Neutral Citation Number: [2009] IEHC 420

THE HIGH COURT

COMMERCIAL

2007 4691 P

BETWEEN:

HANSFIELD DEVELOPMENTS, VIKING CONSTRUCTION, MENOLLY PROPERTIES AND MENOLLY HOMES

PLAINTIFFS

AND

IRISH ASPHALT LIMITED, LAGAN HOLDINGS LIMITED, LAGAN CONSTRUCTION LIMITED, LAGAN CEMENT GROUP LIMITED (FORMERLY KNOWN AS LAGAN HOLDINGS LIMITED) AND LINSTOCK LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 21st day of September 2009

Background

1. This is an application on behalf of the first and fifth named defendants (hereinafter the "defendants" or "applicants") for an order pursuant to Order 31, rule 18/19 of the Rules of the Superior Courts, requiring the plaintiffs to make available for inspection certain documents over which they have claimed privilege. In the alternative, the defendants ask the court to inspect the documents in question for the purpose of deciding on the validity of the privilege claim: this as provided for by O. 31, r. 20(2) of the Rules of the Superior Courts.

2. These proceedings arise out of a dispute regarding infill provided by the defendants to the plaintiffs in the construction of 681 houses over three housing estates in North Dublin (namely, the Drynam, Beaupark and Myrtle estates). Following construction, problems arose with many of the houses and complaints were made by homeowners in 2005-2006. After an investigation and the production of a report by Trinity College Dublin in January 2007, the plaintiffs concluded that the problems were due to excessive pyritic content in the infill provided by the defendants, which reacted expansively *in situ* to form gypsum, causing floor heave and cracking in the walls and floors of the properties. The defendants contend that the material provided by them, which was subject to ongoing monitoring and sampling, was not the cause, and that any defects in the houses were in fact due to the negligence and/or contributory negligence of the plaintiffs in the construction thereof. There are other ongoing proceedings also involving the estates in which certain have sued Helsingor Limited and Menolly Homes (see para. 8 *infra*).

3. In the current application the defendants seek a review of the privilege claimed by the plaintiffs in two affidavits sworn by them on 25th June and 7th August of this year. 243 contested documents were identified from the first affidavit of and another 310 documents from the second affidavit. The defendants, who have abandoned their challenge to four documents, are maintaining a challenge to 549 documents in total from the two affidavits in question. The fact that these affidavits were the twelfth and thirteenth affidavit of documents sworn by the plaintiffs, after the case has been at hearing before the Commercial Court for more than 50 days (Gilligan J.), is an area that thankfully I can avoid entering. As is the suggestion that this application in reality is an attempt by the defendants to "squeeze" out further documents to advance their claim for a mistrial. Neither allegation is material to this Court.

4. The challenged documents can be effectively divided into seven categories and can conveniently be dealt with in the following manner:

i) Documents passing between the plaintiffs and Helsingor Limited ("the Helsingor documents");

ii) Photographs taken by the plaintiffs as to the state of certain properties;

iii) HomeBond documentation;

iv) Documents provided to a public relations firm, Reputation Inc.;

v) Certain internal Menolly spreadsheets and charts;

vi) Documents and reports provided by the plaintiffs' engineers Golder / DBFL; and,

vii) Other miscellaneous documents.

5. Where it has been possible to determine this application by considering a sample of the documents in the above categories the Court has done so, but where it has been necessary to do so the Court has also considered documents individually.

6. In summary the defendants accept that the Helsingor documents are covered by legal advice privilege or litigation privilege and would thus be exempt from production but for their passing to a company known as Helsingor Limited. The issue in relation to this category is therefore whether the plaintiffs have a sufficient "common interest" with Helsingor. All of the other documents require an assessment as to whether the dominant or primary purpose of their creation was apprehended or threatened litigation and/or legal advice.

The Helsingor Documents:
7. This first category comprises documents which passed between the plaintiffs and Helsingor; a non-party to this action. Helsingor's involvement, which is described in para. 13(c) of the Statement of Claim, can be summarised as follows:

i) Helsingor, on 22nd June, 2004, entered into a Project Management Agreement under which Menolly would construct houses and apartments on lands owned by Helsingor, and which is now known as the Myrtle estate;

ii) That the units in the estate would be built pursuant to individual Building Agreements entered into between Helsingor and intended purchasers and that when constructed title to the unit would be conveyed to such purchasers by Helsingor; and,

iii) That Menolly would indemnify Helsingor against all claims in respect of any defect in these units (Clause 10.20).

Two further points should be noted: Helsingor is a separate company; it is not a subsidiary of any of the plaintiffs, although Menolly has a 50% interest in it. Secondly, two of the directors of Menolly Homes are also directors in Helsingor.

8. Certain homeowners, following complaints in 2005 and 2006, took separate legal proceedings against the builder, Menolly, and against Helsingor; a representative example being the case of *Anthony Quinn and Brian Quinn v. Helsingor Limited and Menolly Homes* (Record No. 2008/4302P). On 16th October, 2007 Menolly requested Helsingor to join the current action as a further plaintiff, but at a meeting of 27th November, 2007, it decided: (a) not to do so, and (b) that it would obtain separate legal advice in relation to the problems affecting the Myrtle estate. Thereafter it retained the firm of Eversheds O'Donnell Sweeney, Solicitors. Notwithstanding this, both Helsingor and Menolly Homes and their respective solicitors have at all material times shared information in relation to the homeowner proceedings and have adopted a joint approach in respect of all relevant litigation. Furthermore, B.C.M. Hanby Wallace ("B.C.M."), who are retained by the plaintiffs in these proceedings, are the solicitors on record for both Menolly Homes and Helsingor in the homeowner proceedings having served a Notice of Change of Solicitors on the 19th August, 2008. In respect of any correspondence received by B.C.M. in such proceedings, the draft responses prepared by them were then furnished to Menolly Homes for its instructions and thereon further legal advices were provided if necessary. Thereafter, the duly amended/approved versions of the draft responses were sent to Eversheds O'Donnell Sweeney for review by it and their client, Helsingor. Based on instructions and following legal advice, the draft responses as ultimately agreed reflected the joint view of both companies and their solicitors. In the homeowner litigation correspondence received by Helsingor was similarly dealt with.

9. With regards to the first category of documents, the plaintiffs therefore argue that the same is subject to "common interest privilege" by virtue of the relationship between the plaintiffs and Helsingor. In particular, it is alleged that since Helsingor is a joint venture company with the fourth named plaintiff, who indemnified it in respect of any defects in the properties (which there certainly are), and that it is a co-defendant in the homeowner proceedings, these factors create an interest sufficient to sustain the type of privilege claimed. Whether this is the case will be considered in due course. It should be noted that the defendants concede that the documentation in this category could be said to have litigation and/or professional advice privilege, but they argue that the disclosure to a third party, where there is no common interest, has waived such privilege.

Photographs:
10. In this category, the plaintiffs have claimed litigation privilege in respect of 63 photographs. These were taken by an employee(s) of Menolly, purportedly on legal advice and in the context of litigation. The plaintiffs thus contend that they are covered by litigation privilege. In response, the defendants argue that photographs of this nature, which reflect the actual state of the properties, constitute primary factual evidence of the condition of the houses and therefore cannot be privileged. In the alternative, it is suggested that the photographs were not created with the dominant purpose of litigation, but to provide a photographic record of remedial works and testing carried out by the plaintiffs.

11. In addition it is further argued that this material could be extremely probative, since at the commencement of litigation the plaintiffs sought to corroborate their case by relying on the assertion that there was no damage to any property where the defendants' infill had not been used. However as the case has proceeded the defendants claim that similar cracking has arisen in houses where their infill had not been so used, thus supporting their stated position that any defects in the residential units were a result of the poor workmanship and/or negligence on the part of the plaintiffs. These photographs therefore could be crucial to their defence.

