Neutral Citation Number: [2005] IEHC 451

THE HIGH COURT
COMMERCIAL

2004 No. 19386 P

BETWEEN

WOORI BANK
AND
HANVIT LSP FINANCE LIMITED

PLAINTIFFS

AND
KDB IRELAND LIMITED

DEFENDANT

Judgment of Ms. Justice Finlay Geoghegan delivered the 21st day of December 2005

Preliminary
1. The plaintiffs have made discovery to the defendant of documents in these proceedings. The plaintiffs have claimed privilege and refused disclosure of certain documents. In this application the defendant seeks disclosure of those documents and challenges the plaintiffs' entitlement to maintain or to continue to maintain a claim of privilege over the disputed documents. Since the issue of the motion the parties have limited the number of documents about which there is a subsisting dispute and narrowed the issues. There remain three groups of documents raising different issues relating to the claim and/or challenge to privilege. Prior to considering these it is necessary to summarise the nature of the proceedings.

Proceedings
2. The first plaintiff is a Korean bank. The second plaintiff is a company incorporated in Ireland. The defendant is an Irish company which is a wholly-owned subsidiary of the Korean Development Bank, KDB, and carries on business as a provider of financial services.

3. As part of a series of agreements between the plaintiffs, the defendant and others in October, 2000, the defendant was permitted to make investments on behalf of the second plaintiff on certain terms and conditions. On 16th July, 2002, pursuant to those agreements the defendant arranged for the second plaintiff to enter a loan agreement with a Japanese company, AEL Corporation ("AEL").

4. The plaintiffs contend that the defendant was obliged to obtain prior written approval for the loan to AEL and that neither written nor oral approval was obtained in advance. The defendant concedes that there was no prior written approval but alleges a course of dealing whereby oral approval was the accepted practice between the second plaintiff and the defendant. It also relies on additional facts which it says would disentitle the plaintiffs to their contractual and other claimed rights.

5. In particular, the defendant contends that the plaintiffs were aware of the AEL loan as early as 19th July, 2002, that they directed the application of interest arising from the loan and that, until October, 2003 after default by AEL, they took no steps to require the defendant to unravel the loan. It is also alleged that the plaintiffs accept that they learned of the loan on 19th July, 2002, that the first written query was raised in January, 2003 and that no written objection of any kind was made until October, 2003.

6. The defendant contends that the attitude adopted within the plaintiffs to the AEL loan, following their learning of it in July, 2002, is of critical importance to the issues in the proceedings. For the purposes of this application no issue arises as to the relevance of any of the documents sought. The plaintiffs have already made discovery of all the documents in respect of which disclosure is sought.

7. The documents at issue in this application were discovered by the first plaintiff ("Woori Bank"). Mr. W.R. Kim swore an affidavit of discovery on behalf of Woori Bank on 15th April, 2005, pursuant to an Order of the Court of 18th February, 2005. Mr. W.R. Kim swore a second affidavit of discovery on 27th June, 2005. This arose in the following way. The circumstances surrounding the transactions the subject matter of the proceedings were investigated by the Board of Inspection and Audit (BAI) and the Financial Supervisory Service (FSS) in Korea. The defendant raised queries by letter of 9th June, 2005, as to the paucity of documentation relating to the BAI investigation in the documents originally discovered. By letter of 23rd June, 2005, the plaintiffs' solicitors stated that the plaintiffs had overlooked including in their discovery their internal file of documents relating to the investigations by both BAI and FSS. The second affidavit of discovery was then sworn.

Disputed documents and issues
8. The disputed documents and issues may be summarised as follows.

9. 1. The first category comprises a redacted portion of each of two internal reports of Woori Bank (documents 3 and 5 of the second affidavit of Mr. W.R. Kim). Privilege is claimed upon the basis that the dominant purpose of the creation of these documents was the litigation with KDB. The issues in dispute are whether or not the dominant purpose of the documents was the litigation and the proper approach of the Court to determining the dominant purpose of the creation of the documents.

