THE HIGH COURT

Record No. 2008 No. 6253P

BEWTEEN:

ARTISAN GLASS STUDIO LIMITED

Plaintiff

-and-

THE LIFFEY TRUST LIMITED and

SLOVAK LIMITED

(SUBSTITUTED BY AVIVA LIMITED) and

JIMMY ENNIS ENGINEERING LIMITED

Defendants

Judgment of Mr. Justice Denis McDonald delivered on 17 May, 2018

1. In the motion before the Court, the Plaintiff challenges the claim to privilege asserted by the second named Defendant over two documents described in the Second Part of the First Schedule to the Affidavit of Discovery sworn on behalf of the second named Defendant as follows:-

(a) "*Burgoynes' record of inspection – 15th November, 2002 – 2 pages*"; and

(b) "*Burgoynes' Report – 20th March, 2003 – 14 pages, with diagrams, floor plans, Fire Brigade Report and photographs".*

2. The basis on which privilege is claimed over these documents (as set out in the Affidavit of Discovery) is that the documents came into existence in contemplation of litigation. Ms. Sandra Murphy (the deponent of the Affidavit of Discovery) avers that Aviva Insurance Limited (formerly Hibernian Insurance) first contemplated such litigation on 6 November, 2002. Thus, the sub-species of privilege relied upon is what is frequently called litigation privilege - or "*privilege in aid of litigation*".

3. The parties are agreed that – based on the case law - the following questions and considerations arise on an application of this kind, namely:-

(a) Whether litigation was reasonably apprehended at the time the documents in question were brought into being;

(b) Whether the documents in question were brought into being for the purpose of that litigation;

(c) If the documents were created for more than one purpose, the documents will be protected by litigation privilege in the event that the litigation was the dominant purpose;

(d) The party claiming privilege has the onus of proving that the documents are protected by privilege.

Was litigation reasonably apprehended at the time of creation of the report and the record of inspection?

4. The first question that requires to be considered is whether litigation could be said to be reasonably apprehended at the time of creation of the documents in question. In order to address this question, it is necessary to consider the relevant facts which emerge from the pleadings and affidavits before the court.

5. On 2 November, 2002, a fire broke out at premises owned by the first named Defendant ("the Liffey Trust Limited") at 117-126 Upper Sherriff Street, Dublin 1. Both Slovak Limited (which was originally named as second Defendant to these proceedings) and the Plaintiff had units at that premises. I should explain that from photographs of the premises which I have seen (attached to the Burgoynes' Report), the premises appeared to comprise a relatively extensive Victorian warehouse which had been converted and subdivided into a number of units. The Plaintiff was the occupier of Unit 44, while Slovak Limited was the occupier of Unit 42 from where it operated a bakery with ovens in 24 hour use. The Plaintiff alleges that the fire started in Slovak's unit, and escaped to the Plaintiff's premises causing substantial damage. The particulars of wrongdoing alleged in the Statement of Claim include the following allegations:-

(a) Slovak Limited caused or permitted an oven in the bakery to go on fire;

(b) Slovak allowed or permitted an unsafe installation of a gas oven, canopy and flue in its premises;

(c) Slovak Limited failed to properly inspect the flue;

(d) Slovak Limited caused or allowed or permitted the build-up of combustible material on the inside of the flue;

(e) The gas oven was installed in an unsuitable location in Unit 42 where it required a long section of horizontal flue to discharge the products of combustion of the gas heating the oven and the steam and oil fumes generated by the baking process in the oven and where it was foreseeable that there would be a build-up of combustible material in the flue that presented a danger and risk of fire in the flue.

6. It will be seen from the particulars of wrongdoing that there is a significant focus on the gas oven and associated flues situated on the premises occupied by Slovak Limited in Unit 42. The order for discovery made by the court on 7 March, 2016 was also similarly focused. It required Aviva to make further and better discovery of the following categories of documents:-

(a) Documentation relating to the inspection of the oven and flue;

(b) All reports compiled on behalf of Slovak Limited and/or Aviva – including the engineer's report in respect of the oven and flue;

(c) All documentation relating to the manufacturer type design and purchase agreement relating to the oven and flue.

7. It appears that the fire damaged a number of units within the Liffey Trust premises. It is clear from the papers which I have seen that both the premises of the Plaintiff and the premises of Slovak Limited were each extensively damaged by the fire. At this point, it is important to note that Slovak Limited had the benefit of fire insurance (with a ceiling on the level of public liability cover of IR£1.3 million) with Hibernian Insurance (now Aviva Insurance). While I have not been provided with a copy of the policy of insurance, it appears from the papers before the court that the cover extended to the damage to the premises of Slovak Limited itself and (in the event that Slovak Limited had liability to any third parties), the cover also extended to such liability (albeit subject to the ceiling on the level of public liability cover mentioned above).

