THE HIGH COURT

COMMERCIAL

[2011 No. 4336 P.]

BETWEEN

CIARA QUINN, COLLETTE QUINN, BRENDA QUINN, AOIFE QUINN, SEAN QUINN JUNIOR AND PATRICIA QUINN

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND KIERAN WALLACE

DEFENDANTS

AND

SEAN QUINN, DARA O'REILLY AND LIAM MCCAFFREY

THIRD PARTIES

Judgment of Mr. Justice Robert Haughton delivered on the 31st day of July, 2018

1. This ruling concerns an application by the first named defendant ("IBRC") brought by Notice of Motion dated 18th April, 2018 seeking:-

> "(1) An order re-entering the first named Defendant's Notice of Motion dated 22 April, 2015 seeking an order for further and better discovery against the Plaintiffs pursuant to Order 31, rule 12 of the Rules of the Superior Courts.
>
> (2) An order declaring that the Plaintiffs have no valid claim of privilege over all documents relating to Mason Hayes & Curran Solicitors' legal advices."

2. The focus of the application has been on whether the plaintiffs are entitled to maintain privilege over documents held by Mason, Hayes & Curran ("MHC"). MHC were the solicitors initially consulted by the plaintiffs in relation to the commencement of these proceedings. Because of potential conflict of interest, MHC were unable to continue to act and the proceedings were issued by Messrs Eversheds instead. However MHC were, and are, in possession of documents which were generated or arose in the context of, *inter alia*, anticipated litigation. Indeed, for the purposes of this application IBRC do not dispute that ordinarily the documents discovered by MHC, or many of them, may attract a valid claim of privilege.

Background to proceedings

3. The first to fifth plaintiffs are children of Sean Quinn (Senior), the first named third party, a business man who founded a group of companies ("the Quinn Group"). While Mr. Quinn was the founder of the group, the first to fifth plaintiffs say that they were at all material times the ultimate beneficial owners. The sixth plaintiff is Mr. Quinn's wife, and the second and third named third parties are both former executives of the Quinn Group. The Quinn Group comprised the manufacturing and insurance arms of the business interests of Mr. Quinn/the plaintiffs, and a complex structure of companies known as the International Property Group ("IPG") was established so that the first to fifth plaintiffs would each have their own property and investment portfolios.

4. Various Quinn Group entities owe debts to IRBC of approximately €2.8 billion arising from lending by Anglo Irish Bank which was secured in a number of ways, including the provision of security which the plaintiff seek to invalidate in the within proceedings. Mr. Quinn personally guaranteed the lending and judgment was granted against him on 23rd November, 2011 and 28th November, 2011 for amounts of €417 million and €1.6 billion respectively on foot of those guarantees and indemnities.

5. These proceedings arise out of claims by the plaintiffs that share pledges and personal guarantees and indemnities executed by them are invalid and unenforceable on grounds of undue influence, breach of fiduciary duty/a duty of care to ensure that they received independent legal advice in relation to the relevant borrowing and security arrangements, and/or unconscionable bargain. IBRC has delivered a full defence and has counterclaimed for the recovery of sums due. As a result of decisions made by the High Court, and on appeal by the Supreme Court, further claims as to invalidity based on breach of the Market Abuse Regulations, 2005 and/or s. 60 of the Companies Act, 1963 can no longer be pursued by the plaintiffs.

The process of discovery and the claim to privilege

6. It is necessary to refer to the somewhat complicated discovery process, which included non-party discovery by MHC, the privilege claimed over documents, and the waiver of privilege.

7. By Order dated 26th July, 2012 (Moriarty J.), the plaintiffs were directed to make discovery of nineteen categories of documents, including relevant documents within their possession or power relating to the financial affairs of the Quinn Companies/Quinn Group.

8. The plaintiffs made discovery on 9th November, 2012. It should be noted that at the time that discovery was made they did not have solicitors on record.

9. Each discovery affidavit asserted privilege over the documents set forth in the Second Part of the First Schedule in the following terms:-

> "I say that the documents set forth in the second part of the first schedule hereto consist of letters, notes, memoranda, reports, documents and advices passing between the plaintiffs' solicitors and the plaintiffs, between the plaintiffs' solicitors and counsel, counsels' advices, drafts, notes, documents all made during the progress of these proceedings and correspondence arising therefrom (including attendances or other documents which came into existence solely for the purpose of obtaining legal advice on behalf of the plaintiffs in connection with this litigation or in contemplation of this litigation). I say that these documents are privileged from discovery."

The Second Part of the First Schedule to each affidavit sets out a list of documents in respect of which privilege was claimed.

The Second Schedule sets out the documents that the plaintiffs once had, but no longer had, in their possession. This referred generically to documentation in categories 1 – 19 being –

> "1. All documentation as envisaged in categories 1 to 19 in the Order of this Honourable Court dated 13 July 2012 including but not exclusive to all financial records, tax advice, investment strategy, communications and the transfer of funds relating to the Quinn Group of Companies.
>
> 2. Documents in the possession of Quinn Group of companies and/or their agents and/or advisers.
>
> 3. Documents in the possession of PWC.
>
> 4. Documents in the possession of A & L Goodbody.
>
> 5. Documents which have been provided by Quinn Group to unidentified third parties which are unknown to the plaintiffs."