HomeBond documents:
12. The third category of documents in issue is the HomeBond documents. Originally the plaintiffs' privilege claim in respect of documents exchanged between them and HomeBond rested on there being a common interest between them; however in an earlier application McGovern J. on 17th February, 2009 ([2009] IEHC 90) noted, albeit *obiter*, that *"in determining whether or not the plaintiffs and HomeBond have a common interest, it seems to me that they do not."* The learned Judge did not however make his decision on this basis: instead he denied the documents the status of litigation privilege.

13. On the present application, the defendants claim that any further correspondence between, or notes of meeting with, HomeBond, over which the plaintiffs still claim privilege are subject to the decision of McGovern J. and therefore should be produced. In the alternative, it is evident from the relevant dates that the documents in question were in fact created for the purposes of investigating the problems and identifying what remedial works were required. Litigation was not therefore the dominant reason behind their creation. In response the plaintiffs argue that the documents in question are a mixture of draft letters intended for HomeBond, but not in fact sent, and minutes of meetings with HomeBond. These documents, which were the subject of legal advice and/or related to the litigation, are therefore covered by one or other form of legal professional privilege.

Reputation Inc.:
14. The plaintiffs claim privilege over documents sent to or received from this public relations company, which they briefed following the instigation of litigation. The defendants, whilst pointing out the ever more common practice of engaging public relations companies in a litigation context, strongly dispute this claim and suggest that any antecedent privilege will be lost on contact with such a company. The latter is not a legal adviser, although it could be said to be involved in some respects in the litigation process. The defendants, whilst accepting that they too have engaged a public relations

company, complain about the unrealistic explanations given by the plaintiffs in relation to certain documents, an example of which is the following:

> *"This is an e-mail from John Keilty, Reputation Inc. to Gerard Butler of BCM Hanby Wallace copied to Menolly attaching amended working draft letter to homeowners and seeking legal advice in relation thereto on behalf of Menolly."*

It is simply not feasible, according to the defendants that a public relations company would be looking for such legal advice, particularly where the correspondence is copied to the client itself.

15. There are other documents in this category which have been prepared by the public relations firm and passed to the client over which litigation privilege is also claimed. These documents have no input from lawyers. The defendants argue that although the context is litigation, the real purpose of this company in preparing statements or letters is not for litigation itself, but rather for a public relations purpose. In those circumstances no privilege should attach to the preparatory work. In the alternative the provision of legally privileged documents to the public relations company amounts to a waiver of any privilege which might otherwise have attached to those documents.

Internal Spreadsheets and Charts:
16. With regards to certain internal Menolly documents, a claim to privilege is asserted on the basis that they were produced with the dominant purpose of the Commercial Court and/or homeowner litigation. The defendants assert that these documents relate to tests done and analyses made of the infill, and in those circumstances should be discovered; such being highly relevant to the proceedings herein. Further, the undated nature of the documents, and the generality of their description, means that the defendants are highly dubious of the privilege claim. In those circumstances, the Court itself should investigate whether these documents are privileged.

17. A document representative of this category was opened to the Court. It was described by the plaintiffs as *"a spreadsheet concerning the state and/or condition of the houses in the Myrtle estate prepared by Menolly for the dominant purpose of the home owner litigation and in order to achieve settlement and aid negotiations for settlement."* The defendants contend that this shows the problem of the dual purpose nature of much of the material over which privilege is claimed. Although it is conceded that these documents would no doubt be useful in contemplated or actual litigation, they could not be said to have been produced for the primary purpose of such litigation.

Golder / DBFL documents:
18. The next category contains 74 Golder or DBFL documents. Golder is an engineering firm advising the plaintiffs. They were retained some time in March 2007, after pyrite was identified in the Trinity College report as the underlying problem. DBFL were advising prior to pyrite being the identified issue. They produced reports which suggested that subsidence was a potential source of the problem. The defendants concede that there is a stronger case for litigation privilege in respect of documents produced by Golder, since they were only briefed in March 2007, after litigation was contemplated. However, they argue that if the documents are test results relating to pyrite it is unclear why they have not been produced. There was agreement between the parties that results such as these would be discovered. In those circumstances it is unclear why they have not been discovered. Alternatively, they argue that the disclosure of part of a category of documents can be said to waive privilege in respect of the total category, since it would be unfair to allow a discovering party to cherry pick those documents most favourable to their case, whilst withholding those which are not.

Miscellaneous Documents:
19. Finally there are a number of miscellaneous documents where the defendants contend that the dominant or primary purpose thereof could not have been the preparation of litigation or the provision of legal advice. This category includes, *inter alia,* lists of correspondence to go to the homeowners compiled by the plaintiffs. The defendants argue, firstly, that these documents were not produced by B.C.M., but were internal Menolly documents. In any event, the dominant or primary purpose of these lists was not the conduct of litigation but was related to remedial works and contacting homeowners with problems. The plaintiffs reply that these documents were created by Menolly in order to update their solicitors at weekly meetings in relation to the pyrite litigation. The defendants however note that it was not the case that every homeowner who had problems was engaged in litigation, and that letters would have been sent to all homeowners advising them that remedial works would need to be carried out to remedy the infill problem. Even if no proceedings were threatened the plaintiffs would still have had to carry out this task.

20. Within this category there are also 14 internal Menolly e-mails and one e-mail from Menolly's engineers which are in dispute. The defendants complain that these were internal Menolly e-mails, not between experts, for the purpose of passing spreadsheets and reports as to the factual state of the properties and are unimpressed with the bold assertion that they were created for the dominant purpose of litigation. Thus the Court is again invited to investigate the claim of privilege over this documentation.

21. Finally in this category there are documents described as method statements, as well as a letter and one set of minutes which do not need to be described in any detail at this point, but which will be returned to in conclusion.

22. Before considering the documents specifically however, I will outline the law in relation to litigation and legal advice privilege, common interest privilege and waiver.

Legal Professional Privileges: Advice / Litigation: (Relevant to all categories of documents):
23. The purpose behind allowing privilege to attach to documents produced in litigation or containing legal advice is well rehearsed and accepted. As Finlay C.J. put it in *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1991] 1 I.R. 469 at p. 477:

> *"The existence of a privilege or exemption from disclosure … clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interest 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 … can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts."*

This rationale should not be seen as preferring a restrictive view of the preservation of privilege.

24. McCracken J. in the Supreme Court in *Fyffes v. DCC* [2005] 1 I.R. 59 at p. 84, describes the basis of legal professional privilege as follows:

> *"The principle of privilege arising in the preparation or conduct of a case is based on the proper administration of justice. This requires that a litigant must be in a position to communicate freely with his or her legal advisors, and further must be entitled to obtain expert evidence from third parties to assist, not only in the preparation of the case, but in the assessment as to whether there is any case to be made. While there is not now any issue in this case as to whether the documents in question were privileged prior to their disclosure to the Stock Exchange, nevertheless in considering the question of waiver it is important to remember at all times that privilege does not exist merely for the protection of a party, but also exists to ensure the proper administration of justice."*

Fennelly J. in his concurring judgment, having adopted a passage from the judgment of Lord Bingham C.J. in *Paragon Finance v. Freshfields* [1999] 1 WLR 1183, stated at para. 24:

> *"The law, therefore, attaches significant value and accords a high degree of protection to the principle of legal professional privilege. It can, of course, be lost if it is clear that it is being used as a cloak to cover fraud. It may also be overridden by express statutory provision."*

25. Similarly so in England, where Lord Taylor C.J., in *R v. Derby Magistrates' Court Ex. p. B* [1995] 3 WLR 681 at p. 695, succinctly outlined the rationale to this type of privilege:

> *"The principle … 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."*

These remarks by the Chief Justice, according to Patten J. in *Dadourian Group International Inc. v. Simms* [2008] EWCA 1784 (Ch.) *"… have re-emphasised its [legal professional privilege's] importance in the administration of justice."*

26. The seminal case for the test applicable to this type of privilege is *Waugh v. British Railways Board* [1979] 3 WLR 150. Therein the House of Lords adopted the "dominant purpose" test as set out by Barwick C.J. in his minority judgment in the High Court of Australia in *Grant v. Downes* [1976] 135 CLR 674 at p. 677:

> *"A document which was produced or brought into existence either with the dominant purpose of its author, or the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."*

Lord Wilberforce in *Waugh* at p. 154 of the report noted:

> *"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 interests of encouraging truthful revelation."*

27. The dominant purpose test was adopted in this jurisdiction in *Silver Hill Duckling v. Steele* [1987] I.R. 298, where O'Hanlon J. stated:

> *"Having considered the relevant authorities, I am of the opinion that once litigation is apprehended or threatened, a party to such litigation is entitled to prepare his case, whether by means of communications passing between him and his legal advisers, or by means of communication passing between him and third parties, and to do so under the cloak of privilege."*

28. Such legal professional privilege incorporates two categories of privilege, namely legal advice privilege and litigation privilege (see *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 at p. 658). It is clear from the judgment of Lavan J. in *Ochre Ridge Ltd. v. Cork Bonded Warehouses Ltd* [2004] IEHC 160 that the dominant purpose test applies equally in this jurisdiction to both types of privilege. He stated:

> *"The dominant purpose of the communications must be the seeking or giving of legal advice. While most of the Irish cases or textbook writers do not employ the terminology of a 'dominant purpose' as to the test for legal advice privilege (it more usually being associated with 'litigation' privilege, not the subject of discussion here), it is useful in determining the scope of 'legal advice' and appears to form part of the test in the English authorities."*

29. A point at issue in this case could be seen to be the production of documents other than by the principal claimant of privilege. In this regard note can be had of the comments of the Court of Appeal in *Three Rivers v. Governor and Company of the Bank of England (No. 5)* [2003] Q.B. 1556 at p. 1561:

> *"It is clear on the authorities that documents emanating from or prepared by third parties or employees of a party are covered by the principle of litigation privilege if prepared with the dominant purpose of use in existing or contemplated litigation."*

30. The practical application of the dominant purpose test can be illustrated by *Gallagher v. Stanley* [1998] 2 I.R. 267.

This case involved allegations of negligence with regards to the delivery of the plaintiff at birth, which was *"a complicated one"* leaving the plaintiff *"severely injured and disabled"* (ibid. at p. 269). The nurses on duty at the time had taken notes of events at the request of the matron, who swore an affidavit that she had ordered the taking of such notes for their provision to the hospital's legal advisors. O'Flaherty J., in the Supreme Court, examined the documents to ascertain the dominant purpose behind their creation and noted at p. 271:

> *"The recognition of legal professional privilege goes back many centuries. The privilege attaches to confidential communications passing between lawyer and client for the purpose of obtaining legal advice or assistance and also where litigation is contemplated or pending. Litigation was obviously not in the contemplation of anyone on behalf of the plaintiff at the time that these statements came into existence and, therefore, the question is whether it can be taken as being in contemplation as far as the hospital authorities were concerned. The privilege does not attach to members of the legal profession. It is a privilege of the client, who can always waive it. Its purpose is to aid the administration of justice, not to impede it. In general, justice will be best served where there is the greatest candour and where all relevant documentary evidence is available. …As far as this case is concerned it is essential that litigation should be reasonably apprehended at the least before a claim of privilege can be upheld."*

He ultimately concludes that:

> *"I find it impossible to hold that the sole purpose which motivated the matron in having the nurses provide these statements was in regard to possible litigation. I think that the matron would have had in the forefront of her considerations, as well as the possibility of litigation, that she should be in a position to account for how the hospital was run, as far as her domain was concerned, and how the staff under her control had conducted themselves in regard to what must have been quite a traumatic occurrence on the night in question. As a matter of professional standards and decorum, as well as for the proper management and running of a hospital, it seems to me that a matron would, in such a situation as this, require this information. She would require of her nurses that they give a factual account of the course of events where there has been an untoward occurrence with serious consequences. This I am sure is what the nurses attempted to do. These statements are bound to amplify what may be quite cryptic notes in hospital charts and related documents."*

31. Lynch J., who also found that the principal reason for the creation of the records was not litigation, had this to say of the dominant purpose test:

> *"People as often as not act from mixed motives or for a number of reasons, rather than one single motive or reason. Therefore to require that the sole reason for obtaining the statements the subject matter of this appeal should have been the anticipation or contemplation of litigation is to set too high a test before privilege can arise. The true test is that the anticipation and/or contemplation of litigation should have been the dominant motive or reason. In this regard I would adopt the reasoning in the case of Waugh v. British Railways Board [1980] A.C. 521."*

32. The judgment of the Court in *Gallagher* is highly illustrative of what is considered a dominant purpose. There was little doubt but that one of the reasons for the creation of the records was to cover the hospital in the event of litigation, however this was not sufficient to resist disclosure. The event being unusual, the hospital undoubtedly had a desire to investigate what went wrong and to determine the events which lead to it; it may have been unavoidable, or it could have been the result of a systemic failure which required remedying. In either case these were legitimate and likely reasons for the taking of the statements, in addition to, if not above and beyond, any possible litigation. These statements would have been taken regardless of whether proceedings ultimately issued and would have been reviewed to identify the cause of the incident and improve safety and standards if necessary. This is why it could not be said that the dominant purpose of the creation of the records was litigation.

33. The above considerations apply in relation to the majority of the challenged documents in this case. The Court must decide whether the dominant purpose of their creation was litigation or otherwise involved legal advice. The defendants have put forth two alternative motives behind the creation of these documents. The first is that they were created in order to assist the plaintiffs in establishing the general cause of the problems in the housing. It was not until January 2007 that a report was received from Trinity College that posited the cause as being pyritic expansion. Thus any documents created prior to this time must have had, as their primary purpose, the investigation of the cause. The second alternative put forth is that following the discovery of the pyritic expansion, the plaintiffs then set about organising and performing remedial works on the affected properties. Later documents were created primarily for this purpose and not litigation, the defendants contend. In response to this last point the plaintiffs say that even if this was a primary purpose of correspondence, the remedial works themselves were in fact related to litigation. They state that remedial works would have been used in resolution or part resolution of threatened or commenced litigation by homeowners. Thus even if the documents related to remedial works, these works are themselves related to litigation, and thus any documents created for this purpose would be covered by litigation privilege.

34. The above general principles apply to all of the contested documents save for the Helsingor documents; where the added component of common interest privilege comes into play.