8. According to Mr. Michael Corrigan, solicitor (who swore an affidavit on behalf of the second named Defendant on 31 January, 2018), the insurers for Slovak Limited appointed a firm of independent loss adjusters, Miller Farrell, on 4 November, 2002 to investigate the loss on its behalf. To assist in Miller Farrell's investigation, Burgoynes, consulting scientists and engineers, were also appointed on 4 November, 2002 to conduct forensic enquiries. Mr. Corrigan says that the purpose of the appointment of Burgoynes was "*to obtain clear and specific advices in respect of the cause of the fire and it was immediately clear that such advices would impact on matters of liability*". Mr. Corrigan says that the Burgoynes' report was commissioned as an essential part of Aviva's response to any claim and in preparation of its defence of any litigation, and it was specifically contemplated by Aviva that forensic advice would be essential in defending any litigation.

9. Mr. Corrigan says in paragraph 8 of his affidavit that given the scale of the fire, it was immediately apparent that there was significant third party damage, and it was always contemplated by Aviva that such damage would inevitably result in third party claims. Mr. Corrigan also says that the investigation and report were commissioned so that Aviva could "*if necessary, properly defend itself and its insured against such claims and ensuing litigation".*

10. Mr. Corrigan also draws attention (in paragraph 9 of his affidavit) to the fact that loss adjusters were appointed by a number of third parties. He also says that a number of forensic engineers were engaged by such third parties including Mr. Norman Slack of Manus Coffey & Associates. I should explain in this context that one of the parties who appears to have instructed Mr. Slack was the insurer of the Plaintiff. Extracts from Mr. Slack's report have been exhibited in the affidavit of Mr. Tom O'Regan sworn in support of the Plaintiff's application challenging the claim to privilege over the Burgoynes' Reports.

11. Mr. Corrigan says in paragraph 10 of his affidavit that within "*days of the loss (and well in advance of 15 November, 2002)"*, Aviva had opened two files, namely:-

(a) A specific third party claim file with its own file reference – 856/02/29650; and

(b) A file in relation to the claim registered by Aviva in respect of Slovak's own claim in respect of material damage and business interruption losses.

12. The affidavit does not explain whether the Burgoynes' Report and the Burgoynes' record of inspection were placed on either or both of these files.

13. Mr. Corrigan also explains in paragraph 10 of his affidavit that when Aviva was instructing its loss adjusters, Miller Farrell, it also sought specific advice from Millar Farrell's liability division on the issue of "*liability*" in addition to the normal investigative quantum work one would expect from a firm of loss adjusters. Particular emphasis was placed at the hearing on the fact that (as recorded in paragraph 10 of Mr. Corrigan's affidavit) the Millar Farrell liability division issued a preliminary report on liability dated 7 November, 2002 headed "*Private & Confidential – Privileged made in contemplation of legal proceedings. For insurer's legal advisors only*". There is nothing in the affidavits to suggest that anything similar was endorsed on the Burgoynes' Report and the Burgoynes' record of inspection. I confirm that in fact, no such endorsement appears on either document. For completeness, I should also say that the existence of such an endorsement would not in any event be determinative.

14. The Burgoynes' Report and the Burgoynes' record of inspection were provided to me by the second named Defendant's legal team so that I could inspect them for the purposes of my determination of the Plaintiff's application. It should be noted that it is clear from the Burgoynes' Report of 20 March, 2003 that Burgoynes received their instructions from the loss adjusters (by that time Miller Farrell appears to have changed their name to the name by which they are now known, namely "*OSG*").

15. Mr. Corrigan draws attention in paragraph 12 of his affidavit to the fact that Miller Farrell received correspondence dated 12 November, 2002 from Thornton & Partners acting for other insureds of Aviva/Hibernian and also from Allianz indicating an intention of "*seeking recovery*". The relevant letter has been exhibited by Mr. Corrigan. He also says in paragraph 11 of his affidavit that verbal intimations had been given that claims would be made against the insured and possibly other parties.

16. In paragraph 13 of his affidavit, Mr. Corrigan confirms that his firm was first instructed formally on 16 November, 2002 but that prior to that date, "*I already had had general, informal discussions with both Aviva and Miller Farrell on the issue of the real, (sic) potential for third party claims to be brought and the required investigations to respond to them".*

17. Mr. Corrigan also describes attending a meeting at Aviva's offices on 18 November, 2002 at which a discussion took place about the "*very real potential for such liability claims to be brought*". Mr. Corrigan says that the potential for such claims was then at the "*forefront of all our concerns, particularly in circumstances in which the level of public liability cover provided by Aviva to its insured Slovak …was only €1.3 million whereas it was believed that the total level of claims would well exceed that sum*". In those circumstances, Mr. Corrigan says that there was a concern that Slovak should obtain its own legal advice and guidance in relation to the implications of those third party liability claims. Amorys were appointed for that purpose.

18. On 5 December, 2002, a letter of claim was received from a firm of solicitors, William Davis & Co. on behalf of an occupier of one of the units in the Centre. Furthermore, on 17 December, 2002, Associated Loss Adjusters Limited acting for the insurers of another unit, wrote to Slovak purporting to hold Slovak responsible for all losses suffered as a result of the fire. Subsequently, on 24 February, 2003, Tom O'Regan & Co., acting on behalf of the Plaintiff, also wrote intimating an intention to pursue a claim against Slovak with respect to the loss and damage sustained by the Plaintiff.