This did not suggest any belief on the part of the plaintiff's that there were further documents in the possession of MHC, or MHC documents that the plaintiffs believed to exist, but that were no longer in their power, possession or procurement.

10. On 15th November, 2012 along with the discovery the plaintiffs furnished a disc containing an "Adeo Schedule" listing the discovered documentation. There were difficulties with accessing some of the documents on that disc and a further disc was furnished on 4th February, 2013 by the plaintiffs' new solicitors Whitney Moore.

11. By letter dated 18th December, 2012 to Ciara Quinn, IBRC's solicitors challenged privilege asserted over:-

> (1) legal advice received by or on behalf of Quinn Companies, including advice given by MHC to the Quinn Group;
>
> (2) correspondence between legal advices and the Office of Director of Corporate Enforcement ("ODCE");
>
> (3) tax related communications e.g. with PricewaterhouseCooper ("PwC");
>
> (4) other "inadequately described documents",

and they identified in a schedule the documents where no image was presented on the Adeo disc.

12. The plaintiffs persisted in their claim for privilege and a Notice of Motion was issued by IBRC's solicitors on 28th May, 2014 requiring the plaintiffs to produce the disputed privilege documents for inspection. On 30th May, 2014 CP Crowley solicitors, now acting for the plaintiffs, wrote to McCann Fitzgerald (solicitors for IBRC) stating:-

> "Dear Sirs,
>
> We refer to your motion, returnable for 3rd June, 2014 in respect of the discovery of privileged material.
>
> *Having reviewed the material, the plaintiffs propose to waive the privilege claimed over the documents and to provide same to the defendants. The plaintiffs are not conceding their previous position – simply adopting a practical approach.*
>
> Our clients are gathering the necessary material and should be in a position, by Tuesday, to indicate a timeline for handing over copies of same.
>
> Yours sincerely
>
> CP Crowley & Co." [Emphasis added].

13. On 24th June, 2014 CP Crowley forwarded to IBRC's solicitors a CD containing the documents listed in the Second Part of the First Schedules to the affidavits of discovery. Due to apparent technical problems this was incomplete, and by letter dated 9th July, 2014 a further CD containing all the documents listed in the Second Part of the First Schedule was provided. This disclosed all the documents over which privilege had been claimed and in respect of which privilege was now waived ("the disclosed privileged documents").

14. On 3rd February, 2015 McCann Fitzgerald wrote to CP Crowley raising a number of issues with what had been provided on this disc, and in particular identified an absence of material relating to advice or correspondence with MHC in the period 2008-2010. This was identified in part by reference to what are known as the "Conspiracy Proceedings" between IBRC (*in Special Liquidation), Quinn Investments Sweden AB, and Leif Baecklund, plaintiffs – and – Sean Quinn and others defendants* (High Court, Record No. 5843 P/2011). From these it was apparent to IBRC that there were other documents on the server of Quinn International Property Management Ltd ("QIPM") that were captured by categories 1 to 19. In particular predictive coding indicated that these included documents relating to advice and assistance from MHC to Quinn Group companies and/or Quinn family members during the same time period and seemingly on the same subject matter as the disclosed privileged documents. Although discovery had yet to be made in those proceedings, there was a reciprocal agreement between IBRC and the plaintiffs whereby documents discovered in the Conspiracy Proceedings could be used in the present proceedings.

15. IBRC maintained that all of this QIPM documentation ought to have been disclosed by the plaintiffs in their November 2012 discovery schedules, and further that the plaintiffs' waiver of 30th May, 2014 applied also to this material.

16. Further it was asserted by reference to the disclosed privilege documents, and in particular an attendance by Niamh Callaghan of MHC on Dara O'Reilly dated 14th May 2010, that there should be further material relating to exchanges between the plaintiffs and MHC or MHC and Quinn Group companies relating to advices of that firm concerning the guarantee obligations of the plaintiffs. In that attendance Mr. O'Reilly outlined factual issues relating to the plaintiffs' knowledge of various issues, including a chronology of the various personal guarantees the subject matter of these proceedings, and details of other personal guarantees granted by them which the writer of the attendance points out "could demonstrate a knowledge and experience on children's behalf with executing such documentation".

17. CP Crowley responded by letter dated 11th February, 2015 somewhat surprisingly rejecting the suggestion that their clients had

failed to fully discovery documentation from MHC and stating "our clients have discovered the entirety of such documentation in their power, possession or procurement". With regard to the waiver letter of 30th May, 2014 they stated:-

> "The suggestion that our clients have somehow waived privilege over the entirety of all Mason Hayes & Curran documentation is entirely rejected. You will recall that, following the issuance of your Motion on 30th May, 2014, our clients adopted a pragmatic approach and waived privilege over a discrete number of Mason Hayes & Curran documents, to avoid unnecessary expense and court time, where the documents albeit clearly privilege, did not prejudice our clients."

In that letter CP Crowley also objected to the "very questionable manner" in which IBRC was investigating/comparing the privilege material (or descriptions of same) disclosed in the Conspiracy Proceedings which had been segregated and listed on behalf of IBRC in an "Espion Schedule". In their response of 19th February, 2015 McCann Fitzgerald on behalf of IBRC emphasised that the Espion Schedule "has been treated very carefully and has been segregated by Espion to the extent that it can be" so that material over which the plaintiffs might be entitled to assert privilege had not been reviewed.