10. 2. This category is divided into two sub-categories. Firstly, documents 3, 9, 13, 14 and 16 in the first affidavit, first schedule, second part of Mr. W.R. Kim: these are all documents over which the defendant accepts the plaintiffs were entitled to claim legal professional privilege but asserts that such privilege has been waived or lost by Woori Bank giving to the Public Prosecutor in Korea copies of the documents. The second sub-category is again that portion of document No. 5 in the second affidavit of Mr. W.R. Kim referred to above. The defendant asserts that even if the plaintiffs are entitled to claim legal professional privilege it has been lost by giving the document to FSS in Korea. There are disputes between the parties as to the relevant legal principles and their application to the facts.

11. 3. Documents 5, 7, 14, 15, 16 and 17 of the first affidavit of Mr. W.R. Kim which are verbatim records of conversations between employees and/or agents of the plaintiffs and third parties. The plaintiffs contend that such conversations were part of an evidence gathering exercise for the purposes of this litigation and that they are entitled to claim privilege based upon the principles of litigation privilege. The defendant contends that confidentiality is a prerequisite to a claim of privilege and there is no evidence that any of these conversations were intended as confidential.

Dominant purpose
12. The parties are in agreement that the principles set out by the House of Lords in *Waugh v. The British Railways Board* [1980] A.C. 521, as adopted in this jurisdiction by O'Hanlon J. in *Silverhill Duckling Limited v. Minister for Agriculture* [1987] I.R. 289, are those to

be applied. In the latter decision, O'Hanlon J. at p. 294 summarised the view expressed by the House of Lords in *Waugh v. The British Railways Board* as:

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

13. In Waugh at p. 531, Lord Wilberforce stated:

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

14. There is also agreement that the onus is on the person asserting the privilege, in this instance Woori Bank. In this connection the Court's attention was drawn to the decision of the High Court of Northern Ireland in *Downey v. Murray* [1988] N.I. 600, where at p. 602 Carlswell J (as he then was) said:

> "It is necessary for the party opposing production to prove that the dominant purpose for which the document was brought into existence was to obtain legal advice or enable his solicitor to prosecute or defend an action. It must be borne in mind that the important matter is the purpose, which is not necessarily the same as the intention of the person who composed it: *Guinness Peat Ltd. v. Fitzroy Robinson Partnership* [1987] 2 All E.R. 716."

15. The distinction adverted to by Carswell J. above between the purpose for which a document is created and the intention of the creator is important. A similar distinction appears to have been made by the Supreme Court in *Gallagher v. Stanley* [1988] 2 I.R. 267 between the purpose for which written statements came into existence and the motivation of the person who caused them to be made. I accept the submission that the decision of the Supreme Court in *Gallagher v. Stanley* [1988] 2 I.R. 267 means that the purpose of the document is a matter for objective determination by the court in all the circumstances and does not only depend on the motivation of the person who caused the document to be created. Further that the court should not make a finding that the dominant purpose of a document is litigation based upon a bald assertion, even on affidavit, of such motivation or intention of the creator of the document.

16. The claim in *Gallagher v. Stanley* resulted from a difficult birth at the National Maternity Hospital. The documents whose disclosure was resisted were contemporaneous statements obtained by the matron from the nurses who attended the birth. The matron had stated on affidavit that the only purpose for which she requested the documents was to provide the legal advisers of the hospital with necessary material to advise in the event of a claim subsequently being made on behalf of the infant. The members of the Supreme Court were furnished with copies of the disputed documents prior to reaching their decision. The sworn, uncontested testimony of the matron of the hospital was not accepted by the members of the Court as determinative of the purpose for which the statements came into existence. The Court appears to have concluded from a common sense approach to the probable reaction of senior management in a hospital following a serious incident that the matron would have required such statements for the proper management of the hospital. Barron J. at p. 274 stated:

> "It appears to be common case that the plaintiff had a difficult birth as a result of which he suffered serious injuries. This is not the norm. That being so, it is reasonable to suppose that the hospital authorities would be concerned to discover why it occurred and to take steps to acquaint themselves with the sequence of events which led to that result. So far as they were concerned, it may well have been something completely unavoidable. On the other hand, there might have been a failure of procedures or circumstances which might have required such procedures to have improved or altered. In the particular case, as in most if not all such cases, it was not unreasonable to anticipate legal action.
>
> Clearly, there were two strands leading to the need to obtain statements. The first was to learn any lesson that might be capable of being learned so as to improve safety. The second was to be best able to defend legal proceedings which might be brought for compensation for the injuries which occurred. Whichever the reason, it is obviously better that such statements should have been obtained as soon as possible before memory might become less reliable with the passage of time.
>
> In the present case, the hospital authorities maintain that the steps which they took to obtain statements related solely to the consideration that legal proceedings might be issued. That might well be, but it is not the view of the defendant which is relevant, but that of the court. Before the court can be satisfied, it needs evidence from which it can determine the reality and not just a bald assertion without anything to back it up. If there were solid reasons why there was no need to take statements from the nurses in relation to hospital administration there was no reason why such should not have been put on affidavit. In the circumstances the view of the Court that the threat of legal proceedings was not the predominant reason is a proper one."

17. Counsel for the plaintiffs does not dispute that these are the relevant principles and submits that in their application to the facts of this case that the plaintiffs have discharged the requisite onus of proof of establishing that the dominant purpose of the creation of documents Nos. 3 and 5 in the second affidavit of discovery was the contemplated litigation against the defendant.

18. Mr. W.R. Kim explains the nature, genesis and purpose of document 3 at paras. 16 to 18 of the first affidavit sworn in this motion on 30th August, 2005, and at paras. 7 and 8 of a supplemental affidavit sworn on 24th October, 2005. Between the swearing of the affidavits the plaintiffs decided to make available to the defendant part of this document without prejudice to the validity of its claim to privilege over the entire document. The document is an internal report dated 16th April, 2004, stated to be prepared by Mr. W.R. Kim following interviews with BAI on 10th and 14th April, 2004. The document initially records the substance of conversations between the BAI inspectors and Mr. Kim and another employee of Woori Bank. Mr. Kim explains the subsequent portion of the document over which privilege is claimed at para. 18 as follows:

> "The document also notes certain matters relevant to the circumstances of the case. The notes summarise issues which were anticipated by Woori Bank to likely arise in the present litigation and Woori Bank's position with regard thereto. The document was in effect a position paper prepared by Woori Bank with litigation with regard to recovery of the AEL loan

very much in mind. As has been described by A&L Goodbody in its letter of 12th July 2005, on Woori Bank's instructions, the document is *'reference material'* for this litigation. By way of further explanation, although a portion of the document records conversations between BAI inspectors and staff of Woori Bank, the document also records Woori Bank's perception of key tactical issues in the litigation. Accordingly, as the report is a document prepared in contemplation of litigation, and for the purpose of assisting Woori Bank in the litigation, I say and am advised that the document benefits from legal professional privilege."

19. In his supplemental affidavit Mr. Kim explains that in error he had stated that the internal report of 16th April was provided to BAI but now realises that it was not so furnished and is in fact an internal report. He then states at para. 8 of that affidavit:

> "In particular I recall that I prepared this document following my meeting at BAI on 14 April 2004 in order to summarise the discussions relating to the legal proceedings arising out of the AEL loan and their implications for the litigation going forward. In order to narrow the scope of dispute between the parties as to discovery, it has been decided to make this document available to the Defendant insofar as it contains an account of the discussions between Woori Bank and the BAI. However, Woori Bank maintains the position (and is so advised) that the portion of the document which relates to the analysis of issues in the litigation is none the less privileged."

20. In addition to considering the above averments, the Court, by consent of the parties, was given a copy of the full document No. 3. Counsel for the defendant has also laid emphasis upon the fact that this is a document which was not discovered in the initial affidavit of discovery. It is a document which was on the internal file of documents relating to investigations by the BAI and which does not appear to have been given to the solicitors acting in the litigation prior to the first affidavit of discovery.

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

22. The second document over which privilege is claimed under this heading is document No. 5. Again, it is only a portion of the document over which privilege continues to be claimed. The Court has also been given a copy of this document. It is also a document only discovered in the second affidavit of discovery and was on an internal file relating to the investigation by FSS in Korea.