19. Having described each of the matters outlined above, Mr. Corrigan says in paragraph 18 of his affidavit that the chronology and

factual context "*clearly and firmly demonstrate that liability claims arising from the fire on 2 November, 2002 were apprehended from the outset by Aviva and that litigation was contemplated by Aviva and its advisors as early as the 6th of November, 2002. In this regard, the Burgoynes' report was sought specifically in contemplation of litigation and it was always believed that the report would form a fundamental part of the preparation of Aviva's response to and defence of such claims. Burgoynes were retained to provide clear, specific advices to Aviva that would impact on matters of liability and the contemplated litigation and to assist Aviva in defending such litigation, I therefore, say and believe that the dominant purpose for which the Burgoynes' inspection report of 15 November, 2002 and the report of 20 March, 2003 came into being was litigation which was then clearly apprehended*".

20. A further affidavit was sworn on behalf of Aviva by Ms. Sandra Murphy who says that she is a claims executive employed by Aviva and that she has been responsible since July 2008 for the handling of the claim for damages brought by the Plaintiff against Slovak. While Ms. Murphy is obviously not in a position to give contemporaneous evidence of what transpired in 2002 in the immediate aftermath of the fire, she purports to confirm much of the information contained in Mr. Corrigan's affidavit. In particular, she says in paragraph 10 that she "*can also confirm that Aviva opened a third party claim file within days of the loss (and well in advance of 15 November, 2002) under a specific claim reference – 856/02/29650. This was in addition to the claim registered by it in respect of its own insured's (Slovak's) material damage and business interruption losses. This file was opened because Aviva expected third party claims and recognised the possibility of proceedings being brought by third party claimants"*. I am not sure what her source of knowledge is in relation to either of these averments, and her affidavit does not assist in identifying the precise date when the liability file was actually opened. In circumstances where Ms. Murphy does not give a precise date, it would appear likely that there must be nothing on the face of the file to indicate the precise date when this file was opened. That being so, I am not sure how Ms. Murphy (who had no involvement in the case prior to 2008) can say that the file was opened within days of the loss and well in advance of 15 November, 2002. She does not explain her source of knowledge for this averment or explain how it is that the materials available to her within Aviva demonstrate that the file was opened at some stage between "*within days of the loss*" and "*well in advance of 15 November, 2002*". Potentially, this may be of some importance given that it is clear from the affidavit evidence tendered by Mr. Corrigan (and is apparent in any event from the Report of Burgoynes of 20 March, 2003) that Burgoynes were instructed on 4 November, 2002 and that Stuart Formby of Burgoynes attended the scene on the same day. Neither Mr. Corrigan's affidavit nor Ms. Murphy's affidavit provides any assistance as to whether the liability file was opened at the time Burgoynes were retained on 4 November. However, I have to bear in mind that the relevant record of the inspection and the Burgoynes' Report were created on 15 November, 2002 and 20 March, 2003 respectively. Therefore, the question is whether, on the evidence available to the court, litigation was reasonably apprehended as at the date of creation of those documents.

21. In paragraph 11 of her affidavit, Ms. Murphy says that the heading on the Miller Farrell preliminary report of 7 November, 2002 "*reflects precisely Aviva's state of mind at that time*", and that "*the sort of proceedings now brought by the Plaintiff and others are exactly what was contemplated by Aviva at that time and this report and other advices were obtained in anticipation of such proceedings*". Again, it is unclear to me as to the basis upon which Ms. Murphy is in a position to give evidence as to Aviva's state of mind as of November 2002 given that she did not work for Aviva at that time, and given that she has not explained the basis (by reference to any internal Aviva documentary materials or otherwise) for this averment.

22. In paragraph 14 of her affidavit, Ms. Murphy says that having reviewed and examined Aviva's files and records (albeit that she does not particularise what files and records were reviewed by her), "*it is clear that Aviva appreciated from the very outset the potential for significant third party public liability claims being brought against its insured*" and "*I am in absolutely no doubt whatsoever about the role of Burgoynes. Burgoynes were appointed to provide clear, specific advices to Aviva in respect of the cause of the fire that would impact on matters of liability and the contemplated litigation and to assist Aviva in defending such litigation. I say that Burgoynes' advices regarding the fire were always considered absolutely essential in Aviva's consideration of clear, contemplated, future liability claims and litigation. The report was sought on that basis"*.

