THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 59

Record Number: 2018/300

Peart J.
Irvine J.
McGovern J.

BETWEEN/

CHARMAINE COLSTON

PLAINTIFF/RESPONDENT

- AND -

DUNNES STORES

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 28th day of February 2019

1. This is an appeal brought by Dunnes Stores ("Dunnes") against an order of the High Court (McDonald J.) of the 9th July 2018.

2. By his order the High Court judge directed Dunnes to disclose to the plaintiff, Ms. Charmaine Colston, within three weeks, certain documents over which privilege had been claimed in an affidavit of discovery sworn by Mr. James Downey on the 9th June 2016.

Background Facts
3. These proceedings arise out of an incident which is alleged to have taken place on the premises of Dunnes at Green Road, Portlaoise, Co. Laois, on the 7th April 2013.

4. Ms. Colston claims to have suffered significant injuries to her low back, sacrum and coccyx as a result of a fall which she maintains occurred as a result of her shoe becoming snagged or trapped in the flooring.

5. A letter of claim was received by Dunnes some four days after Ms. Colston's fall, following which proceedings were commenced by personal injury summons dated the 31st January 2014. In her summons Ms. Colston claims that the floor was defective and had not been inspected or maintained in accordance with the obligations of Dunnes *qua* occupier.

6. A full defence denying liability was delivered on the 1st July 2014. In particular, it is denied that Ms. Colston's shoe became trapped in the manner alleged, in addition to which a plea of contributory negligence is made. The basis of this plea is that if there was a hazard on its premises, which Dunnes denies, then Ms. Colston was negligent in failing to avoid it.

7. On the 12th January 2015, the High Court (O'Malley J.) ordered Dunnes to make discovery on oath of several categories of documents. These categories included floor maintenance records, documents relating to the repair of the floor, complaints concerning the flooring, the risk assessment in respect of the use of the floor and all CCTV footage of the relevant area on the date of the accident.

8. In his affidavit of discovery sworn on the 9th June 2016, Mr. James Downey, Store Manager, discovered, in the First Part of the First Schedule, what is described as the "Dunnes Stores Group Accident Report Form". However, in the Second Part of the First Schedule he claimed privilege over the statements made by the four persons therein identified as well as what is described as an "Internal Investigation Form". He did so on the basis of what was stated by him at paras. 3 and 5 of his affidavit which read as follows:–

> "3. I say that the defendant claims privilege over the statements set out in the First Schedule Second Part herein on the basis that the same were prepared in contemplation of legal proceedings.
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> 5. I say, believe and am advised that the defendants object to producing the said documents set forth in the Second Part of the said First Schedule hereto on the grounds that the same were created in the course of, and for the purpose of, the defence of the within proceedings."

9. The privilege claimed by Mr. Downey over the documents identified in the Second Part of the First Schedule was challenged by Ms. Colston by way of an application for inspection of the documents over which privilege had been claimed and her application was grounded upon the affidavit of her solicitor, Mr. Denis O'Mahony, sworn on the 29th May 2017.

10. In his affidavit Mr. O'Mahony referred to the five documents in respect of which privilege had been claimed, and noted that the dates of those documents had not been identified. He was, however, later advised that all of the privileged documents were dated the 7th April 2013, that being the date of the accident.

11. Mr. O'Mahony referred to his correspondence with the solicitors on record for Dunnes, wherein he had questioned how, not having been notified of any claim, Dunnes could maintain that the documentation in respect of which privilege had been claimed could be deemed to have been created in contemplation of litigation. Quite properly, he also advised the Court that the said solicitors had made known to him that each of the four statements over which privilege was claimed bore the headline *"privileged and private for the use of Dunnes Stores and/or their legal advisors"* and that the Internal Investigation Form, the remaining document over which privilege was maintained, was headed *"Internal Investigation in respect of incident which it is contemplated may become the subject of legal proceedings/privileged and private for the use of the Company and their advisors and underwriters"*.

12. No replying affidavit was filed by Dunnes for the purposes of elaborating on the averments contained in Mr. Downey's affidavit of discovery. However, the High Court judge was given copies of the documents in respect of which privilege was claimed.

13. Having considered the evidence before him and the submissions of counsel, the High Court judge made an order permitting Ms. Colston to inspect the documents over which privilege had been claimed. It is against that order that Dunnes now appeals.

The Appeal
14. For the purposes of adjudicating upon the appeal, this Court, in addition to the documentation and evidence that was before the High Court judge, has been furnished with a transcript of the ruling of the High Court judge and detailed written submissions from both parties.