Legal Professional Privilege involving Common Interest: The Helsingor Documents

35. The phrase "Common Interest Privilege" is apt to mislead if it conveys the existence of a *sui generis* category of privilege known by that name. None so exists. The description if used must be understood as preserving legal professional privilege where the third party, recipient or creator of a communication, has a common interest in the subject of the privilege with the primary holder thereof. As interpreted the phrase can be so used. In this regard I would agree with the comments of Patten J. in *Dadourian Group International Inc. v. Simms* [2008] EWHC 1178 (Ch.) at para. 88 where he stated:

> *"This is not a separate type or category of legal professional privilege. It is simply a convenient way of describing the principle under which communications between parties with a common interest may be entitled to protection from disclosure."*

36. Common Interest Privilege, used as described above, arises where a document has been passed between two legal entities who are sufficiently connected that what would otherwise amount to a waiver of privilege does not, as the persons or organisations could be seen to be effectively one. As put by an Australian commentator (Desiatnik, "*Legal Professional Privilege in Australia* (2nd Ed.)" (2005)), common interest privilege is:

> *"… the common law equivalent of one person passing a document from one hand to another as it were, the right hand does know what the left hand knows, but no-one else does – or, more importantly, should be allowed to."*

37. Before it is possible to claim this type of privilege, it must first be established that the documents in question would attract in the hands of the issuer either legal advice or litigation privilege. If this is established, then it must be shown that the receiver of the document has a sufficiently close interest in the subject matter of the primary privilege (*i.e.* in the proceedings, if litigation privilege applies, or in the advice if legal advice applies), before the common interest privilege can be said to attach to the documents. Indeed, it has been suggested that such an interest should be more particularly of a legal rather than of an economic nature (see para. 51 *infra*.). If the documents pass the first part of the test but fail the second, by there being insufficient common interest between the parties, then the disclosure of the documents will amount to a waiver of any claim of privilege which otherwise would have attached to them.

38. With regards to waiver by this type of disclosure, the Supreme Court in *Redfern Ltd. v. O'Mahony* [2009] IESC 18 quoted from Matthews & Malek "*Disclosure"* (2007), who state:

> *"The position is less clear where there is a deliberate supply of a privileged document to a third party. One aspect of the question is the intention with which it was supplied. Was it supplied in confidence, without prejudice to the privilege, e.g. to the directors of the client company, another professional adviser of the plaintiff, such as his accountant, a person otherwise with a 'common interest', … in such cases the privilege is generally not lost. Or was it supplied with the intention of abandoning the privilege e.g., to the court to be released to parties and non-parties in the exercise of the court's discretion, to the media, in the hope of publication, or to the public generally? In these cases it is normally lost."*

Whilst it is unclear whether this passage was adopted, as such, by the court it seems evident from first principles that intention, purpose, breadth of disclosure and the relationship between issuer and recipient are all factors to be considered when waiver is an issue.

39. The comments of Fennelly J. in *Fyffes Plc v. DCC Plc & Others* [2005] 1 I.R. 59, as cited with approval in *Redfern*, are also informative and should be noted. He said at p. 68:

> *"The plaintiff, nonetheless, argues for the broad proposition that any disclosure to a third party leads to loss of the privilege. No authority has been cited in support of such a far-reaching principle. It is not to be found in Matthews and Malek, Discovery (London 1992) dealing with the topic of waiver. Apart from the more specific cases of waiver, most of which have been discussed in these proceedings, the authors pose the question whether relevant information was supplied 'with the intention of abandoning' the privilege. They footnote instances of communication to the public generally or to the media. Indeed, these references are the only support for the general proposition that disclosure defeats the privilege."*

The learned judge goes on to accept as a correct statement of the law, the *dicta* of Clarke J.A. in *Goldberg v. Mg* [1994] 33 NSWLR 639 that:

> *"there is no universal rule that the disclosure of documents produced for the sole purpose of seeking legal advice or litigation to a stranger to that litigation constitutes a waiver of the privilege in the documents."*

Thus it can be seen that there is not a general rule that <u>any</u> disclosure to a third party leads to loss of privilege; whilst disclosure can defeat privilege it is not bound to do so. Therefore the following discussion relating to specific comments on common interest privilege should be read in that light.

40. Whilst I will refer back to *Redfern* later in the judgment, the following passage from the decision of the Court is relevant to the instant topic:

> *"It is accordingly clear that privilege may be waived by disclosure. If the document comes into the public domain privilege will be lost. It will not, however, be lost where there is limited disclosure for a particular purpose or to parties with a common interest."*

In that case Finnegan J. thus found that in the circumstances:

> *"The disclosure relied upon by the appellants here is limited and was to parties having a common interest with the respondent in the proposed development of the car park. Such disclosure does not evince an intention to waive privilege. I am satisfied there has been no waiver of privilege in respect of the opinion sought to be inspected."*

41. The general legal principles governing the application of common interest privilege were described by Clarke J. in *Moorview Developments & Ors. v. First Active Plc & Ors*. [2008] IEHC 274. There is no dispute about this orthodox description:

> *"It is clear to me that common interest privilege arises in relation to documentation or materials which would be the subject of either legal professional privilege or litigation privilege in the hands of one person or body but where the relevant materials are given to a third party who may be said to have a common interest in either the legal advice or the litigation concerned. See for example Svenska Handelsbanken v. Sun Alliance & London Insurance plc*

[2005] 2 I.R. 284. Two questions therefore arise. The first is as to whether the documents would, in the hands of a single party, have the benefit of privilege in the first place. If not, then no question of common interest privilege could arise. If, however, the materials pass that first test but have been released by one party to a second party then it follows that it is also necessary to ask whether the release was on foot of a common interest in either the relevant litigation or advice. If so then the documents will remain privileged, notwithstanding their release, by virtue of the doctrine of common interest."

42. Thanki QC, "*The Law of Privilege*" (2006) describes common interest privilege thusly:

"In short, common interest privilege arises where one party (party A) voluntarily discloses a document which is privileged in its hands to another party (party B) who has a common interest in the subject matter of the communication or in litigation in connection with which the document was brought into being. In such circumstances, provided disclosure is given in recognition that the parties share a common interest, the document will also be privileged in the hands of party B."

43. Matthews and Malek, "*Disclosure*" (2007) address common interest privilege in the following way:

"Where joint privilege exists, it is unnecessary to rely on common interest privilege. But common interest privilege is different, both formally and in substance. And the rules on waiver are different. It does not matter whether both parties are in the same litigation, or only one is, or whether they are both plaintiff or both defendants, as long as they have a genuine common interest. Nor is it necessary for them to be represented by the same solicitor as long as their interests are close enough to be able to do so. *And although they must have a common interest, i.e. an area of interest which is common to both, they need not have exactly the same interests. The insurers of a party in litigation will usually have a 'common interest' with that party sufficient to attract the privilege, as will reinsurers of insurers, at least so long as the contract of reinsurance is not avoided."* [Emphasis added]

The reference underlined which has become known as the "putative common solicitor test", is in controversy and may not be an essential requirement of the rule.

44. Coleman J. in *Formica v. Secretary of State (acting by the Export Credits Guarantee Department)* [1995] 1 Lloyd's Rep. 692, at p. 699 describes the principle in this way:

"The protection by common interest privilege of documents in the hands of someone other than the client must presuppose that such third party has a relationship with the client and the transaction in question which, in relation to the advice or other communications, brings that third party within that ambit of confidence which would prevail between the legal advisor and his immediate client… [T]he essential question in each case is whether the nature of their mutual interest in the context of their relationship is such that the party to which the documents are passed receives them subject to a duty of confidence which the law will protect in the interests of justice."

45. What constitutes a "sufficient common" interest has been considered in a number of cases, although there is some disagreement as to how broad the test is. For example in *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1981] Q.B. 233, Brightman L.J. spoke of parties with "a common interest and a common solicitor", whereas in the same case Lord Denning M.R. made no mention of the solicitor requirement, and Donaldson L.J., the third member of the court, saw difficulties with such a condition. Lord Denning observed that the interests in question must be so closely linked that the courts should be able to:

"treat all the persons' interest as if they were partners in a single firm or departments in a single company."

Interestingly, the parties were separately represented in Buttes and therefore did not share a common solicitor.