23. Mr. W.R. Kim in his first affidavit, deals with document 5 in paras. 21 and 22 which he states:

> "21 . … Document 5, First Schedule, Second Part, was furnished by me under cover of a letter dated 28th November 2003.
>
> 22. The two undated internal reports had been prepared by me in or about late October or early November 2003 for the purposes of summarising the background to the dispute for the purposes of the litigation which was then in contemplation and were submitted to FSS (i.e., 28th November 2003 and 3rd December 2003 respectively)."

24. The second document referred to is Document 4 over which privilege is no longer maintained.

25. The Court cannot be satisfied that the plaintiffs have established that as a matter of probability the dominant purpose of the creation of this document was the contemplated litigation against the defendant. Again, from the affidavits of Mr. W.R. Kim, the file on which it was placed and the document itself, I have concluded that at minimum, an equal purpose of the creation of the document appears to have been the furnishing to FSS of information and explanations in relation to the transactions the subject matter of the litigation.

26. Accordingly, I have concluded that the plaintiffs have not made out a claim to privilege and the defendant is entitled to disclosure of the full documents, Nos. 3 and 5, in the first schedule, second part of the second affidavit of discovery of Mr. W.R. Kim.

Waiver or Loss of Privilege

27. As appears from above, at the hearing of the motion there were two sub-categories of documents which came under this heading. Document No. 5, referred to above, was disclosed to the FSS. As I have concluded that the plaintiffs are not entitled to maintain privilege over this document it is no longer necessary to consider that document under this heading and disclosure to FSS.

28. The remaining documents were all disclosed to the Public Prosecutor's Office ("PPO") in Korea and therefore may be considered collectively. It is accepted by the defendant that these are documents over which the Woori Bank was entitled to claim legal professional privilege but submitted that it has waived or lost its entitlement to maintain such claim by reason of disclosure to the PPO in Korea.

29. The principles relevant to the determination of this issue were considered recently by the Supreme Court in *Fyffes Plc v. DCC Plc* [2005] 1 I.L.R.M. 357. Prior to considering those principles it is necessary to set out the Court's findings in relation to the circumstances in which and conditions under which the documents were given to the PPO as disclosed in the affidavits sworn in this motion.

30. It is common case that on 16th February, 2004, Woori Bank laid a criminal complaint under the Korean Act on Aggravated Punishment of Specific Economic Crimes (Breach of Trust etc.) against Mr. D.K. Kim, an employee of KDB. It is alleged that he was instrumental in arranging for the second named plaintiff to make the AEL loan without the prior consent of Woori Bank. KDB laid criminal complaints against Mr. W.R. Kim in March and April, 2004 under the same Korean Criminal Act and also under a Korean Criminal Act for alleged obstruction of business. The intention to make such complaints had been flagged at an earlier date.

31. The circumstances in which Mr. W.R. Kim on behalf of Woori Bank handed over to the PPO the documents 3, 9, 13, 14, 15 and 16 in his first affidavit of discovery are set out in by him at para. 37 of the affidavit sworn on 30th August, 2005, and expanded upon at para. 9 of his affidavit sworn on 24th October, 2005. It appears that shortly after the filing of the complaint against Mr. D.K. Kim, Mr. W.R. Kim attended a meeting at the PPO in connection with such criminal complaint. He brought with him to that meeting an internal report dated 2nd August, 2002 (not one of the disputed documents). In the course of that visit he states that the prosecutor asked to see Mr. Andrew Lueder's legal opinion (document number 3) which was referred to in the internal report of 2nd August, 2002. Mr. W.R. Kim also states that he was asked to produce any document showing that "Woori Bank had conducted sufficient legal review

before filing the criminal complaint against D.K. Kim". Also, that the prosecutor made a more general request for any and all other documents which might be relevant to the criminal proceedings. It is in response to those requests he states that he returned to the PPO on 2nd March, 2004, and submitted documents 3, 9, 13, 14, 15 and 16 in his first affidavit of discovery.