23. In paragraph 15 of her affidavit, Ms. Murphy continues:-

> *"I say that the dominant purpose for appointing Burgoynes and to seek their advice was to enable Aviva to consider its position and to come to an informed decision regarding any third party claims. I say that the Burgoynes' Report was commissioned so that Aviva could, if necessary, properly defend itself and its insured. I say that the Burgoynes' Report was sought specifically in contemplation of litigation and it was always believed that the report would form a fundamental part of the preparation of Aviva's response to and defence of such claim. I, therefore, say and believe that the dominant purpose for which the Burgoynes' inspection report of 15 November, 2002 and the report of 20 March, 2003 came into being was litigation which was then apprehended".*

24. Notwithstanding the concerns which I have outlined above in relation to Ms. Murphy's state of knowledge and her failure to explain the basis for many of her averments, I have nonetheless come to the conclusion that, having regard to the relevant chronology of events, and having regard to the fact that, as Mr. Corrigan explains, Corrigan & Corrigan were first instructed formally on 16 November, 2002, and that even prior to that date, Mr. Corrigan had discussions with Aviva and Miller Farrell on the issue of the potential for third party claims to be brought, litigation was reasonably apprehended by the time Burgoynes created the record of inspection dated 15 November, 2002. Furthermore, there is no doubt at all that by the time the report of 20 March, 2003 was created, litigation was contemplated. By that date, a letter of claim had been received from William Davis & Co., solicitors on behalf of the occupiers of one of the units. Associated Loss Adjusters Limited had also written to Slovak Limited purporting to hold Slovak Limited responsible for all losses suffered by their clients as a result of the fire. Most importantly, on 24 February, 2003, the Plaintiff's solicitors had written intimating an intention to pursue a claim against Slovak Limited.

Was litigation the dominant purpose of the creation of the record of inspection and the report?

25. 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. In this context, it appears to be clear from the averments made by Mr. Corrigan and Ms. Murphy respectively that Burgoynes were retained for more than one purpose. There would be no need for the deponents to each address the question of "*dominant purpose*" if the sole purpose of retaining Burgoynes and obtaining their views was the litigation which was reasonably apprehended as of November 2002. If litigation was the sole purpose of the documents, I have no doubt but that Mr. Corrigan and Ms. Murphy would have said so. As noted above, neither deponent went so far as to suggest that litigation was the sole purpose of the report. They both said that litigation was the "*dominant purpose*".

> 26. As noted above, the very fact that both Mr. Corrigan and Ms. Murphy in their respective affidavits go so far as to make the case that apprehended litigation was the dominant purpose of the reports illustrates very clearly that the reports must also have had some other purpose. In these circumstances, it seems to me that the observations of Lord Wilberforce in *Waugh v. British Railways Board* [[1980] AC 521 at pp 531-532 (on which Ms. O'Brien B.L. for the Plaintiff

strongly relied).] are relevant. There, Lord Wilberforce said:-

> *"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*" [Emphasis added]…….

27. The approach taken by the House of Lords in *Waugh* has been followed in Ireland on a large number of occasions (see, for example, *Silver Hill Duckling Limited v. Minister for Agriculture* [[1987] IR 289.] and *Gallagher v. Stanley* [[1998] 2 IR 267])Furthermore, similar observations were made by Finlay C.J. in the Supreme Court (albeit in a slightly different context) in *Smurfit Paribas Bank Ltd v. AAB Export Finance Limited* [[1990] 1 IR 469 at p 477.] where he said:-

> *"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 of the facts".*

28. The question which I therefore have to consider, on the basis of the materials before the court, is whether Aviva has demonstrated that the dominant purpose of the Burgoynes' Report and the record of inspection was apprehended litigation by third party claimants against Slovak Limited in respect of the fire. In this context, it is very important to bear in mind that it is necessary for the party claiming litigation privilege over a discoverable document to prove that the dominant purpose for which the document was created is the litigation. This is clear from the decision of Carswell J. (as he then was) in *Downey v. Murray* [[1988] NI 600 at p 602.] which was expressly followed in Ireland by Finlay Geoghegan J. in *Woori Bank v. KDB Ireland Limited* [[2005] IEHC 451 at p 6] .

29. In determining whether the Defendant has discharged the onus of proving that the dominant purpose of a document was apprehended litigation of the kind mentioned above, the court is not bound by a bald assertion in an affidavit contending that litigation is the dominant purpose of a document. On the contrary, the question of dominant purpose is a matter for objective determination by the court. This was made clear by Finlay Geoghegan J. in *Woori Bank* 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".*

30. It is instructive to consider the approach taken by Finlay Geoghegan J. in the *Woori Bank* case. Despite averments by the relevant deponent in that case explaining the nature, genesis and purpose of the documents in issue there, Finlay Geoghegan J. came to the conclusion that Woori Bank had failed to establish, as a matter of probability, that the dominant purpose of the creation of the documents was the contemplated litigation against KDB. She said [At pp 10-11.]:-

> *"Whilst I am satisfied that at the time of creation of this document, litigation against KDB was contemplated, I am not satisfied that Woori Bank has established that, as a matter of probability, the dominant purpose of the creation of document No. 3 was the contemplated litigation against KDB. I have concluded both from the affidavits of Mr. W.R. Kim, the file on which the document was placed and the nature of the document itself that at least an equal purpose of this document was a Woori Bank internal report (in the sense of a report for management or corporate governance purposes) of the meetings with the BAI Inspector and Mr. W.R. Kim's then assessment as to the position of, and options available to, Woori Bank in relation to the AEL loan transactions".*