46. In *Bank of Nova Scotia v. Hellenic Mutual War Risk Association* [1992] 3 Lloyd's Rep 540, the court found that there was not a sufficient interest between the plaintiff bank and a third party, which had previously sued the defendants. The documentation had consisted of legal advice which the third party had received concerning its claim against the defendants. There was also an agreement that the plaintiff would be entitled to the proceeds of the other case if the third party was successful. Saville J. stated:

"In the present case it cannot be disputed that the plaintiffs had the greatest possible interest in the owners' action against the defendants. The owners were deeply indebted to the plaintiffs and it was agreed between them that the plaintiffs would be entitled to any proceeds of that action. Furthermore, the plaintiffs' own claim against the defendants would be affected by this litigation, for if the owners were successful in their claim under the insurance policy, it would follow that the plaintiffs' complaint against the defendants (that the latter had failed to inform the plaintiffs that the owners were uninsured) would necessarily fail."

Nevertheless:

"the interest of the plaintiff bank and that of the [third party] in the action of the latter against the defendants is not a common interest sufficient to found a claim to common interest privilege. It could hardly be suggested (and indeed it was not suggested) that the plaintiffs and the owners could have shared the same solicitor or other lawyer… [The] interests of the plaintiffs and the owners could not have been dealt with by the same solicitors or other lawyers for the respective interests were (at the lowest) likely to conflict. They could not, in my judgment, be regarded as so close that the Court could, again using the words of Lord Denning M.R., treat the plaintiffs and owners as partners in a single firm or departments in a single company." [Emphasis added]

47. This test, as stated above, has been referred to as the "putative common solicitor" test, and is traced with doubtful authority to *Buttes* (see para. 45 *supra*.). In the intervening period there have been several cases where the requirement

of a common solicitor has been doubted, if not rejected: yet uncertainty continues as the English High Court in *Dadourian Group International Inc v. Simms* [2008] EWHC 1784 felt able to state:

> *"The parties must therefore share a common solicitor and information must itself be privileged from disclosure in the hands of the communicating or primary party."*

This approach not been followed in Australia, where instead:

> *"the parties' interest need not be identical, so long as they are closely related, and that the relationship must be such that it is 'inappropriate to treat the parties claiming privilege separately.'"* (Thanki QC).

As will be noted *infra*, the description of the test in *Simms* is, in my view, too restrictive.

48. The plaintiffs have suggested that the "putative common solicitor" test has been implicitly rejected in this jurisdiction by *Moorview v. First Active plc*. [2008] IEHC 274 and by the recent Supreme Court decision in *Redfern Limited v. O'Mahony* [2009] IESC 18; where the Supreme court held that common interest privilege existed with regards to counsel's opinion provided to the first non-party for the purposes of a joint venture agreement ('The Square Management Limited') and to the second non-party for the purposes of approving the granting of a Building Lease (South Dublin County Council). In neither *Moorview* nor *Redfern* could it be suggested that the parties were, or could have been, served by the same set of solicitors. In fact in *Moorview*, First Active and Mr. Duffy were quite antagonistic towards each other and yet the Court held that there was a common interest between them. In these circumstances, it is suggested that both courts would seem to have implicitly rejected the putative common solicitor test.

49. Furthermore it is clear that even if the parties are to some extent at odds with each other, this will not automatically preclude common interest privilege. In *The World Era* [1993] 1 Lloyd's Rep. 363, at p. 366, Phillips J. stated:

> *"The relationship between parties with a common interest in proceedings is not always harmonious: they may quite legitimately hold different views about who is to conduct the litigation and how. Such views may be strongly held and vigorously expressed. But the mere existence of such disagreements does not necessarily entail the conclusion that the parties no longer have a common interest in the proceedings themselves."*

50. Rix J., in *Svenska Handelsbanken v. Sun Alliance* [1995] 2 Lloyd's Rep. 84, at p. 86, noted in this regard:

> *"It is clear that the fact that differences may arise between parties of whatever closeness of interest such as to prevent them from at all times using the same lawyers or such as may indeed even cause them to find themselves ultimately on opposite sides of litigation, does not necessarily mean that they cannot be parties with a common interest for the purposes of this concept."*

The learned judge felt that the ability to share a solicitor could be a factor, but was not a pre-condition.

51. Common interest privilege nevertheless may not apply if parties are potential adversaries or if they are acting from purely selfish motives (*Todd v. Novotny* [1999] WASC 28). From U.S. jurisprudence, although not entirely consistent between states, it is generally accepted that the common interest must be a legal rather than a purely commercial interest. In *Duplan Corporation v. Deering Milliken, Inc*. 397 F. Supp. 1146 the court found that the patent-owner's legal success would benefit the patent-licensee only financially; the licensee had no legal interest in common with the patent-owner. The court reasoned:

> *"[W]here there is no legal interest …, the mere interest of a non-party client in legal transactions between the prime client and an outsider is not sufficient to prevent a waiver of the attorney-client privilege. This is true no matter how commercially strong the non-party client's interest is, or how severely the non-party client may be legally affected by the outcome of the transaction between the prime client and an outsider."*

52. Finally, the decision of McGovern J. in these proceedings should be mentioned. He was asked to apply common interest privilege to documents passing between the plaintiffs in this case and HomeBond. Although commenting *obiter* in this regard, he stated:

> *"While it may be 'putting the cart before the horse' in determining whether or not the plaintiffs and HomeBond have a common interest, it seems to me that they do not."*

Ultimately with regards to the documents at issue in that application he found it unnecessary to rule on whether there existed such a common interest, since:

> *"it seems to me that [the documents] are substantially concerned with how the pyrite issue should be addressed and investigated. Undoubtedly, they deal with issues such as how to address defects in houses arising out of this problem, but the communications are not specific to any litigation although they could be said to be of relevance to apprehended claims… I am not satisfied that [the documents] were created with the dominant purpose of preparing litigation, but that this purpose (if it existed) was secondary or equal to another purpose… For that reason, I hold … that the plaintiffs are not entitled to claim privilege over the communications that are at issue in this motion."*

53. Having considered the above authorities, I feel that the correct test where common interest privilege is claimed is thus: the Court must first determine by normal standards whether the documents would be privileged in the hands of the party transmitting the information, assuming that no disclosure had in fact been made. If it is found that the documents would be so privileged, then the court must ask whether the relationship between the parties was sufficiently close that the transmission of documents should <u>not</u> be held to amount to an implied waiver of the privilege. In considering this the Court should take into account the relationship between the parties, as well as the nature and purpose of the disclosure

and whether there could be held to be an objective intention to waive privilege on the part of the holder. Privilege should not be overborne lightly, and therefore the ultimate question must be whether it is reasonable in the circumstances to conclude that there was an implied waiver of the privilege. If such an implied waiver cannot be found, the Court should not otherwise interfere. As Ebsworth L.J., in *Kershaw v. Whelan* [1996] 1 WLR 358 at p. 370, said:

> *"Waiver is not lightly to be inferred; although privilege is an aspect of the law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy."*

54. In coming to the above conclusions I would note that the controversy surrounding the putative common solicitor test might be seen as a conflict between the law in this area being in a state of expansion or contraction: if such a requirement exists, there would be little difference in practice between joint privilege and common interest privilege; where the former is available there should be no need to rely on the latter. It does not in my view serve the interests of justice by further assimilating both. There is a call for each to play its part. The greater interest is served by rejecting the restrictive approach. This in my view is what the High Court did in *Moorview* and the Supreme Court did in *Redfern*. Moreover Lavan J. in *Ochre,* when referring to "the Common Interest" test said that *"A broad construction of this principle appears possible"* ([2004] IEHC 160). I would therefore hold that the common putative solicitor test does not have to be satisfied before common interest privilege can arise. That is not to say that whether the parties could be represented by the same solicitor is not a relevant consideration, but it will in no way be determinative. It is merely a factor to be taken into account in deciding whether the parties were sufficiently closely related that the disclosure should not amount to an implied waiver.