32. In his first affidavit Mr. W.R. Kim states that he emphasised to the Public Prosecutor "the need for utmost confidentiality" in relation to the documents submitted in the view of the likely civil proceedings in Ireland and that the Public Prosecutor replied that he understood this. On the affidavits sworn by Korean lawyers both for the plaintiffs and the defendant, I find that Article 198 of the Criminal Procedure Act in Korean imposes a general duty of confidentiality on public prosecutors not to disclose information obtained in the course of their investigation. I am satisfied on this evidence that the confidentiality to Woori Bank of the documents in issue was sought to be maintained and not lost by handing them over to the PPO.

33. The second issue which is in dispute on the affidavits sworn by the Korean lawyers on this motion is whether or not Woori Bank were under a legal obligation to furnish the documents in question to the PPO. Having considered the affidavit it does not appear to me that Woori Bank can be considered to have been under a legal obligation as a matter of Korean law at the relevant time to furnish the documents to the PPO but rather that it was in its interest to do so as certain adverse consequences may have occurred if the request from the PPO was refused. For reasons which will become apparent it does not appear to me having regard to the decision of the Supreme Court in *Fyffes Plc v. DCC Plc*. that the existence or absence of such a legal obligation is determinative to the issues which I have to decide.

34. I have concluded, on the averments in the affidavits of Mr. W.R. Kim (on which he was not cross examined) that the documents in dispute were furnished by Woori Bank to the PPO for the purpose of supporting the criminal complaint made by it against Mr. D.K. Kim and for the purpose of pre-empting and/or defending the criminal complaint (either then anticipated or already made) by KDB against Mr. W.R. Kim. Further I am satisfied that the confidentiality of the documents was sought to be preserved at the time they were submitted to the PPO.

35. In *Fyffes Plc v. DCC Plc* [2005] 1 I.L.R.M. 357 the judgments of both Fennelly J. and McCracken J. (with whom Geoghegan J. agreed) make clear that, in general, privilege will not be lost by disclosure, even on a voluntary basis to third parties for a particular purpose where confidentiality is sought to be preserved. Applying such general principle to the facts as found herein would lead to the conclusion that there has been no loss of privilege by the plaintiffs herein.

36. However, it is necessary to consider the limitation to the general principle as expressed by the judgments in the Supreme Court *in Fyffes Plc v. DCC Plc*. In that case DCC had submitted certain documents to which privilege attached to the Stock Exchange for the purpose of persuading the Stock Exchange and through it ultimately the D.P.P. that no wrongdoing had taken place in relation to transactions which were then under investigation by the D.P.P. so that he would not pursue a criminal prosecution against it. In that case, Fyffes who were asserting that the right to privilege had been lost by giving the documents to the Stock Exchange sought to rely upon the decisions of the Supreme Court of New South Wales and High Court of Australia in *Goldberg v. N.G.* [1994] 33 N.S.W.L.R. 639 and 137 A.L.R. 57.

37. In that case proceedings were brought against a solicitor (Mr. Goldberg) and his wife by former clients (Mr. and Mrs. Ng) who also lodged a formal complaint to the Law Society of New South Wales. The Law Society was given certain privileged material by the solicitor on condition that his privilege would be maintained. On receipt of this material it dismissed the complaint against the solicitor. In civil proceedings brought by the clients they sought to obtain the documents from the Law Society and the solicitor then sought a declaration that the documents produced to the Law Society were subject to legal professional privilege. By majority decisions in both the Supreme Court of New South Wales and the High Court of Australia the declaration was refused. In each court the decision was based upon a principle of fairness. McCracken J. at p. 378 sets out the issue as stated by the High Court of Australia at p. 66 as follows:

> "It follows that the critical question in the present case is whether Mr Goldberg's disclosure of the privileged documents to the Law Society gave rise to the situation where ordinary notions of fairness required that he be precluded from asserting that those documents were protected from production for inspection by the Ng's in their related equality proceedings between the Ng's and the Goldberg's."

38. Counsel for the defendant accepts that the Supreme Court did not follow the Goldberg decision. However, he seeks to rely upon the potential exceptions to the general rejection of determining loss of privilege by reference to "unfairness" by both McCracken J. and Fennelly J. McCracken J. at p. 380 stated:

> "… I am not ruling out the fact that there may be cases in which the question of fairness arises, and the general rule that a disclosure for a limited purpose does not amount to a waiver may have to give way where a serious injustice might result."