The Judgment of the High Court
15. The principal reasons given by the High Court judge for rejecting the privilege claimed were as follows:-

> (i) the onus was on the party claiming privilege to demonstrate that the dominant purpose for which the documents had been created was apprehended litigation and this had to be established on the basis of evidence. In the present case no affidavit had been sworn by Dunnes explaining how the documents in respect of which privilege was claimed had come into being;
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> (ii) whilst the documents in respect of which privilege had been claimed were "documents of a kind to which privilege might well attach in certain circumstances", from his examination of their content he was satisfied that they could also have been created for an alternative purpose than apprehended litigation. He referred in this regard to a Health and Safety Authority form mentioned in the document entitled *"Internal Investigation in respect of incident which is contemplated may become the subject of legal proceedings"* and to the possibility that the documents concerned might also have had a purpose in the context of a possible workplace investigation or an investigation by the Health and Safety Authority;
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> (iii) it was to be inferred from the fact that the Internal Investigation Form referred to the possibility that the incident therein described might later become the subject matter of legal proceedings that the form might also have been relevant for some other purpose. He emphasised the use of the word "may" in the heading of the said form; and
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> (iv) as no replying affidavit had been filed by Dunnes, it had failed to demonstrate that the dominant purpose for which the privileged documents had been created was apprehended litigation. He questioned whether anybody in Dunnes could have formed the view on the day of the incident that litigation was reasonably apprehended. Additionally, if it was to be asserted that Dunnes apprehended litigation as of the date of the accident, that should have been set out on affidavit.

Discussion

A Preliminary Matter
16. Before considering the substance of the appeal, I consider it only fair to record that Ms. Colston contends that the arguments advanced by Dunnes in its oral submissions on the appeal are not those that were made on its behalf in the High Court. Mr. O'Donnell BL, maintains that at first instance, counsel then acting for Dunnes, when challenged as to how documents that had come into being on the date of the accident could have been created in apprehension of litigation, had sought to bolster Mr. Downey's affidavit by advising the Court that his client had a policy to treat every incident, wherein injury had occurred, as an event in respect of which litigation was to be apprehended. In response, to this objection, neither Mr. Leonard S.C. nor Mr. Martin B.L., who represented Dunnes on the appeal, were in a position to gainsay this submission. Neither of them had been retained to represent Dunnes in the application in the Court below.

17. Whilst not in any respect critical to the outcome of the appeal, it appears to me that Mr. O'Donnell's summary of the manner in which the High Court hearing was approached by Dunnes is borne out by the written submissions filed on this appeal and the criticism of the High Court judge concerning the absence of evidence from Dunnes as to the circumstances in which the privileged documents were created. I will later return to consider the written submissions filed by Dunnes on the appeal. Suffice for the moment to state that at paras. 23-25 this Court is advised that it is the corporate policy of Dunnes, following the occurrence of any injury, to fully investigate the accident involved in apprehension that litigation will follow. It is stated that the experience of Dunnes is that accidents which occur on its premises usually result in litigation.

Submissions on Behalf of Dunnes
18. In his written and oral submissions to this Court Mr. Leonard S.C. submits: -

> (i) that Dunnes need to show that (a) there was a reasonable apprehension of litigation on Dunnes' part and that (b) the dominant purpose of the documents in question was the preparation of litigation;
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> (ii) as for the reasonable apprehension part of the test, that there is a distinction to be drawn between apprehension of litigation and certainty of litigation on part of the party claiming privilege. Dunnes need only show a reasonable apprehension of litigation. A passage by McGovern J. in *BMO REP Asset Management Plc v. Friends First Managed Pension Funds Limited* [2018] IECA 357 at para. 26 but also Cooke's J. dictum in *Rhatigan and others v. Eagle Star Life Assurance Company of Ireland Limited* [2013] IEHC 139 support this contention;
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> (iii) the only evidence before the Court was that the documentation in respect of which privilege was claimed was prepared in anticipation of apprehended legal proceedings;
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> (iv) the fact that the documents in respect of which privilege was claimed predated the letter of claim did not undermine the privilege asserted;
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> (v) that the particular circumstances warranted a reasonable apprehension of litigation. The fact that the respondent complained of severe injury on the day and was taken by ambulance to a hospital generated a reasonable apprehension of litigation on the part of Dunnes. In the case of *P.J. Carrigan Ltd v. Norwich Union Fire Society Ltd* [1987] I.R. 618 circumstances with similar effect made the court conclude that there had been a reasonable apprehension of litigation;

(vi) the headed statements on the report compiled by Dunnes in his appeal are similar to those in *Carrigan* where the High Court upheld a claim of litigation privilege, holding that the dominant purpose of the documents was the preparation of litigation;

(vii) there was no evidential basis for the conclusion of the High Court judge that the documentation might have enjoyed an alternative purpose such as an internal safety investigation or a health and safety investigation. The evidence was that the sole purpose was the apprehension of legal proceedings, *Waugh v. British Railways Board* [1974] AC 521 relied on;

(viii) the fact that Dunnes compiled a second report in addition to and separate from the documentation in question, entitled Accident Report Form, indicates that the Internal Investigation Form was for the distinct purpose of the defence of the within proceedings;

(ix) it was only necessary to establish that the dominant purpose for creating the documents was apprehended litigation if there was evidence that there was more than one possible purpose. Here, the only evidence was that litigation was the purpose for which those documents were generated. He relied upon the averments at paras. 3 and 5 of Mr. Downey's affidavit;

(x) the judge wrongly relied upon the content of the Internal Investigation Form to conclude that there might be another purpose for which the documents concerned had been generated. Contrary, to what was found by the trial judge, the destination for that form and the accompanying statements, i.e. to the insurance department at head office supported Mr. Downey's averments; and

(xi) if documents prepared for insurance departments, and the High Court judge identified the documents in question as such, become automatically discoverable in personal injury actions, the Courts would depart from their usual practice. It would extend the parties' obligations for discovery beyond that set by s. 45(1)(a) of) the Courts and Courts Officers Act 1995 (and Order 39, rule 46 of the Rules of the Superior Courts).