Waiver (other than through disclosure to a third party):
55. As has been stated *supra,* common interest privilege essentially involves the determination of whether there has been a waiver of privilege through disclosure to a third party. The defendants in this case claim that the plaintiffs have also implicitly waived privilege over a number of documents by virtue of their selective disclosure of documents of a similar type. It is accepted by both parties that waiver may also occur in these circumstances. The conditions for such a waiver shall now be considered.

56. In *Paragon Finance v. Freshfields* [1999] 1 WLR 1183, Lord Bingham C.J. held:

> *"A client expressly waives his legal privilege when he elects to disclose communication which the privilege would entitle him not to disclose. Where the disclosure is partial, issues may arise on the scope of the waiver… While there is not a rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness of misunderstanding may result."*

57. Thanki QC notes:

> *"This concern as to fairness is most acute in cases of deliberate waiver (since a party could otherwise 'cherry pick' privileged documents which most supported his case and claim privilege in relation to less favourable ones), but also applies to non-deliberate waiver."*

58. Fennelly J., in the Supreme Court, dealing with this question in *Fyffes v. DCC* [2005] 1 I.R. 59, considered the Australian case of A*.G. (NT) v. Maurice* [1986] 161 CLR 475 as being of "*especial importance*", and commented:

> *"The language of the judges in the latter case is revealing …:*
>
> *'The question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production.' (per Gibbs C.J.).*
>
> *'The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication … In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed documentation, fairness will usually require that waiver as to one part … should result in waiver as to the rest.' (per Mason and Brennan JJ.).*
>
> *'Ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings … be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance on professional privilege.' (per Deane J.).*
>
> *These dicta all concern attempts to abuse privilege by making partial and selective disclosure."*

59. The learned judge concluded in this regard, at p. 72 of the report, that:

> *"[T]he well-established rule regarding privilege, whether including a notion of fairness or not, goes no further than the proposition that a party who seeks to deploy his privileged documents by partially disclosing them or summarising their effect so as to gain an advantage over his opponent in the action in which they are privileged [see Hannigan v. D.P.P. [2001] 1 I.R. 378], runs a serious risk of losing the privilege. I do not deny that the partial disclosure which has that effect might, in some circumstances, be made to a third party, but it would have to be for the purpose of gaining an advantage in that action. I would add that express stipulations of confidentiality, such as in the present case, will necessarily be a material factor. They will obviously negative any claim of express waiver and most cases of implied waiver."*

60. These statements were recently reaffirmed by the Supreme Court in *Redfern Limited v. O'Mahony* [2009] IESC 18, where Finnegan J. stated:

> *"There is one other area in which legal profession privilege can be lost on the basis of unfairness and that is in*

relation to partial disclosure of legal advices …. Where a party deploys in court material which would otherwise be privileged the other party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole material relevant to the issue in question. To allow an individual item to be plucked out of context would risk injustice through its real weight or meaning being misunderstood."

61. It is therefore clear that a party may not make selective disclosure with regards to a group of documents of a similar nature. The question which arises in this case is whether the documents over which the plaintiffs still claim privilege are of such a similar nature to the ones which they have produced or expressly waived privilege over that this might give rise to unfairness by presenting a partisan or biased view of their case to the Court and the other party. The plaintiffs argue that there are justifiable differences between their disclosed documents and those over which privilege is maintained. They claim that the remaining privileged documents are drafts which involved consultation with their legal advisors and which, unlike many of the documents which they produced for inspection, were never sent to any parties. The Helsingor documents discovered must also be included in this heading of complaint. In those circumstances, it is argued, there are sufficient differences between them to justify a continuing claim of privilege.

Photographs: Privilege:
62. A further issue in this case was whether a collection of photographs was privileged. There was some dispute between the sides as to whether any photos could be privileged; although the defendants conceded that those produced by an expert in preparation of a report in contemplation of litigation would be privileged. The defendants argue that "*photographs are factual records*": and therefore "*It is well established that facts which are conveyed in communication subject to litigation privilege are not privileged*". In this regard they cite Thanki QC at para. 3.13.

63. The plaintiffs take issue with this on two fronts. Firstly they note that the defendants themselves have claimed privilege over more than 22,000 photographs. I need not comment on this, as the status of these photographs is not at issue in this application. Secondly the plaintiffs contend that no material distinction can be made between photographs taken by experts in preparation or contemplation of litigation, and photographs taken by employees on foot of advice from legal advisers and in preparation or contemplation of litigation. They note that the photographs at issue in this application were taken on foot of advice from their legal advisers and in contemplation of litigation, and they are therefore privileged, as would any other document created in those circumstances.

64. Having looked at authorities I conclude that photographs are "documents" for the purpose of discovery and may be privileged, where the dominant purpose of their creation was litigation. I would also agree with the plaintiffs that there is no material distinction to be drawn between experts' photographs and employees', provided both were taken in contemplation or in preparation of litigation.

65. The case of *Lyell v. Kennedy (No. 3)* (1884) 27 Ch. D. 1 provides a convincing rationale for such privilege. The case involved a claim to be an heir to a deceased's estate. Considering whether collections of public records and photographs taken of tombstones were privileged, Cotton L.J. stated at pp. 25-26:

"What ought we to do here? Here is a litigation about pedigree and the heirship to a lady who died many years ago; and it is sworn by the Defendant that for the purpose of defending himself against various claimants he has made inquiries, and he has obtained every one of those documents for the purpose of protecting himself, and that he has got them, not himself personally, but that his solicitors have got them, for the purpose of his defence, for the purpose of instructing his counsel, and for the purpose of conducting this litigation on his behalf. Now no case has been quoted where documents obtained under such circumstances have been ordered to be produced. In my opinion it is contrary to the principle on which the Court acts with regard to protection on the ground of professional privilege that we should make an order for their production; they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps publici juris in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might shew what his view was as to the case of his client as regards the claim made against him."

66. Thus it is possible for a collection of documents which otherwise would not be privileged to be so where they were obtained by solicitors, or on their behalf, for the dominant purpose of litigation, a phrase I obviously import into the above judgment of Cotton L.J., by virtue of the fact that production of the documents could show the line of legal inquiry of the plaintiffs legal team and give clues as to how they will seek to run the litigation.

Conclusions:

Category No. 1: Helsingor documents:
67. If one was to approach this category of documents (see paras. 7-9 *supra*.) from a narrow point of view, it would be possible to argue that Helsingor could offer no value to the plaintiffs in the instant litigation. These proceedings in essence allege that the defendants' infill, used for an intended purpose, was defective and was the causative agent in the problems complained of. When these difficulties first arose it is reasonable to assume that the necessary investigations and consequential remedial works were essentially undertaken by / or on behalf of the plaintiffs, who in the process retained or accessed various experts in appropriate disciplines *etc*. In such circumstances it is difficult to see how Helsingor could usefully contribute to this action by offering views on documents generated by the plaintiffs or by issuing documents itself.

68. In addition, since Helsingor has an indemnity from Menolly, it could be said to be a disinterested observer to these proceedings. Its interests will be covered in any event. In support of this is the fact that it refused an invitation to become a party to this litigation and secondly that in November 2007 it retained lawyers independent of Menolly.

69. On the other hand, this entire project had its origins in a Joint Venture Agreement made on 22nd June, 2004 between Helsingor, Menolly Homes and Ballymore Residential. Under that agreement Menolly was to build the residential units on lands owned by Helsingor; which are now known as the Myrtle estate. The method used by the parties to engage with would be purchasers was that interested persons would (and did) enter into a building contract with Helsingor, and once the unit was complete, the company conveyed the property to the homeowner. So whilst it did not build the houses, it

was potently involved in the factual and legal arrangement underpinning the Joint Venture Agreement. Further, 50% of Helsingor is owned by Menolly and Menolly has 2 directors on the Board of Helsingor.