39. Fennelly J. at p. 368 having referred to the issue in Goldberg 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 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."

40. In seeking to bring the facts of this application within the type of exceptions envisaged above, counsel for the defendant relies upon explanations given by Mr. W.R. Kim to the B.A.I. as to the purpose of the criminal complaint in Korea against Mr. D.K. Kim recorded in that part of document no. 3 in the second affidavit of discovery of Mr. W.R. Kim disclosed to the defendant. The document sets out questions from B.A.I and responses given on behalf of Woori Bank. The response recorded to a question from B.A.I. as to why the criminal litigation was started is:

> "The employee at KDB who was in charge of AEL investment (Dae-Kyu Kim ("DK Kim")) gave a false statement that Woori Bank had given prior verbal consent to the AEL investment, which is not true.
>
> It was inevitable for Woori Bank to accuse DK Kim of breaching his duties in order to punish him pursuant to the Act on the Aggravated Punishment, etc. of Specific Economic Crimes and to reveal the truth that Woori Bank did not give

consent."

41. In the next response to a request for further details it was stated *inter alia* on behalf of Woori Bank:

> "DK Kim also confirmed in writing to K&C lawyer that Woori Bank did not consent to the AEL Loan because he changed his mind after looking over the evidence submitted by Woori Bank in the course of the interrogations at the prosecutor's office. (Mar. 15, 2004)."

42. Counsel for the defendant draws attention to the fact that the plaintiffs in their Reply have pleaded at paragraph 3:

> "Mr. D.K. Kim (the person primarily responsible for arranging the A.E.L. Loan for and on behalf of the defendant) has admitted to Woori Bank that the Bank did not consent to the A.E.L. Loan. The plaintiffs will rely on, *inter alia*, this admission at the hearing of these proceedings for the purpose of establishing that the plea at paragraph 3 of the defence is about substance."

43. It should be noted that the defendant in its Rejoinder pleads at paragraph 1: "The probative facts pleaded at paragraphs 3, 13 and 17 of the plaintiffs' Reply are not proper matters for a Reply or any pleadings. The alleged facts are matters of evidence. Their admissibility at the hearing of this action will be contested by the defendant."

44. The submission made on behalf of the defendant is that the responses referred to above given to B.A.I. make clear that the purpose of Woori Bank making a criminal complaint in Korea against Mr. D.K. Kim was inter alia to reveal the truth that Woori Bank did not give consent to the A.E.L. Loan. Further, that in that criminal procedure Woori Bank's lawyers have obtained an alleged admission from Mr. D.K. Kim which it is attempting to use in the Irish proceedings against the defendant. Hence that the Court should conclude that Woori Bank disclosed these documents to the P.P.O. in Korea so as to gain an advantage over the defendant in the Irish proceedings.

45. Such a conclusion would be contrary to the sworn testimony of Mr. W.R. Kim as to the reason for which the documents were furnished to the PPO. The defendant did not seek to cross-examine Mr. W.R. Kim. I am not satisfied that the defendant on the evidence in this application has established facts which bring the disclosure within the exceptions envisaged by either Fennelly J. or McCracken J. in their judgments in *Fyffes Plc v. DCC* Plc. In reaching this conclusion however I wish to make clear that this ruling does not preclude the matter being reopened in the event that Woori Bank seek to admit evidence of the alleged admission from D.K. Kim. I note that in the last response to B.A.I. set out above it is stated that Mr. D.K. Kim "changed his mind after looking over the evidence submitted by Woori Bank in the course of the interrogations at the prosecutor's office".

46. If the documents in issue in this application formed part of the evidence shown to Mr. D.K. Kim (which was not alleged in this application) and Woori Bank were to persist in seeking to put into evidence the alleged admission by Mr. D.K. Kim then quite different considerations might arise.

47. Subject to the foregoing reservation I have concluded that there has been no waiver or loss of privilege in documents 3, 9, 13, 14, 15 and 16 in the first affidavit of discovery of Mr. W.R. Kim by their disclosure to the PPO. in Korea.