31. One of the real difficulties which I face in dealing with this application arises from the approach which has been taken in the affidavits of Mr. Corrigan and Ms. Murphy. While both deponents have asserted that the dominant purpose of the Burgoynes' materials was the apprehended litigation by the occupiers of other units in respect of damage done by the fire, no attempt has been made in the affidavits before me to explain what was (or were) the other purpose (or purposes) of the Burgoynes' Report and record of inspection. As noted above, there must have been some other purpose for the report given the way in which both deponents contended that the "*dominant*" purpose was litigation. I have already drawn attention to the fact that the very use of the word "*dominant*" immediately indicates that litigation was not the sole purpose of the report.

32. I have to say that it is unsatisfactory that the other purposes of the report have not been specifically addressed and explained. In an application of this kind, I believe that it is essential that a party claiming privilege over a discoverable document should place before the court sufficient explanations or sufficient materials to identify all of the purposes of the document with a view to assisting the court in assessing whether or not it can properly be said that apprehended litigation was the dominant purpose of the creation of the document. In the present case, it would have been helpful if the relevant instructions to Burgoynes or the loss adjusters were made available to the court to inspect alongside the underlying report and record of inspection. Alternatively, there may been other relevant documents on the file over which privilege is claimed which would assist in carrying out the assessment as to what were the purposes of the report and the record of inspection.

33. As stated above, the onus lies on the party claiming privilege to prove that the dominant purpose for which the document was brought into existence was to enable his solicitor to prosecute or defend the anticipated litigation. The observations of Lord Wilberforce in *Waugh v. British Railways Board* (quoted above) and Finlay C.J. in *Smurfit Paribas* (also quoted above) must be borne in mind. If the public interest in the due administration of justice is to be overridden by the public interest in ensuring that the parties to litigation can properly prepare their case, the party claiming privilege must be in a position to justify that claim. As Lord Wilberforce made clear, to carry the protection of litigation privilege into cases where the litigation purpose is secondary or equal with another purpose would be excessive and unnecessary.

34. In order to assess whether the dominant purpose of the document is (as claimed) the apprehended litigation, it is therefore essential that the court should be provided with sufficient material to enable it to properly and comprehensively assess that

contention. Otherwise, the court will not be in a position to carry out the objective determination which is required in accordance with the case law. Where a party claiming privilege fails to provide the necessary material to the court, the court may be left with no alternative but to conclude that the party in question has failed to establish the dominant purpose of the creation of the document.

35. As I have already noted, in the present case, the court is faced with very little information as to the other purposes for which the Burgoynes' Report and record of inspection may have been created. The furthest the affidavit evidence appears to go is in paragraph 9 of Ms. Murphy's affidavit where she says:-

> *"Following any large fire loss, it would be appreciated almost immediately that there was a risk to litigation, particularly in respect of third party claims. Reports and advices from a firm of forensic engineers/scientists such as Burgoynes would be essential for Aviva* to properly consider all issues of liability and exposure and the defence of potential third party liability claims". (Emphasis added).

36. While this averment is in quite general terms, it appears to me to follow from what Ms. Murphy says that the retention of Burgoynes was not solely to assist with the defence of potential third party claims, but also to deal with "*all issues of liability and exposure*". When an insurer, in the context of a fire, refers to "*all issues of liability and exposure*", that would appear to me to cover not only issues of liability under the public liability element of the insurance, but also issues as to liability of the insurer to its own insured in respect of damage done to the insured's own premises. This would not be unusual in the context of a fire claim particularly where there is extensive damage. The first question which insurers will often ask is "*Are we on cover?"* or "*Does the policy cover our insured in relation to this loss?".* Insurers may also wish to satisfy themselves that a fire was not caused by a deliberate act of the insured. In the course of the hearing before me, Mr. McGrath S.C. on behalf of Aviva said that there was no suggestion by Aviva here that its own insured might have deliberately started the fire. While that suggestion was made to me by Mr. McGrath on instructions, I am confined, in my consideration of the present application, to the evidence before the court. There is no affidavit before the court confirming that Aviva never had any concern in relation to its own insured here. On the contrary, the language of paragraph 9 of Ms. Murphy' affidavit (quoted above) suggests to me that the issue of liability of Aviva to its own insured was one of the purposes for retaining Burgoynes. This appears to me to be clear from the fact that Ms. Murphy refers to Aviva considering "*all issues of liability and exposure" and "the defence of potential third party liability claims*". When an insurer speaks of considering "all issues of liability and exposure", it seems to me to follow that the insurer is considering not just potential third party liability claims, but also its own exposure and liability to its own insured. The question which I therefore have to consider is whether, against that background, there is sufficient evidence before the court to demonstrate that nonetheless the dominant purpose of the record of inspection and the report of Burgoynes was the apprehended litigation – namely the defence of potential third party liability claims.