18. Following further correspondence by Notice of Motion issued on 22nd April, 2015 and returnable to 11th May, 2015 IBRC sought further and better discovery of documents relating to legal advices of MHC to the plaintiffs or companies of which they are or were beneficial owners, inspection of all the documents ordered to be discovered on 26th July, 2012, and an order "declaring that the plaintiffs had no valid claim of privilege over all documents relating to Mason Hayes & Curran solicitors legal advices".

19. That motion was adjourned because IBRC took the view that "the most efficient manner of proceeding was for IBRC to seek non-party discovery directly against MHC". It is that motion that IBRC now seek to re-enter.

20. Thereafter an order for non-party discovery was made by consent by McGovern J. on 14th May, 2015 requiring MHC to make discovery of:-

> (a) "Documents relating to any lending (including the provision of any security referable to that lending) by Anglo Irish Bank to Ciara Quinn, Collette Quinn, Sean Quinn Junior, Aoife Quinn, Brenda Quinn or Patricia Quinn or any of them, or companies of which they were individually or collectively beneficial owners, which were created or provided to MHC between 1st April, 2010 and 1st March, 2011 and which have not been already discovered in these proceedings by the plaintiffs or any other non-parties;
>
> (b) Documents generated between 2008 to 2010 relating to the Quinn CFD position built up in shares of Anglo Irish Bank Corporation Ltd. (the Quinn CFD position), the closeout of the Quinn's CFD position and the proposed reorganisation of Quinn family interests, including but not limited to documents referring to the insider dealing provisions of the Market Abuse (Directive 2003/6/EC) Regulations in connection with the aforesaid;
>
> (c) Any notes or memoranda associated with the documents described in 1(a) and 1(b) above."

21. Affidavits of discovery on behalf of MHC were sworn by Niamh Callaghan and Justin McKenna on 26th June, 2015. These disclosed a great many documents. It is not disputed that these documents were captured by categories 1 – 19 and ought to have been discovered by the plaintiffs in these proceedings - whether in the Second Part of the First Schedules, or in the Second Schedules. In the replying affidavit sworn by Ms Aoife Quinn on behalf of the plaintiffs in response to this application no explanation is offered for the failure to comply properly with the discovery order of Moriarty J.

22. Ms Callaghan and Mr McKenna in their affidavits of discovery on behalf of MHC claimed privilege on behalf of their clients, including the plaintiffs, over all but a small number of the discovered documents. McCann Fitzgerald conducted a detailed review of the schedules and identified (1) documents which appeared to be some of those over which the plaintiffs had already waived privilege, (2) executed security documents and other documents which were clearly not privileged, and (3) documents from the plaintiffs' discovery which were missing from MHC's discovery (although this was subsequently rectified in the case of some documents). This led to protracted correspondence between McCann Fitzgerald and MHC.

23. In the course of this correspondence the plaintiffs' solicitors raised the issue of the discovery by MHC of certain documents which MHC considered were non-privileged. MHC, at McCann Fitzgerald's request, also conducted a partial cross-referencing exercise on the Espion Schedule as against documents discovered by their clients, but would not review the "ring-fenced documents" due to privilege concerns. The results of this were disclosed to McCann Fitzgerald and led to a further exchange of correspondence. Further due to privilege and confidentiality concerns relating to the non-privileged documents, MHC wrote to numerous third parties and asked for confirmation that they would consent to disclosure of the documents listed in the non-privileged schedules to their discovery. Ultimately and as a result of this process on 11th October, 2016 McCann Fitzgerald were provided by MHC with further supplemental affidavits of discovery sworn by Mr. McKenna on 4th October, 2016 and Ms. Callaghan on 6th October, 2016.

24. Insofar as privilege is now asserted by the plaintiffs over the documents scheduled in these supplemental affidavits, this relates to privilege asserted by MHC by and for the benefit of the plaintiffs only. It emerged in the course of argument that the plaintiffs' solicitors are in possession of the disc containing the documents discovered by MHC, including the documents over which privilege is asserted.

25. Remarkably the court was informed that while the MHC discovered documents have been viewed by the plaintiffs/solicitors, they have not reviewed the MHC documents over which privilege is asserted by MHC on their behalf.

26. A significant issue arises in this application because IBRC maintain that the descriptions in the MHC listings of documents over which privilege is asserted are inadequate and insufficient for them to assess the claim of privilege and, in particular, whether there is such connection or similarity to disclosed privileged documents (in respect of which privilege was waived on 30th May, 2014) such that privilege may also be said to be waived in respect of the listed document.

Preliminary observations

27. Before turning to the relevant legal principles in relation to waiver of legal professional privilege, certain observations should be made.

28. First, MHC were required to make non-party discovery of certain categories of documents, and, at least on a prima facie basis, those categories were ordered because they relate to documents discovery of which is relevant and necessary for the fair disposal of these proceedings. It is not open to the plaintiffs to resist this application by asserting otherwise, particularly where they have not sought to identify, whether by description or by reference to content, any particular documents which it may be claimed are not

relevant or necessary.