Verbatim Records of Conversations

48. The documents at issue under this heading are transcripts of telephone conversations between either employees or agents of Woori Bank and third parties. There is no averment on behalf of the plaintiff that any of the conversations were confidential or took place in circumstances such that they should be considered as confidential. Further, there is no averment that the other parties were told of the alleged purpose of the conversations i.e. evidence gathering for litigation.

49. The essential dispute between the parties in relation to these documents is whether or not confidentiality is a prerequisite to a claim of privilege in respect of verbatim records of such communications. The submission on behalf of the plaintiffs is that the dominant purpose of the making of the records of the conversations was the litigation and that confidentiality in relation to the subject matter of the record is not a prerequisite to a claim for privilege on the basis of what is termed litigation privilege as distinct from legal advice privilege. It is accepted on behalf of the plaintiff that confidentiality of communications is necessary for the purpose of claiming legal advice privilege.

50. The defendant is in fundamental disagreement with this submission. It is submitted on its behalf that as these documents are verbatim records of communications between Woori Bank and third parties they can only be privileged if the communications themselves are privileged. Further, that confidentiality is at the core of a claim for privilege and that the communications can only be privileged if they are confidential to Woori Bank. It is submitted that it is the confidentiality which takes it out of the realm of what may be enquired into by the opposing party as part of the discovery procedure in the litigation.

51. It appears to me that it is necessary to distinguish a document which is a verbatim record (either in electronic or typewritten format) of a communication between a party to litigation and a third party from a document which has been prepared by or on behalf of the plaintiff for the purpose of litigation. Whilst it may be said that the only reason for which the particular communications have been recorded is that litigation is contemplated, it does not appear to me that this means that the recording should be treated as a document created for the purposes of litigation and to which the dominant purpose test referred to above is applied.

52. Support for this approach is found in the judgment of Hedigan J. in the Supreme Court of Victoria in *Telebooth Pty. Ltd. v. Telstra Corporation Ltd*. [1994] 1 B.R. 337. At issue in that decision was a claim to privilege over a tape recording of an admittedly non confidential communication between representatives of the plaintiff and the defendant. At p. 348 Hedigan J. stated:

> "The tape itself is not a communication to anybody. It is simply a record. It did not come into existence as a communication from the client to the solicitor.
>
> The conversation itself is admitted not to be privileged. . . . The law should be slow to extend the boundaries of legal professional privilege so as to protect a non confidential communication simply because a record of it is made and deposited with the lawyer of one of the parties."

53. This approach also is supported by the judgment of Finnegan J (as he then was) in *MFM v. PW* [2001] 3 I.R. 462 and the authorities referred to by him. That decision concerned a claim to privilege of a solicitor's note of evidence given in court. The issue was resolved in part by considering whether that which was recorded in the note was privileged.

54. In relation to these transcripts I have concluded that the issue which this Court has to resolve is whether communications between Woori Bank and third parties which are not claimed to be confidential but are claimed to have occurred as part of an exercise in gathering "materials for evidence" are privileged.

55. The parties have not drawn my attention to any decision either in this jurisdiction or in any other common law jurisdiction precisely on the question as to whether or not communications between a party to the litigation and third parties must be confidential before the party to the litigation can claim privilege over a record of them. My attention was drawn to a number of decisions which assist.

56. In *Ventouris v. Mountain* [1991] 1 W.L.R. 607 Bingham LJ (as he then was) stated:

> "Confidential communications between a party to litigation or his legal adviser and third parties for the purpose of the litigation are without doubt protected from production to the other party. So are documents prepared for the dominant purpose of submission to a legal adviser in connection with actual or anticipated litigation… The issue is how much further the privilege extends."

57. In this jurisdiction the principles according to which the existence of privilege in relation to communications should be determined are as set out by Finlay CJ in *Smurfit Paribas Bank Ltd v. A.A.B. Export Finance Ltd*. [1990] 1 I.R. 469 as follows at p. 477:

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

58. The objectives relevant to communications between a client and third parties appear to be the ability of a party to litigation to prepare its case in the adversarial system without disclosure to the opposing party and also the necessity for party to litigation to obtain full and frank statements from potential witnesses.