37. The only materials placed before the court for the purposes of the court's assessment of this issue comprise the record of inspection dated 15 November, 2002 and the subsequent report of 20 March, 2003. I must therefore determine the present application on the basis of those materials and on the basis of the affidavit evidence described above.

38. Insofar as the record of inspection dated 15 November, 2002 is concerned, it is impossible for me to form any view based on my consideration of this document that the dominant purpose of the document was apprehended litigation. It seems to me, having read the document, that it is equally capable of being referable to enquiries being made on behalf of the insurance company as to whether it had a liability to make a payment to its own insured. Although described as a "*record of inspection",* the record is actually of a meeting held between the author and representatives of the Liffey Trust (namely the landlord of the warehouse building). The first page of the document describes information gleaned from Liffey Trust in relation to Slovak Limited itself. It appears to me from the notes contained in the record that enquiries were being made at that time (November 2002) as to the reliability and character of Slovak Limited itself. These are the kind of enquiries one would expect an insurer to conduct if it wished to rule out the possibility that its own insured may have been involved in setting the fire itself. For example, the note records that the information supplied by Liffey Trust indicated that Slovak Limited was not just the best maintained unit, but that rent was paid three months in advance. These enquiries seem to me to be directed towards the character of Slovak Limited. It therefore appears to follow that at the time of the record of inspection, Aviva was still considering its own exposure or liability to its own insured.

39. There is nothing in the record of inspection that would enable me to conclude that the dominant purpose of the inspection in early November 2002 was apprehended third party litigation. As noted above, the bald averments made in the affidavits sworn on behalf of Aviva are not sufficient in themselves to establish that the apprehended third party litigation was the dominant purpose. Accordingly, on the basis of the evidence before the court, and on the basis of my review of the record of inspection, I am not satisfied that Aviva has established that the dominant purpose of the record of inspection dated 15 November, 2002 was apprehended litigation relating to the fire, and in those circumstances, I do not believe that Aviva is entitled to claim privilege over this document.

40. However, I have reached a different conclusion in relation to the report of Burgoynes of 20 March, 2003. Having carefully considered that report, I can see nothing in that report which suggests that at the stage of its preparation, Aviva was still considering the question of its own liability to its own insured. The report does not contain any material which suggests that this issue was still under active consideration by Aviva. The report appears to me to comprise a careful analysis as to what was the cause of the fire. Given that I am upholding the claim to privilege in relation to the document, it would be wrong for me to provide any detail as to what is contained in the document. All I will say is that, having carefully considered it, the report appears to me to be a forensic examination of the available evidence in order to determine (insofar as that might be possible) the cause of the fire and the place where the fire originated. Such a report would be necessary in order for Aviva to form a view as to whether third party litigation which was then threatened against it was capable of being defended. In addition, the report would be necessary in order for Aviva to form a view as to whether a case could be made on behalf of Slovak Limited against any of the other occupiers of the units. It seems to me that by the time the report of March 2003 was compiled, Aviva's concern was to establish the cause of the fire and the place where the fire broke out so that it would be in a position to meet any claims that might be brought against it, or potentially to formulate claims that might be made on behalf of Slovak Limited against any other occupier of the units. While arguably, it might be said that the latter is a different purpose to the defence of claims brought against Slovak Limited, it seems to me that the two purposes are so closely interlinked that the same litigation privilege applies to both. In truth, they are opposite sides of the same coin. This is confirmed by the provisions of paragraph 4 of the Defence subsequently delivered on behalf of the second named Defendant in which it is expressly denied that the fire broke out or started in the second named Defendant's unit. The place where the fire broke out is therefore a significant issue in the current proceedings.

41. As I have said, by the time the report in March 2003 was completed by Burgoynes, there is no evidence to suggest that Aviva was still considering whether it had an obligation to indemnify its own client (subject to any applicable limit of indemnity under the policy) in respect of the damage done to its own premises. There is nothing in the Burgoynes' Report of March 2003 to suggest that this was still under active consideration at this point.

42. Thus, notwithstanding the concerns I have about the lack of detail in the affidavit evidence before the court, I have come to the

conclusion, based on my review of the Burgoynes' Report, that the dominant purpose of the Burgoynes' Report of March 2003 is apprehended litigation as between the different occupiers of units in the Liffey Trust premises, and that accordingly, it is protected by litigation privilege.

Extracts from documents

43. In the course of the hearing before me, the Plaintiff submitted that it would be content if Aviva made available those parts of the Burgoynes' Report that contained a factual description of what was found by Burgoynes on site. Counsel for the Plaintiff suggested that any parts of the Burgoynes' Report expressing views on liability could be appropriately redacted. It was entirely understandable that this submission should be made in circumstances where it appears that, subsequent to the inspection by Burgoynes, the oven situated on the premises of Slovak Limited had been destroyed on 28 April, 2004. It was therefore no longer possible for the Plaintiff's experts to inspect the oven and the flues. However, counsel for Aviva submitted that it was inappropriate to engage in a severance exercise of this kind and drew my attention to the decision of Kelly J. (as he then was) in *Duncan v. The Governor of Portlaoise Prison* [[1997] 1 IR 558.] where Kelly J. said [At pp 575-576.] :-