70. With regards to the homeowner litigation, as any prudent solicitor would do, each purchaser who took action did so against Helsingor and Menolly. The former was, from the point of view of the homeowner, in the front line of this litigation; and given its contractual commitments rightly so. In the homeowner litigation, whereas originally appearances were entered on behalf of both defendants, B.C.M., who at all times represented the plaintiffs, took over the defence of Helsingor on 19th August, 2008 and now represents both the defendants in these actions.

71. The evidence establishes that at all times, in both sets of proceedings, the solicitors for the plaintiffs and Helsingor have shared information regarding the problems with the Menolly units and have done so by the exchange of documents on which the instructions of their respective clients and their legal advice are recorded. That legal professional privilege, whether advice or litigation type, attaches to such documents is not in dispute: the question is whether privilege had been waived by disclosure to each other or is it still protected by both the companies having a sufficient common interest in the subject matter thereof. I believe that it is still so protected. I am satisfied that such documents were created and passed in confidence and whilst the indemnity intervenes, it does not, by itself, dislodge the previously existing privilege. Both companies are inextricably linked to each other for the purpose of the Menolly proceedings.

72. This conclusion, by viewing the disclosure in context and by adopting a broad approach to the issue, is much like *Redfern*, when a similar application of the concept of common interest privilege was utilised. In that case the development of "the Square" in Tallaght was carried out on lands the subject of two leases dated September 1988 and August 1989 and made, put simply, between Dublin County Council and L&C Properties Limited. The leases, *inter alia*, granted a licence over premises which eventually vested in South Dublin County Council ("S.D.C.C.") as the lessor and in Square Management Limited as the lessee. Another company Lowe, which was owned by Mr. O'Mahony and Mr. McFeely ("the partners") was entitled to a sub-licence over the surface car park (part of the development), which sub-licence was enjoyed by Aifca Limited, a wholly owned subsidiary of Lowe.

73. Alburn, an unlimited company and wholly owned subsidiary of *Redfern Limited*, and Square Management entered into a "Joint Venture" agreement in July 2003, the object of which was to develop the car park. For this to take place it was a prerequisite that all licences over the car park be extinguished; Square Management agreed to this. In order to extinguish Lowe's licence, the "Alburn Agreement" was entered into in August 2005 by the partners on behalf of Lowe and Alburn. Under the agreement the partners agreed to dispose of the entire issued share capital in Lowe to Alburn in exchange for the allotment of shares in Alburn to them. Completion of this agreement was essential if the development of the car park was to proceed.

74. In July 2007, *Redfern* instigated proceedings against the partners seeking, *inter alia*, a declaration that the Alburn Agreement was valid and subsisting and seeking specific performance thereof. The partners did not deny the existence of the agreement, but argued that Alburn had been guilty of unreasonable delay and laches which thereby estopped it from seeking completion of the agreement. The delay by *Redfern* in the completion of the Alburn agreement caused detriment to Lowe's financial position causing its lenders to call for repayment of borrowings, or failing that enforcement of security. Thus it was necessary for the partners in Lowe to seek alternative funding. This was achieved by Aifca entering into an agreement with Liam Carroll whereby Tafica, in which he was entitled to the entire issued share capital, would subscribe for 50.25% of an increased issued share capital in Aifca (the "Aifca Agreement"). Following this, *Redfern* joined Liam Carroll, Tafica and Aifca as defendants and delivered amended proceedings. Against Liam Carroll and Tafica it was alleged that they entered the Aifca Agreement with the intention of interfering with the due performance of the Alburn Agreement, or of inducing a breach of contract by the Lowe partners. In response Liam Carroll and Tafica claimed that they had entered into the Aifca Agreement with the specific purpose of ensuring that there would be no breach of the Alburn Agreement.

75. In relation to the above agreements, an opinion of Paul Sreenan SC was obtained by *Redfern*. This was circulated to the Square Management Limited board committee with responsibility for the implementation of the Joint Venture agreement and to S.D.C.C., who subject to Council approval proposed to dispose of 11 acres, including the car park, without which, once again, the development could not proceed. The issue was therefore whether that disclosure to non-parties amounted to a waiver of privilege over the opinion. It was noted that the membership of the Square Management Limited consisted of all lessees in the Square development, thus the disclosure was potentially very wide in that regard. Further, the circulation to South Dublin County Council also represented a very wide disclosure since each member of the Council could request sight of the opinion if they so wished. Despite this the Supreme Court held that there was a sufficient common interest between *Redfern* and the Square Management and South Dublin County Council so that notwithstanding the potentially broad disclosure, the circulation did not amount to a waiver of the privilege, with the Court saying:

> *"The disclosure relied upon by the appellants here [was] limited and was to parties having a common interest with the respondent in the proposed development of the car park. Such disclosure [did] not evince an intention to waive privilege." ([2009] IESC 18)*

76. As can be seen, *Redfern* represents a very broad application of the principles relating to common interest privilege. It is in a similar context that I too would adopt a broad approach. Having regard to this interpretation of "common interest", I thus find that there was no implied waiver of the privilege which exists in the documents passed between Helsingor and Menolly.

77. Additionally, I would note that in my opinion no unfairness arises by reason of partial disclosure, by reference to the test set out in *Fyffes* (see paras. 57-58 *supra*). In particular, the Helsingor documents already disclosed are heavily redacted; showing that the plaintiffs were live to the issue of privilege over documentation involving Helsingor and they did in fact assert privilege over sections thereof. I therefore refuse the defendants' application in relation to the first category.

Category No. 2: Photographs:

78. As outlined at paras. 64-66 *supra*, I am satisfied beyond question that photographs can be the subject matter of privilege, and that the retention of experts to take such photographs is not and could not, as a matter of first principles, be a necessary pre-condition to the successful establishment of privilege in this regard. Of course, it must be recognised

that the creation of such photographs must satisfy the dominant purpose test, but if so within, they can attract privilege.

79. In support of their assertion that no privilege attaches to this material, the defendants argue that since photographs are factual records containing facts, then litigation privilege does not apply.

80. Patrick Dalton, on behalf of the plaintiffs, gave the background to the taking of the photographs in his affidavit, sworn on 10th September, 2009. He states that on 26th February, 2007 B.C.M. furnished the plaintiffs with written advice that photographs should be taken as part of the process of handling claims for damage by homeowners. The photographs were then taken between 7th March, 2007 and 2nd October, 2007. At a meeting on 11th January, 2007 the plaintiffs decided to retain senior counsel. That date can therefore be reasonably taken as the date from which litigation was contemplated or threatened.

81. The evidence in the affidavits and exhibits, which has not been rebutted, thus clearly establishes that the photographs complained of were taken following express legal advice from the plaintiffs' solicitors at a time when it was known that the root cause of the problem in the three housing estates would ultimately have to be decided in a court of law. I do not accept that photographs *per se* can be considered in like manner as a primary fact. The surrounding circumstances in which the photographs were taken can clearly be explored in evidence but that does not alter the fundamental nature of photographs for the purpose of discovery rules. I believe that whilst there may have been secondary or subsidiary reasons for the creation of a photo bank, the dominant purpose of their taking was in the context of and related to litigation. I do not think that this conclusion is dislodged by the fact that the same were not transmitted to the plaintiffs' lawyers on their taking, or soon thereafter. Moreover, evidence contained in Exhibit "PD3" of Mr. Dalton's first affidavit, puts the circumstances of their taking into context, and from this evidence, which remains uncontested, I am quite satisfied therefrom that privilege attaches to this category of documents.