Stale/moot application/delay
29. Secondly, the plaintiffs on affidavit and in argument asserted that the re-entered motion, first brought in 2015, is "both stale and moot".

(1) Further and Better Discovery
30. Insofar as IBRC now requests that the court order the plaintiffs to make further and better discovery, in large part I accept the plaintiffs' argument. The affidavits of non-party discovery were first sworn on 26th June, 2015, and it was at that stage evident that the plaintiffs' discovery affidavits were incomplete, and there was a clear basis upon which IBRC could have pursued or re-entered their motion seeking further and better discovery. They chose not to do so at that time and instead chose to pursue non-party discovery. MHC made very extensive and comprehensive non-party discovery under two wide categories.

31. It seems to me that the target of further and better discovery would be largely if not entirely within the categories of MHC legal advice discovery ordered by McGovern J. IBRC have not identified from the pleadings or other sources, including the discovery made to date by the plaintiffs and MHC, any other particular heads of document that would, as a matter of probability, be forthcoming as a result of further and better discovery. Furthermore, such an exercise would involve a full review of all documents/records by the plaintiffs which would be costly and disproportionate, and might not reasonably be completed in advance of the hearing date of 15 January 2019.

(2) Privilege
32. However, I do not agree that IBRC's application in relation to privilege over the MHC discovered documents is stale or moot. Nor do I believe that such application should be dismissed on grounds of delay. Having made their initial discovery, and at a time when they were represented by solicitors (Whitney and Moore) the plaintiffs and their solicitors asserted and maintained that their discovery was complete. As I have found, it is clear from a review of the MHC non-party discovery that many relevant documents were in existence which were not, but should have been, discovered by the plaintiffs.

33. In the circumstances I am of the view that it was reasonable for IBRC, instead of pursuing their original application returnable to 11th May, 2015, to pursue non-party discovery against MHC, and engage with that process, as they did, until October 2016. The question of privilege maintained by MHC on the plaintiffs' behalf is certainly not stale. Nor is it moot in that it is clearly potentially relevant to the trial scheduled for January 2019.

34. The plaintiffs also seem to rely upon a quasi-estoppel point, arguing that IBRC were both anxious and willing to proceed to a full hearing of these proceedings without prior determination of the privilege claim. This is certainly true, in that the trial was due to begin at oral hearing in early June 2015. The trial was postponed then, and subsequently on a number of occasions, at the behest of the DPP, because of the concurrent existence of criminal proceedings involving former officials of Anglo Irish Bank, some of whom may be witnesses in this case. Indeed in early 2018 IBRC issued a motion requesting the trial to commence during Trinity Term 2018, and specifically advised the court that this application in relation to privilege would not need to proceed if it were likely to lead to further deferral of the trial date.

35. It frequently happens that litigants will be faced with the dilemma of proceeding to hearing with a case which they know or are advised is not completely ready for hearing because discovery is not complete, or a witness is unlikely to be available, or personal injuries sequelae have not crystallised. In such instances it is ultimately for the litigants concerned to decide whether they push for trial or seek an adjournment. If, having determined that they will proceed to trial, the case does not start or is suspended for some reason, are they then to be deprived of the opportunity so given to better prepare their case for the adjourned hearing?

36. The answer must be that in general they are not to be so deprived, and that, given additional time, however fortuitously this may arise, such litigants should in principle be entitled to avail of this to complete the preparation of their case. This is because the interests of fairness and justice require that a reasonable opportunity in all the circumstances should be given to each litigant to fully and properly prepare their case before trial. Of course there will be cases where another party can demonstrate urgency, or where the case is part heard, where it may not be fair or just for a party to be entitled to improve its case or amend its hand during a period of adjournment. No such considerations apply in the present case. Nor have the plaintiffs satisfied me that there is any egregious delay or other reason why IBRC should not be permitted to pursue its application in relation to privilege.

37. Accordingly, in the additional time that has become available – incidentally not through any wish of IBRC who have always been anxious for these proceedings to be determined – IBRC is entitled to pursue its arguments in relation to privilege, and the delays occasioned by the adjournments because of criminal prosecutions cannot afford an answer or defence to this motion.

Summary of the waiver arguments
38. IBRC argued first that the letter of 30th May, 2014 should be construed as containing a waiver of privilege extending to all discovered documents, including the documents later discovered by MHC over which privilege is claimed. The plaintiffs argued that the letter, particularly having regard to circumstances in which it was written, should not be so construed.

39. Secondly IBRC asserted waiver by partial disclosure. Counsel argued that the disclosure resulting from the letter of 30th May, 2014 was a partial disclosure such that it would be unjust for the plaintiffs to maintain privilege over the MHC documents and thereby be permitted to choose to disclose only documents which they considered were not prejudicial to their case. They argued that it would be unjust if privilege were to be maintained over similar or related documents, such as strings of emails where only part has been disclosed. In response it was argued that, the onus being on IBRC, it had failed to show that the MHC privileged documents were so similar or related, or part of a string, that it would be unfair on IBRC if privilege were maintained, and had failed to show that the plaintiffs had deployed any of the MHC privileged documents.

