summary about topic of discussion (e.g. reclamation), timeline for discussion, conclusion of discussion and reason for offered goodwill payment … we would like to provide HDI Global wished information as soon as possible. "*

On the same day, Mr. Uitham responded stating that Mr. Groot Rouwen was on holiday until 7 August, 2017. He said that Mr. Groot Rouwen "is fully informed about the case and he also communicated about the case with Ballytherm."

34. It is clear from this communication that the principal matter about which Ms. Hessel is seeking information to respond to HDI's enquiries is the "EUR 500,000 offer as gesture of goodwill." This is a reference to an open offer by way of goodwill gesture previously made by Covestro to Ballytherm in the context of their longstanding commercial relationship. Information concerning the making of such an offer, particularly if made without the prior knowledge or agreement of insurers, would undoubtedly be relevant to inform HDI in any decision it was required to makes as to its position regarding coverage of claims arising from the matter. But that fact, in the absence of further evidence from any of the authors of these emails, would not of itself mean that the purpose extended also to the substance of such claims, let alone prove that the dominant intention was the defence of litigation, albeit already apprehended litigation.

35. On 1 August, 2017, HDI emailed Ballytherm's loss adjustor, Mr. Goldsbury, to confirm that HDI was acting as liability insurer of Covestro "*under reservation of rights*". This disclaimer indicates that HDI had not confirmed cover in relation to the Ballytherm claim. On 8 August, 2017, the six emails partly the subject of this motion were created between Mr. Groot Rouwen and Ms. Hessel. Mr Kennedy avers that this exchange concerned the provision of the information which Ms. Hessel sought on 31 July, 2017.

36. Mr. Schaefer, at paragraph 9 of his Affidavit of Discovery states that Covestro's claim of privilege rests on the fact that:-

> *"… these documents consist only of documents or of correspondence passing between the Fourth Named Defendant and its solicitors and counsel, documents which reveal the contents of legal advice given to the Fourth Named Defendants, correspondence of a confidential nature written after litigation was threated, contemplated, apprehended or commenced, documents, memoranda, accounts and reports relating to the subject matter of the litigation and prepared for the purposes thereof, all of which documentation came into existence in anticipation of and for the purposes of litigation or after the commencement thereof, which documents are subject to legal advice privilege and litigation privilege being asserted on behalf of the Fourth Defendant."*

37. This is the standard form of averment in a discovery affidavit and of itself is unobjectionable. However, in a case where that averment is challenged such a general statement cannot of itself be sufficient to discharge the burden of proof which the party asserting litigation privilege must meet. In this case, no evidence of any Covestro employee detailing the dominant purpose of the relevant emails has been put before the Court. Mr. Kennedy, which falls short of what is required as described by McDonald J in *Artisan Glass Studio Limited* as an affidavit "*explaining the nature, genesis and purpose of the documents in issue."*

38. Mr. Kennedy in paragraph 21 of his affidavit avers that the six emails dated 8 August, 2017, were created for the following reasons:-

> (a) To enable legal advice to be sought or given,
>
> (b) To obtain evidence/information to be used in or in connection with the litigation,
>
> (c) To provide information to Covestro's insurers directly relating to matters arising in the litigation and,
>
> (d) To provide a background to the events leading up to the claim by Ballytherm for compensation along with a discussion of the arguments being relied on by Ballytherm in support of its case against Covestro.

39. On 1 August, 2017, HDI emailed Mr. Goldsbury, Ballytherm's loss adjuster, confirming that it was acting as liability insurer for Covestro "under reservation of all rights". From this it is clear that HDI had not, at that time confirmed cover to Covestro, and that its investigation of the matter for that purpose, at least, was pending.

40. The Court has been provided with the emails of 8 August, 2017. It is clear that they constitute the provision of the information sought by HDI which caused Ms. Hessel to send her email of 31 July, 2017, the principle – and dominant – purpose of which was to enquire about the compensation offer previously made.

41. In relation to the email from Mr. Groot Rouwen to Mr. Tjallema dated 21 August, 2017, Mr. Kennedy states in paragraph 22 of his affidavit that he has been advised by Mr. Groot Rouwen that these emails were created

> *"for the dominant purpose of enabling advice to be sought or given and to seek and obtain evidence and information to be used in or in connection with the litigation."*

He further states that the email was a follow up on a meeting between Mr. Groot Rouwen and Mr. Tjallema regarding the litigation which had been threatened on behalf of Ballytherm.

42. At paragraph 31, Mr. Kennedy states that the email dated 21 August, 2017, was

> *"… created following Ballytherm and Mr. Goldsbury seeking monies from Covestro in order to compensate Ballytherm's customers arising out of the alleged damage caused to their dwellings by Ballytherm's products and Ballytherm's allegation against Covestro by blaming Chemical PIR 3009 for the damage caused to Ballytherm's customers."*

43. On 25 September, 2017, Mr. Tjallema made a Preliminary Report regarding the matter. In it the insured is named as Covestro and the "claimant" is named as Ballytherm. He refers to a visit he made to "the location on 16 August, 2017", and to discussions had with employees of Covestro.