> *"Mr. McEntee does not contest the existence of legal professional privilege … However, he says that the documents, in addition to containing legal advice, may also contain factual matter and that legal professional would not extend to such matters. He invites me to ….direct the production of these documents with a view to the court reading them and extracting from them the factual content in respect of which he says a claim to legal professional privilege would not apply ….*
>
> *If the contention made by Mr. McEntee for a severance to be made of the documents in respect of which legal professional privilege is claimed is a good one, then of course such documents must be examined by the court with a view to carrying out the exercise sought.*
>
> *It is not without significance that Mr. McEntee was unable to cite any authority from any country in the world supporting his argument that the court could or should embark upon the exercise which he suggests. It is unprecedented and, in my view, such is the case for very sound reasons.*
>
> *In* R v. Derby Magistrates Court ex parte B *[1995] 3 WLR 681, Taylor of Gosforth L.C.J. ….set forth in a succinct form the history of legal professional privilege. He concluded (at p 695) as follows:-*
>
> > *"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests".*
>
> *It appears to me that the proposition advanced by Mr. McEntee to the effect that the court ought in this case to direct the production of the documents in respect of which legal professional privilege is claimed and then, in effect, edit them so as to make factual matter in them disclosable to him, would be to dilute in very considerable measure the whole notion and effect of legal professional privilege. It would, in my view, be an unwarranted and dangerous course to embark upon and would amount to a serious interference with what the then Lord Chief Justice of England described as "a fundamental condition on which the administration of justice as a whole rests"".*

44. Counsel for Aviva also drew my attention to the unreported decision of the Supreme Court in *Quinlivan v. Governor of Portlaoise Prison* [Supreme Court, unreported, 5 March, 1997] where Hamilton C.J. said [At p 5] :-

> *"It has been submitted on behalf of the appellants that it would be open to this Court to examine the document in respect of which privilege was claimed and to edit the document, to separate in the context of the document the portions of it that related to purely legal advice from matters which might be regarded as purely factual and that it would be possible to discover the document as edited. There is no authority produced before this Court to provide justification for this concept of editing communications between professional legal advisors and their clients. It appears to me to be wrong in principle and the learned trial judge was correct in so finding and certainly it is not supported by any authority opened before this Court".*

45. In light of the decisions in *Duncan* and *Quinlivan* respectively, it would clearly be inappropriate for me to direct that any part of the text of the Burgoynes' Report should be released to the Plaintiff. However, there are photographs attached to the Burgoynes' Report of March 2008 and I do not know when these photographs were taken. They are not separately listed in the Second Part of the First Schedule to the Affidavit of Discovery sworn on behalf of Aviva and no date is given for any of the photographs. Item 8 in the Second Part of that Schedule simply refers to the Burgoynes' Report with "*diagrams, floor plans, Fire Brigade report and photographs*". In circumstances where I do not know when the relevant photographs were taken, I can form no view as to whether they have may have been taken at a time when the position of Aviva's own insured, Slovak Limited, was still under consideration, or whether they were taken at a subsequent time. Obviously, if they were taken at a subsequent time, the photographs would be subject to litigation privilege. However, if they were taken prior to that time, the photographs would not, for the reasons outlined above in connection with the record of inspection, be subject to litigation privilege.

46. I have to consider whether, having regard to the decisions of Kelly J. in *Duncan* and of the Supreme Court in *Quinlivan*, it would be appropriate for the court to treat the photographs in a different way to the Burgoynes' Report itself. It seems to me that there is a distinction to be made between the photographs and the report of Burgoynes itself. While, for the reasons outlined by Kelly J. and Hamilton C.J., it would be quite inappropriate for the court to become involved in severing non-privileged sections of the Burgoynes' Report itself, the same issue does not arise in relation to the photographs if it is the case that the photographs pre-date the time when apprehended litigation became the dominant purpose of Aviva in pursuing the Burgoynes investigation. If the photographs pre-date the report and have an independent existence, it seems to me that they should not be regarded as part of the March 2003 report itself. If the photographs have an existence independent of the report of March 2003, it would be inappropriate for privilege to be claimed over them if they were brought into existence before litigation became a dominant concern of Aviva. In these particular circumstances, it seems to me that the most appropriate approach to be taken is to direct Aviva to separately list the photographs and the dates of their creation in a supplemental affidavit of discovery, and, in the event that privilege is claimed over any of the photographs, to give liberty to the parties to apply in relation to whether or not any such claim to privilege can properly be sustained. I would, however, urge the parties to consider whether any accommodation can be reached between them in relation to the photographs so as to avoid further expense in relation to this ongoing discovery dispute. In this context, I am acutely conscious of

the fact that the discovery process in this case has been protracted. In paragraph 24 of his affidavit sworn on 25 July, 2017, Mr. O'Regan draws attention to the fact that ultimately it was necessary in this case for the court to make an "*unless*" order on 24 October, 2016 requiring Aviva to comply with the previous order for discovery made by the court on 7 March, 2016. I would therefore appeal to the parties to try to reach an accommodation in relation to the photographs.