40. Thirdly IBRC maintained that insofar as the relationship between MHC privileged documents and the disclosed privileged documents could not be adequately deduced from the descriptions in the MHC disc, then the plaintiffs should be required to give fuller descriptions sufficient to enable a determination to be made as to whether because of similarity or connection privilege had been lost (or could not be claimed in the first instance).

Waiver of Privilege – Relevant Principles
41. In Smurfit Paribas Bank Ltd. v AAB Export Ltd. [1990] 1 I.R. 469 Finlay C.J. quoted Jessel M.R. in *Anderson v Bank of British Columbia* (1876) 2 Ch. D. 644 where he stated what he believed to be the underlying principle justifying privilege for communications between a client and a lawyer where litigation is in existence or in contemplation, at p. 649:-

> "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman with whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

42. Finlay C.J. at p. 476 in *Smurfit* stated:-

> "I would adopt this statement as far as it goes as identifying the requirement of the superior interest of the common good in the proper conduct of litigation which justified the immunity of communications from discovery insofar as they were made for the purpose of litigation as being the desirability in that good of the correct and efficient trial of actions by the courts."

43. In *Fyffes plc. v DCC plc*. [2005] 1 I.R. 59 (Supreme Court) Fennelly J. having referred to these statements from Jessel M.R., and Finlay C.J., at p. 67 observed:-

> "In my view, whether or not documents are privileged will be determined by the application of these principles to the facts of the case. Once it is found to exist, there is no judicial discretion to displace it. I would adopt the following *dictum* of Lord Bingham C.J. in *Paragon Finance v. Freshfields* [1999] 1 W.L.R. 1183, at p. 1188:-
>
> > "The nature and basis of legal professional privilege has been often and authoritatively expounded…At its root lies the obligation of confidence which a legal adviser owes to his client in relation to any confidential professional communication passing between them. For readily intelligible reasons of public policy the law has, however, accorded to such communications a degree of protection denied to communications, however confidential, between clients and other professional advisers. Save where client and legal adviser have abused their confidential relationship to facilitate crime or fraud, the protection is absolute unless the client (whose privilege it is) waives it, whether expressly or impliedly." (Emphasis added by Fennelly J.)."

Fennelly J. continued:-

> "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."

44. The plaintiffs in their submissions emphasise the importance of the right to legal professional privilege by reference to *Martin & Doorley v Legal Aid Board* [2007] 2 I.R. 759 where Laffoy J. at p. 775 stated:-

> "… It is to obviate such outcomes, which would undermine the proper, fair and efficient administration of justice, that legal professional privilege exists and has been elevated beyond a mere rule of evidence to "a fundamental condition on which the administration of justice as a whole rests" (*per* Kelly J. in *Miley v Flood* [2001] 2 I.R. 50 at p. 65)."

45. Counsel also referred the court to Heffernan in "Legal Privilege" (Bloomsbury 2011) at p. 25 where the author opines that:-

> "The constitution or considerations aside, privilege also enjoys the protection of the European Convention on Human Rights. In R. *v. Darby* Magistrates Court, *ex parte* B., Lord Taylor recognised that legal professional privilege is a fundamental right protected by the Convention. This statement echoes the jurisprudence of the European Court of Human Rights, which has located privilege within the protection of the right to privacy under Art. 8 of the Convention. The Strasbourg organs have also recognised that interference with the confidentiality of the legal professional relationship may infringe the right to a fair trial under Art. VI."

46. It is in the light of the fundamental nature of legal professional privilege that the court approaches the issue of waiver in the present proceedings. Indeed, Fennelly J. in *Fyffes* at p. 68 emphasises this when approving the following *dictum* of Ebsworth L.J. in *Kershaw v. Whelan* [1996] 1 W.L.R. 358, at p. 370:-

> "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."

Like Laffoy J. I am also of the view that legal professional privilege is now more than a mere rule of evidence, but it is an important right that is protected by Articles 6 and 8 of the European Convention on Human Rights.

47. In *Fyffes*, at p. 67, in relation to waiver Fennelly J. stated:-

> "Waiver is another matter. Clearly a party to an action may waive privilege in express terms. A party may also be held to have waived it impliedly, as when a party does not claim privilege, but includes potentially privileged documents in the non-privileged schedule to the affidavit."

48. Referring at p. 68 to Matthews and Malek, *Discovery* (London, 1992) dealing with the topic of waiver Fennelly J. noted:-

> "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."

Fennelly J. found no authority for the proposition that disclosure to a third party necessary leads to the loss of privilege, and implicitly his judgment is that for there to be express or implicit waiver there should be evident some "intention of abandoning" the privilege.

49. In *Fyffes*, Fennelly J. considered the alternative argument for a waiver that was based on a principle of fairness, and the notion

that where there has been some or partial disclosure it would be unfair on the disclosing party not to make full disclosure. Having reviewed the authorities, at p. 72 Fennelly J. stated:-

"… I would conclude, however, that the 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, 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."

50. The question of waiver was revisited by McKechnie J. in *Hansfield Developments & Ors v Irish Asphalt Ltd. & Ors* [2009] IEHC 420. McKechnie J. quoted with approval from Fennelly J. in *Fyffes* and the following recent reaffirmation by the Supreme Court in *Redfern Ltd. v O'Mahoney* [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."

McKechnie J. at para. 61 of his judgment then stated:-

> "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."