Category No. 3: HomeBond documents:
82. Two observations can immediately be made with regard to this category of documents, which contains a mixture of draft communications prepared by the plaintiffs' lawyers, intended for delivery to HomeBond, but which in fact were never sent to them, and minutes of meetings at which a Connor Taaffe from HomeBond was present. The first observation arises out of the judgment of McGovern J., given on 17th February, 2009 in these proceedings, whereby he directed the plaintiffs to produce certain documents which they exchanged with HomeBond. The learned judge whilst offering the view, which was *obiter*, that the plaintiffs and HomeBond could not avail of common interest privilege, did not decide the case on that basis; rather he held that the first test was not met, therefore the documents did not attract legal professional privilege.

83. Originally the plaintiffs on this application alleged common interest privilege in respect of the noted documents but this is no longer being pursued. The above decision however remains relevant because reliance is place on the Order made. The defendants claim that the resulting partial disclosure is apt to mislead and thus fairness demands that all HomeBond documents are released.

84. In reply, the plaintiffs note that these documents are of a wholly different nature to the documents covered by the Order of McGovern J. These are not letters actually sent to HomeBond, but were draft letters prepared in consultation with their legal advisers. In those circumstances they are privileged. With regards to the minutes of meetings, they accept that a representative from HomeBond was present, but they state that otherwise it was a legal meeting relating to ongoing litigation. In those circumstances the minutes are also privileged.

85. I agree with the plaintiffs that the documents over which privilege is maintained here are of a different character to those which were before McGovern J. These letters were not sent to HomeBond; they are merely drafts. Nor does the fact that a representative of HomeBond was present at a meeting remove privilege from contemporaneous minutes of that meeting taken by legal advisers; who were present at all but three of the meetings. These meetings were however part of a process with the same end and with a common purpose; all meetings can thus be treated similarly. These facts do not interfere with the legal professional privilege which attaches to them. I am also satisfied that there has been sufficient disclosure of the HomeBond documents; their disclosure following the decision by McGovern J. was not such as would, by its partial state, mislead the Court, as the law is understood in that regard (see para. 61 *supra*., *Fyffes* and *Paragon Finance*). I can therefore see no scope for the Court being mislead in this regard and I refuse this category.

Category No. 4: Reputation Inc.:
86. The fundamental question in relation to this category is whether the documents were created for the dominant purpose of litigation or legal advice. A major factor in considering this is the fact that the company in question is a public relations company. Therefore can public relations, as such, be for the primary purpose of litigation. There is no doubt that Reputation Inc. was engaged because of litigation, but that does not necessarily mean that their actions had as their primary purpose the litigation itself. Instead, as a public relations firm their primary focus was the control of press and publicity. It could not be said that they did play, or even could have played, an active or useful role in the conduct of the litigation. They could not give legal advice or appear in court.

87. The plaintiffs contend that Reputation Inc. received documents as their agents, however I am not satisfied that they were in reality in such a position. I can see no reason why legal advice should be passed through a public relations firm. Further, having considered the documents, I am satisfied that there is nothing contained therein which would attract legal professional privilege. I therefore accede to the defendants' application and order discovery of this category.

88. I would just note with regards to this category that my determination herein should not be taken as espousing the view that documents provided to a public relations company can never be privileged or that the giving of such documents must implicitly be seen as a waiver of privilege. Each case will turn on its own facts. The Australian Court of Appeal in Victoria in *Spotless Group Ltd v. Premier Building & Consulting Group Pty Ltd* (2006) 16 VR 1 was asked to determine whether privilege had been waived over documents provided both to a litigation funding company and to a public relations consultants ("Royce"). The Court found that there had been no waiver of the privilege, Chernov J.A., at para. 30, stating:

> *"As to the Royce documents, for the reasons I have given, it may be accepted for present purposes that they were forwarded to Royce on a confidential basis and that the reason for the communication was to appraise it of the respondent's legal position and so facilitate its commission of Royce, within that ambit, to prepare the public relations campaign to meet the negative publicity about the contamination on the respondent's land and its*

construction on it of the apartments. … In the circumstances, I consider that for the same reasons that the communication to the financiers did not involve waiver by the respondent, there has been no waiver by it of the privilege in relation to the Royce documents. In my view, there is no inconsistency between the respondent providing the Royce documents to the public relations adviser for information for a limited and specific purpose and insisting on their non-disclosure to the other parties to the litigation on the basis of legal professional privilege. And, for the reasons I have given in relation to the documents that were given to the financiers, there was no unfairness in the respondent continuing to claim privilege in relation to the documents in question." (Emphasis added)

I would agree with this analysis. Where documents are provided to a public relations company for limited and specific purposes on the understanding that they are provided on a confidential basis, their production may not necessarily waive privilege over them. However, as stated, whether the documents are privileged, or whether their disclosure to the public relations company will amount to a waiver, will in any event turn on the specific circumstances of the case. In this case I am not satisfied that the contested documents which passed between the client and Reputation Inc. were in fact privileged, therefore the question of waiver does not arise.

Categories Nos. 5 and 6: Internal Menolly documents and Golder / DBFL documents:
89. It is convenient to deal with both of these categories together. Both effectively relate to documents, in the form of spreadsheets or charts, created either by Menolly or one of their engineers. The documents would appear to be summaries of information: relating to the problems with the houses; with regards to test results; and, in relation to the conduct of certain aspects of the homeowners litigation. In that regard I would note that these proceedings and the homeowner litigation amount to a considerable and complex web of litigation. It would not be unusual in that situation for experts or clients to produce summary documents for consideration by the lawyers. These documents were thus clearly created in furtherance of litigation. I would also note that in any event I am satisfied that the primary underlying material contained and summarised in these documents is already in the possession of the defendants; thus there could be no injustice by withholding these documents. In those circumstances I am satisfied that both of these categories should be refused.

Category No. 7: Miscellaneous documents:
90. There were a number of further miscellaneous documents over which the defendants challenged privilege. These documents were described as: "1 letter and 1 minutes"; "Homeowner correspondence documents"; "14 Internal Menolly Letters/emails and 1 email from Menolly Engineers"; and, "Method Statements". I have considered all of the documents individually and come to the following conclusions.

91. With regards to the letter and minutes I find that these documents are not privileged. The letter referred to was created in 2004 and, in any event, contains nothing which could be considered privilege, regardless of its date production. With regards to the minutes I also find that these are not privileged; there is some reference in them to bringing solicitors and counsel on board, but nothing more.

92. The homeowner correspondence documents, as described, are in fact tables and spreadsheets containing descriptions of problems with specific properties, and actions which may need to be taken in relation thereto, both remedial and legal. I am satisfied, as I was with regards to category 5 that they were produced primarily as part of overall litigation management and are therefore privileged.

93. With regards to the 14 internal letters and e-mails I am confident that these were created in furtherance of litigation and thus are privileged. However, the e-mail from the engineer is not privileged. This conclusion is bolstered by the fact that I am informed that the attachment, a report, has already been discovered. There is nothing of a privileged nature communicated in the e-mail and I would therefore order its production.

94. Finally, I have examined the documents described as "method statements" and am satisfied that they are not privileged. They contain descriptions of works to be carried out. Unlike the charts and schedules considered in category no. 5 which were clearly created in furtherance of litigation and to assist in litigation management, these method statements are just that; namely, documents describing what remedial works are required generally, outlining the remedial works to be done *etc*. They would not have been created with any legal input and are purely engineering/building related in nature. Therefore I find that these are not privileged.

95. In overall summary, I have come to the conclusion that the Helsingor documents, photographs, HomeBond documents, internal Menolly spreadsheets and charts, Golder/DBFL documents, Homeowner correspondence documents and 14 internal Menolly correspondence are privileged. I find that the Reputation Inc. documents, the single engineer's e-mail (docid: EM3542P) and the method statements are not privileged and I therefore accede to the defendants request with regards to those documents and order their production.