47. A somewhat similar issue arises in relation to the Fire Brigade report attached to the Burgoynes' Report. It is not part of the Burgoynes' Report itself. It is an annex to the report. Although it is dated 8 January, 2003, it is clear that it was requested by Burgoynes in a letter dated 13 November, 2002. In circumstances where I have come to the conclusion that the record of inspection of 15 November, 2002 is not subject to a claim to privilege, it seems to me to follow that the Fire Brigade report requested on 13 November, 2002 must likewise be discoverable on the basis that there is no sufficient evidence before the court to demonstrate that by 15 November, 2002, the dominant purpose behind Aviva's retainer of Burgoynes was the apprehended litigation. The key point is that at the time the report was requested, there was insufficient evidence to demonstrate the necessary dominant purpose. For the reasons outlined above in relation to the record of inspection of 15 November, 2002, there is no basis for the court to conclude that when Burgoynes requested the Fire Brigade report on 13 November, 2002, the apprehended litigation was the dominant purpose underlying that request. Furthermore, it does not seem to me that any issue of severance arises here. The Fire Brigade report is an annex to the Burgoynes' Report of March 2003. It has a separate and independent existence. I will therefore direct production to the Plaintiff of the Fire Brigade report.

The destruction of the oven

48. During the course of the hearing before me, and in the course of the exchange of affidavits between the parties, a significant complaint was made by the Plaintiff that the oven in the premises of Slovak Limited was destroyed on 28 April, 2004. In paragraph 25 of his affidavit sworn on 25 July, 2017, Mr. O'Regan says that he only became aware of the destruction of the oven on receipt of a letter dated 18 October, 2016 from Corrigan & Corrigan on behalf of Aviva.

49. While there is a debate between the parties as to the circumstances in which the oven was destroyed, I do not believe that it is necessary for me to resolve the dispute that exists between the parties. It appears to be clear that a request for inspection of the oven was made by Mr. Slack of Manus Coffey Associates Limited on 3 December, 2002. It therefore appears that Mr. Corrigan has mistakenly said in paragraphs 20 and 21 of his affidavit sworn on 31 January, 2018 that no request for inspection was made. In fact, the request dated 3 December, 2002 was followed up by a letter dated 11 February, 2003.

50. While it is regrettable that the oven and the flue were destroyed, I do not believe that their destruction is ultimately relevant to the issue which I have to resolve in the present application. Counsel for the Plaintiff very fairly accepted that there was no authority for the proposition that litigation privilege would be lost where important evidence was destroyed (even if it were the case that the destruction was deliberate and was done in the knowledge that litigation was likely) even where the party who allegedly destroyed the evidence possessed an otherwise privileged report which contained useful factual information relating to the material which had subsequently been destroyed. I therefore do not believe that the destruction of the oven and the flue (even if this was done deliberately or inappropriately by Aviva) can have any influence over the decision which has to be made on an application of this kind. I should emphasise that I make no finding of wrongdoing against Aviva in relation to the destruction of the evidence. It would be inappropriate for me to do so in circumstances where this is not an issue which is ultimately relevant to the decision which I have to make.

51. I should add for completeness that a submission was made to me that the destruction of the oven and the flue were inconsistent with any concern on the part of Aviva that litigation might be apprehended. However, I do not believe that there is any substance to that submission in circumstances where, by the time the oven and flue were destroyed, litigation had already been threatened, and furthermore, Aviva already had the benefit of the Burgoynes' Report, and therefore Aviva itself no longer had any need to preserve what remained of the oven and the flues. While it is obviously desirable that evidence of this kind should not be destroyed, the fact of its destruction in those circumstances does not seem to me to undermine Aviva's concern about apprehended litigation.

The orders to be made

52. For all of the reasons outlined above, it seems to me that the following orders should be made:-

(a) Aviva will be directed to produce to the Plaintiff the following:-

(i) The Burgoynes' record of inspection dated 15 November, 2002; and

(ii) The Fire Brigade report dated 8 January, 2003 and requested by Burgoynes on 13 November, 2002;

(b) Aviva will also be directed to swear a further Affidavit of Discovery listing the dates of the photographs annexed to the Burgoynes Report with liberty to the Plaintiff to further contest any claim to privilege over those photographs. However, in this context, I reiterate the suggestion made by me at paragraph 46 above that the parties should try to reach an accommodation in relation to the photographs;

(c) Both parties will have liberty to apply;

(d) The application in relation to production of the Burgoynes' Report of 20 March, 2003 is refused subject, however, to the ability of the Plaintiff in the future to challenge the claim to privilege over any of the photographs attached thereto, and subject also to the production to the Plaintiff in accordance with the order made above that the Fire Brigade report of 8 January, 2003 should be produced.

53. I will hear the parties in relation to the time to be afforded to Aviva to comply with the directions made above. I will also hear the parties in relation to costs.

Approved

_____

Denis McDonald