51. Counsel for IBRC, in support of the 'partial disclosure' argument and their related contention that the plaintiffs should be required to give fuller descriptions of the MHC privileged document, referred the court to a decision of *Fulham Leisure Holdings Ltd. v Nicholson Graham & Jones* [2006] EWHC 158 (Ch) which is said to reflect the practice of the UK Courts in respect of waiver where there has been partial disclosure of privileged documentation. At para. 10 of his judgment, Mann J. states:-

"The relevant principles and their application to this case

> 10. The first thing that has to be identified is the correct starting point. Mr Stewart's starting point is to treat the disclosure that has been made as partial, but a partial disclosure pre-supposes that there is a relevant greater whole. For example, the advice of Mr. Briggs will be part of the totality of all the advice given by him; it is also a part of all the advice given by counsel; it is also a part of all the legal advice given in the period in question. The first thing to do is to identify what that greater whole is, in the context of this case.
>
> 11. Based on the authorities which I am about to refer to, it seems to me that the relevant process should be as follows:-
>
> (i) One should first identify the "transaction" in respect of which the disclosure has been made.
>
> (ii) That transaction may be identifiable simply from the nature of the disclosure made - for example, advice given by counsel on a single occasion.
>
> (iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.
>
> (iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed."

52. The logic of this approach to identifying unfairness commends itself to this court. Counsel relied on this authority for the proposition that if the court was not with IBRC in respect of express or implied waiver, it should direct disclosure of MHC "privileged" documents where they relate to or are connected to or are similar to "transactions" or material contained in the disclosed privileged documents arising from the plaintiffs' discovery, so as to avoid unfairness or misunderstanding. As I understood the plaintiffs position, they did not seek to argue that the court could not take an approach such as that advocated by Mann J. but they argued that because the plaintiffs had not and were not intending to deploy the MHC privileged documents, and because of logistical reasons and the proximity of the trial date, the court should not adopt this approach.

The First Question – Express Waiver

53. The first question that the court must determine is whether the letter of CP Crowley dated 30th May, 2014 is to be regarded as an express waiver of privilege over not only the documents discovered by the plaintiffs in 2012 (the disclosed privileged documents), but also the documents later discovered by MHC through the affidavits of Ms. Callaghan and Mr. McKenna of 26th June, 2015 and their updated affidavits of 4th October, 2016 and 6th October, 2016.

54. The letter of CP Crowley & Co. of 30th May, 2014 was written in the context of IBRC's motion returnable for 3rd June, 2014 in respect of the material over which the plaintiffs then claimed privilege. The letter records that "having reviewed the material, the plaintiffs propose to waive the privileged claim over the documents and to provide same to the defendants".

55. Plainly this only related to the documents over which the plaintiffs at that time claimed privilege, and CP Crowley & Co. had not reviewed any other material in that context. Accordingly, their advice to the plaintiffs at that time can only have related to the material that they reviewed. On that basis the letter does not evince any general intention on the part of the plaintiffs to give a

general waiver which could be said to apply to further documents subsequently discovered and over which privilege might be asserted. Particularly having regard to the fundamental nature of the right to privilege, and the fact that it cannot be lightly waived, this letter cannot be regarded as a general express waiver. Moreover, its wording cannot be read or interpreted as impliedly waiving privilege over any further documentation that might be discovered.

56. In coming to this conclusion I also have regard to the sentence that reads "the plaintiffs are not conceding their previous position – simply adopting a practical approach". This is a factor that was adverted to by CP Crowley & Co. in later correspondence, and elaborated on by Aoife Quinn in the replying affidavit sworn by her on 13th May, 2018 on behalf of the plaintiffs. At para. 22 of that affidavit she explains that faced with the prospect and cost of fighting IBRC's 2014 motion for inspection, and "since we believe there was nothing significant to fight about in relation to those particular documents" they chose simply to hand over the documents and settle the motion. She describes this as a "pragmatic approach to the settlement of the motion" and points out that while IBRC have a large legal team and are well resourced "we have to pick our legal battles". These averments seem to the court to be in accord with the referencing in the letter of 30th May, 2014 to "adopting a practical approach".

The Second Question – Unfairness

57. One matter that arose in argument was whether the plaintiffs have deployed, or intended to deploy the disclosed privileged documents. Counsel asserted that they had not deployed them, for example in affidavits filed to date, or in their Witness Statements. Even if that is so, the difficulty is that as a result of proceedings to date the plaintiffs have in fact waived privilege over a large body of documents which they have discovered. While the plaintiffs have not themselves made, and, it is said, do not intend to make, positive use of the disclosed privileged documents, they have in the broad sense of the term been deployed by virtue of the plaintiffs' waiver. In this regard, and to give this some context, it is appropriate to refer to two examples of disclosed privileged documents upon which counsel for IBRC placed emphasis to show how unfairness could occur if further disclosure of related or connected MHC privileged documents did not occur.