59. Whether one considers litigation privilege to be a subcategory of legal professional privilege or a separate heading does not matter. Regardless of which it is, it is also clear from the authorities to which I have been referred that at the core of the litigation privilege is the privilege attaching to confidential communications between a party to litigation and his lawyers. In *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd*. [1990] 1 I.R. 469 Finlay CJ at p. 476 cited with approval the statement by Jessell M.R. in Anderson v. Bank of British Columbia [1876] 2 Ch.D. 644 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 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."

60. It is clear from p.648 of the judgment of Jessel M.R. that the rule he is referring to in the above passage is "the rule which protects confidential communications from discovery as regards the other side."

61. The rationale for the extension of the privilege accorded to communications between lawyer and client to communications between client and third parties is explained later in the same judgment of Jessel MR as the client being considered as acting as agent for the lawyer. The importance of this is that it is considered to form part of the same claim to privilege which protects confidential communications.

62. It is undisputed on behalf of the plaintiff that confidentiality of communication between client and lawyer is a prerequisite to claim privilege where the communication is within the "legal advice principle". I am not aware of any authority or principle which distinguishes the position in relation to communication between a client and lawyer in a litigation context.

63. The purpose and effect of a claim to legal professional privilege in a litigation context is to preserve as confidential to the party to the litigation, as against the other party, confidential communications either with its lawyer or third parties. It does not appear to form any part of the general principle to render confidential to the party claiming privilege communications either with its lawyer or third parties which are not already confidential to it. Such would be the consequence of accepting the plaintiffs' submissions.

64. I consider that this view is supported by the approach in the decision of the Supreme Court in *Fyffes Plc v. DCC Plc* referred to in the preceding section of this judgment. The expert reports at issue in those proceedings were confidential reports obtained for the purposes of the proceedings. Fennelly J. at p. 361 cites what he describes as "a central plank of the appellant's submission":

> " 'It follows from the necessity for a communication to be "confidential" before privilege can be properly claimed in respect of it, that disclosure of material to a third party generally destroys any confidentiality and therefore any privilege, otherwise attaching to that communication'."

65. Whilst the Supreme Court did not uphold the totality of that submission insofar as they concluded that limited disclosure for a particular purpose would not cause DCC to lose or waive its privilege, it is clear from the judgments that the steps taken by DCC to preserve confidentiality (subject to limited disclosure) were a material fact in the conclusions of the Court that privilege had not been lost. If there is no necessity in the first place for a communication with a third party to be confidential then there could be no need to preserve confidentiality.

66. Finally, the plaintiffs in their submissions have drawn attention to the discussion in Chapter 9 of Matthews and Malek, *Disclosure, 2nd ed*., (London: Sweet and Maxwell, 2000) of the existence of a "materials for evidence" privilege as a separate basis of privilege from litigation privilege. The proposition primarily emanates from a suggestion in Bray, *Principles and Practice of Discovery* (1885) in relation to potential privilege for a litigant acting in person of communications with third parties and his preparations for trial. Bray

distinguished his suggested head of "materials for evidence" from legal professional privilege at p. 407 as:

> "Professional privilege rests on the impossibility of conducting litigation without professional advice, whereas the ground on which a party is protected from disclosing his evidence is that the adversary may not be thus enabled so to shape his case as to defeat the ends of justice."

67. Matthews and Malek acknowledge that there is no binding decision (presumably in the United Kingdom) on the issue. They also acknowledge that it is questionable as to whether the "materials for evidence" privilege can be said to exist at all today but suggest that, in the absence of binding authority, it is justified but that its limits must be clearly defined. Insofar as it may exist (which I am not holding), I am not satisfied that the plaintiffs have made out any case in accordance with the principles cited above from the judgment of *Finlay CJ in Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* [1990] 1 I.R. 469 to justify the extension of a claim to privilege to non confidential communications with third parties.

68. Accordingly, I have concluded that the plaintiffs have not made out a claim to privilege in respect of documents 14, 15, 16, 5, 7 and 17 of the first affidavit of Mr. W.R Kim.