He refers to an "estimated loss: €5m" and states that his instructions given on 27 August, 2017, were "to investigate and assess the aforementioned loss". This Report was exhibited in proceedings which Covestro commenced against Ballytherm in the Netherlands. It states that it "should be considered as confidential (because of commercial and technical reasons)" but it has not been said that it attracts legal privilege or litigation privilege.

The report examines broad history of the matter and considers a range of issues such as whether the relevant composition or receipt of PIR3009 does not result in adequate PIR foam, whether the delivered product accords to the "receipt", whether storage location was adequate, or whether panels may have been misused on location or applied "in a wrong way". It states that the author has "not identified a reliable cause yet". It contains also a discussion as to the "extent of the damage" and identifies further investigation which could be performed.

44. It is clear that this Report was made after Mr. Tjallema had available to him replies to the information he had requested which caused Ms. Hessel to write her email of 31 July, 2017 and which caused Mr. Groot Rouwen to send his emails of 8 and 21 August, 2017. Apart from the very general and excessively broad claim as to a litigation purpose made by Mr. Schaefer in the discovery affidavit, and now made by Mr. Kennedy, the only direct evidence before this court as to the purpose of those emails is Ms. Hessel's email of 31 July, 2017 which says that the enquiry relates to the offer of compensation previously made.

45. The Court has seen the emails the subject of this application and is satisfied that they form part of this line of enquiry. In paragraph 19 of his replying affidavit, Mr. Kennedy refers to the "extremely close proximity" between the emails threatening litigation on the one hand, and the documents being challenged by the First, Second and Third Named Defendants. At paragraph 3.4 of Covestro's outline legal submissions, it states that the same documents were "created on foot of Mr. Goldsbury's emails and within a very short period of time thereafter." Close proximity of itself is not sufficient to satisfy either limb of the test.

46. It may well have been in the minds of both Covestro and even HDI that litigation would follow and they may even have required information in that context. However, it is clear that Sabrina Hessel's request related to HDI's request for information about the compensation offer already made. If both purposes underlay the request for information, that would not be surprising, but no direct evidence has been offered as to the dominant purpose.

47. An affidavit was sworn in relation to this application by Mr. Ivan Durcan, also a partner in Good & Murry smith, the solicitor for the First, Second and Third Named Defendants. Mr. Durcan refers to his over 35 years of experience in insurance litigation, with particular focus on defending claims on the instructions of insurers and self-insured entities. Covestro's counsel objected that Mr. Durcan is not to be regarded as an expert for the purpose of these proceedings, being a solicitor on record for Ballytherm. That is a valid objection in that, whilst Mr. Durcan is undoubtedly a most experienced of solicitors in his field and an expert in such matters, he cannot be an expert for Ballytherm in these proceedings. I therefore treat Mr. Durcan's affidavit as more in the nature of a submission regarding the procedure of insurers, and the approach they take to notified claims and investigations they undertake before deciding to confirm or decline cover.

48. Mr. Durcan says that it is standard practice for an insurer to deal with the insured on a reservation of rights basis while an investigation is taking place. This Court has not seen the terms of Covestro's insurance policy, but it is a matter of record that on 1 August, 2017 HDI emailed Ballytherm's loss adjuster stating that it acts as liability insurer to Covestro "under reservation of rights". It is clear that the emails which followed were exchanged in the context of HDI undertaking this investigation and having instructed Mr. Tjallema of Cunningham Lindsey for that purpose.

49. Whilst it might be said that an investigation of this nature concerns inevitably the potential for claims arising from the natter being reported, the question of whether the insurer will confirm coverage of their claims is a discrete question from the consideration of the merits or otherwise of the potential claim(s) and of defences thereto. The facts concerning any action taken or admissions made by the insured, such as open offers of settlement even on a goodwill basis, will inform such a decision. It's clear that Ms. Hessel's enquiry was for information concerning those actions.

50. It was submitted that by disclosing emails in the same sequence of correspondence as those in respect of which privilege is now claimed, Covestro has effectively waived privilege over this entire exchange of communications, or that it would be unjust were Covestro to be permitted to select particular emails which should otherwise be disclosed as part of or evidencing this "conversation" between Covestro and its insurers. Since I have concluded that Covestro have failed to discharge the onus of proof as to the dominant intention of the emails concerned I am not required to decide this point. Nonetheless, it seems to me that there is force in this submission and to permit Covestro to maintain its claim of privilege over these selected emails would be unjust in all the circumstances.

51. I find that Covestro have failed to discharge the onus of proving that the dominant intention of the emails the subject of this application was for apprehended litigation and the claim of privilege fails. I shall make an order in the terms of the Notice of Motion.