58. Document P02-0003 is headed "Draft – For Discussion Purposes" and is a draft of a letter to Mr. Paul Appleby, Director of Corporate Enforcement containing a response to letters sent by the ODCE to Sean Quinn Senior, various of the plaintiffs in these proceedings, and other parties apparently concerning suspected breaches of the Companies Acts, Corporate Governance of Quinn Group Companies, Quinn Group Wealth Distribution Strategy, Quinn Investments, and "the Bazzely/BFS/Quinn Insurance/Quinn Group Transactions 2007 to date". The latter transactions relate to CFDs (contracts for difference), inter-company lending related or possibly related to CFDs, and possible breach of s. 31 of the Companies Act 1990. In a Schedule to that draft there is "Recipient Specific Information", which contains details (in draft) in respect of named individuals including various plaintiffs in these proceedings. Under the section headed "Overall Quinn Group Wealth Distribution Strategy" the following appears:-

> "Quinn Group ROI took specific advice in relation to the most efficient manner in which to distribute surplus cash flow to its shareholders. Rather than distributing such reserves through the payment of dividends, Quinn Group ROI received advice that the lending of such surplus reserves through intragroup loans (or subordinated guarantees) to a number of Quinn family associated companies, ultimately owned by the individual shareholders of Quinn Group, would be more efficient and afforded Quinn Group the opportunity to receive repayment in the future.
>
> Therefore, these transactions were not entered into in any cavalier manner but, rather, were part of an overall wealth utilisation strategy. At all times the Group had adequate distributable reserves, was entitled to make such payments and a strategic decision was made to do so by way of intercompany loans rather than by payment of dividends directly to the shareholders. We are also instructed that this was permitted under the Group's banking covenants.
>
> [*Question to consider: is this consistent with our position that Quinn Group ROI directors were not aware of the transactions? Yes. Strategy is a separate issue to the transactions*.]" [Parenthesis and emphasis as in document P02-0003].

59. This draft relates to ODCE letters dated 19th December, 2008. No privilege has been waived. It expressly refers to advice given to Quinn Group ROI and its directors, to relevant lending of company surpluses through inter-group loans to Quinn family associated companies, ultimately owned by individual shareholders of the Quinn Group, and advice to directors.

60. Another disclosed privileged document is an Attendance of a meeting between Niamh Callaghan and Michael Grace of MHC and, *inter alia*, the second named third party Dara O'Reilly. At the meeting Ms. Callaghan brought to Mr. O'Reilly's attention a list of questions previously provided (the "Questionnaire"). It is clear that MHC were seeking information in accordance with the questionnaire, and it was discussed, at some length according to the record, at that meeting. It records on p. 2 queries as to whether there was correspondence that would indicate certain amounts of money needed for investment in Anglo shares or related positions, and a response from Mr. O'Reilly that "he may have email correspondence which sets out that a specific amount of money was required to be drawn down and by calculating the movement at the time in the Anglo share price …". On p. 3 the Attendance indicates that explanation was given as to "the background to how the Quinn children ended up being the shareholders of Quinn Group ROI …". On p. 4 it is recorded:-

> "DOR mentioned that further personal guarantees ("PGs") had been executed by the children. NC noted MH&C was only aware of the "Cypriot" guarantees. DOR mentioned that Anglo debt to Quinn Group and Quinn family was divided. It was also set up so as PG's were not available on corporate debt (instead share charges were granted from children to Anglo) only on personal borrowings (as well as Cypriot borrowings). DOR mentioned that PG's exist in favour of other financial institutions (Sean Quinn Jnr – Belfry and the Windfarm Company, with NIB).
>
> NC noted that existing PG's could demonstrate a knowledge and experience on children's behalf with executing such documentation.
>
> DOR noted that Michael Ryan solicitor ("MR") was the only "independent" advisor who would have discussed any of the PG's with the children. The methodology of execution was generally that the children were advised that a document was to be signed by telephone. DOR and MR would receive copy documentation (facility letters and PG's) and these would also be provided to Sean Quinn Snr. Usually arrangements were made for execution by MR who would send signature pages/full PG to the children and he would collate the signed documentation. Further details are required on the precise practice in relation to each PG noted NC."

This Attendance dated 14th May, 2010 indicates that at the very least there is a "Questionnaire" in blank, and there may well be answering documentation provided to MHC.

61. In this regard, counsel for IBRC attempted to identify related documentation, or a string of documentation, by reference to the lists of privileged documentation within Category A and Category B arising from the MHC non-party discovery. In Category A Privileged, there are a large number of documents listed in the period April/May 2010, including entry 0140, 29th April, 2010 with the subject "Quinn – Peter Questions"; a series of documents numbers 0147 – 0156 dated between 30th April, 2014 and 4th May, 2010 concerning "personal guarantees and other matters – action needed"; items 0159 – 0164, all on 4th May, 2010, concerning advice Re: PG's; items 0183 – "MHC advisory PG's of 5th May, 2010". Then moving to 10th May, 2010, the date of the Attendance, there are a number of items: item 0204, an email of Niamh Callaghan, the subject being "Re: questions – urgent"; item 0205 email from Kevin Lunney "Re: questions – urgent". These emails are sent to a number of recipients including Dara O'Reilly. The likelihood is that they relate to some or part of the meeting the subject matter of the Attendance on that day. The listing shows a number of other emails sent on that date. However, it is notable that the column headed "subject/file name" is thin on detail and does not provide sufficient detail for direct comparison between the content of the document with disclosed privileged documents from the plaintiffs' own discovery.

62. Turning to "Category B privileged" in the MHC discovery, a similar picture emerges. In respect of the subject/file name, particularly in relation to emails, it is not possible to discern much from the description. For example, item 00011 is an email from Paul Egan to various recipients and the subject is given as "mail 2 of No. 2" dated 28th March, 2008. At item 00020 there is a file referenced with the subject "advices proposed reorganisation of Quinn family interests in shares or companies", dated 4th April, 2008. This links to and *may* be the same as a disclosed privileged document being a letter of MHC dated 4th April, 2008 to Mr. Liam McCaffrey, Chief Executive of Quinn Group, but it is impossible to tell with any certainty. At items 00845-00847 there are emails dated 18th December, 2008 concerning "recent telephone conversation", and at item 00848 MHC advisory ODCE investigation, also dated 18th December, 2008. This was reflective of the "Draft – for discussion purposes" amongst the disclosed privileged documentation and referred to above, which was a draft in response to letters from the ODCE dated 19th December, 2008. At items 00858 – 00869 there are listed letters from the ODCE to named individuals, all dated 19th December, 2008, which may well be the letters that are referred to in the "Draft – for discussion purposes". Item 00870 is under "document type" a "draft letter" of MHC to Paul Appleby, dated 19th December, 2008. Further letters of that date authored by the ODCE are listed in the ensuing items. In the "Category B – privileged" there are also a number of items dated 14th May, 2010 (the date of the Attendance referred to earlier), including two emails to Liam McCaffrey and at item 01290 an email from David O'Donnell to Niamh Callaghan headed "Re: Q-Confidential Concern". From the documents listed at or soon after this date it is not possible from the description to identify a response to the Questionnaire referred to in the Attendance or the provision of information in response to the meeting recorded in that Attendance. It is likely that following that meeting on 14th May, 2010 significant further documentation was generated in response to the queries raised by MHC.

63. These examples demonstrate, and I so find as a matter of probability, that MHC have disclosed, as privileged documents, documents which are closely connected to disclosed privileged documents. This probability emerges from what is known from the disclosed documents in terms of date and subject matter, sender and recipient, and the information that can be gleamed from the Category A and B lists of privileged documents – even though the subject matter column provides limited information.

64. I am satisfied that it would be unfair if the plaintiffs were entitled to maintain privilege over MHC privileged documents which are connected or related to the same 'transaction' the subject matter of disclosed privileged documents, or where they are part of a stream of documents, part only of which has been disclosed.

65. There is a real risk that the plaintiffs will achieve unfair litigious advantage by partial disclosure of relevant documents which may give an incomplete understanding of the relevant communications/transactions involving MHC.

66. That is not to say that all of the MHC privileged documents must be disclosed. It is an unfortunate fact – MHC are not to be criticised for this because their discovery seems to have been thorough and complete – that the description of the subject matter of particular documents is generally insufficient for the reader to be able to identify whether and to what extent the document is connected to disclosed privileged documents. Regrettably this means that some process such as that contemplated by Mann J. in the *Fulham* case will have to be undergone to identify what further documents should now be disclosed in advance of the hearing.

67. Accordingly, I propose to make the following directions. Insofar as these suggest time limits for each particular step, I will hear counsel further in relation to those time limits.

Proposed Directions

I. By reference to the Disclosed Privileged Documents (arising from the plaintiffs' discovery), IBRC shall compile a list of documents (List 1), extracted from the MHC Category A and Category B privileged discovery lists, of documents that are potentially part of a 'transaction' evident from the Disclosed Privileged Documents (being, for example, a string of emails or other documents, or related documents, by reference to date, parties, subject/file so far as these can be ascertained from the MHC descriptions). The objective of this exercise is to identify MHC privileged documents which, if not disclosed, would result in the disclosed privileged documents giving such a partial, incomplete and misleading picture (by virtue of the disclosed privileged documents) as would be unfair to IBRC.

II. List 1 is to be transmitted to the plaintiffs' solicitors within two weeks.

III. The plaintiffs shall give their response to List 1 within four weeks of receipt –

(a) producing copy MHC privileged documents over which they decide to waive privilege, and

(b) in respect of all other MHC documents over which they continue to assert privilege, setting out in detail in List 2 a full description of the subject matter of the document, short of disclosing the substance of privileged legal advice, but sufficient to identify whether its contents may or may not be related or linked or similar to any transaction the subject of the Disclosed Privileged Documents, and stating why the plaintiffs continue to assert privilege.

For the avoidance of doubt, to the extent that the plaintiffs fail to respond to any documents in List 1, or default in complying with the above direction, they shall be deemed to have waived privilege and shall produce such documents forthwith.

(c) Upon receipt of List 2 IBRC will have three weeks within which to challenge/debate the privilege claimed (whether because the document does not attract privilege at all, or because privilege has been lost by virtue of its relationship to a 'transaction' referenced in Disclosed Privileged Documents).

IV. This Motion shall be adjourned for mention only to Monday 12th November, 2018. In the event, and to the extent that, IBRC wishes to further dispute privilege maintained by the plaintiffs over List 2 documents, IBRC shall furnish a further grounding affidavit on or before 26th October and any replying affidavit to that shall be filed by the plaintiffs on or before 9th November, 2018.