Ms. Colston's submissions

19. Mr. O'Donnell submits that the High Court judge was correct to conclude that Dunnes had failed to discharge the burden of proof of demonstrating that the documents were privileged. No evidence was put before the Court to explain how, on the facts, the company could reasonably have apprehended legal proceedings on the day of the accident and in advance of any intimation of a claim.

20. The High Court judge was correct to conclude, on the basis of what was contained in the documents, that it was for Dunnes to demonstrate that the dominant purpose for which they had been created was apprehended litigation. Dunnes had made no effort to explain what might have been in the mind of the company when the documents were prepared. Nothing was stated regarding the knowledge of the manager.

21. Counsel contrasted the evidence in this case with many of the leading authorities concerning litigation privilege from which it was clear that the party claiming privilege had to set out in detail the circumstances in which the documents had been created or procured. He instanced the decision in *Gallagher v. Stanley* [1998] 2 I.R. 267.

22. In all of the authorities the party asserting privilege had done much more than make a bald assertion that the party was entitled to claim privilege. There was no evidence of any policy on the part of Dunnes to generate the documents which were created. That case was not made out on affidavit. The High Court judge had applied the correct principles and on the evidence was correct to conclude that inspection was warranted.

The Role of the Appellate Court

23. It is important when considering an appeal such as the present one to have regard to the fact that the role of the appellate Court is to review the decision made by the High Court judge. Its function is not to rehear the application. Relevant also is the fact that an appellant is not entitled to advance any argument that it did not make in the Court below. It is, perhaps, to state the obvious that if the appellate Court were to entertain a new legal argument and it were to prove successful, the respondent would be denied their constitutional right of appeal against that decision.

The Evidential Burden

24. What is well-established in the authorities is the general test to be applied in applications for inspection where litigation privilege is claimed, namely that privilege may be claimed over documentation which was created (a) in contemplation of, or with reasonable anticipation of, litigation and (b) with the dominant purpose of preparing for litigation. Mr. Leonard S.C. made the correct observation that a party claiming privilege must only prove a reasonable apprehension and not certainty of litigation on his or her part. The test can be found in cases such as *Silver Hill Duckling Limited v. Minister for Agriculture* [1987] I.R. 289, *P.J. Carrigan & Ors. v. Norwich Union & Ors.* [1987] I.R. 618 *Waugh v. British Railways Board* [1980] AC 521, and more recently in decisions such as *Rhatigan & Ors. v. Eagle Star Life Insurance Company of Ireland* [2013] IEHC 139, *Woori Bank v. KDB Ireland Limited* [2005] IEHC 451 and *Artisan Glass Studio v. The Liffey Trust Ltd* [2018] IEHC 278.

25. While the parties are in agreement as to the applicable principles, there is disagreement between the parties as to what evidence Dunnes has to produce to demonstrate that their privilege claim is justified. In other words, how can the appellant show that they did indeed reasonably apprehend litigation and that they did produce these documents with the dominant purpose of preparing for litigation?

26. To answer this question, it is beneficial to first look at the rationale behind litigation privilege and to explore why the Courts have eventually determined that a party seeking to rely on such privilege needs to discharge the evidential burden set out later in this judgment. In *Smurfit Paribas Bank Limited v. AAB Export Finance Limited* [1990] 1 I.R. 469, Finlay C.J. stated 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 of the facts."

27. Equally, in *Waugh v. British Railway Board* [1980] AC 521, a decision to which I will later refer in greater detail, Lord Wilberforce remarked the following at p. 531:-

> "It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident."

28. What is evident from the Chief Justice's words as well as those of Lord Wilberforce is that there is a strong public interest in full disclosure and that a privilege preventing such ought to be restricted to circumstances where the interests of justice so require. Similarly, in Payne v. Shovlin [2006] IESC 5 at para. 53 Kearns J. stated that *"litigation privilege is itself an exception to the general principle that all relevant information should be before the court. The consequent need to construe this … exception strictly has been recognised frequently by the courts [sic]"*.

29. The importance of full disclosure and the fact that litigation privilege will only apply where there is a strong public interest means that the Courts have burdened the party seeking privilege with certain evidential prerequisites. Showing that litigation is the dominant purpose of the documentation and that litigation had been contemplated cannot be a mere box-ticking-exercise. To dispense with the rule of full disclosure, a party needs to *demonstrate* that the public interest must weigh in his favour, and therefore he or she must *demonstrate* that the documents were created for the required purpose and in apprehension or contemplation of litigation.

30. Consequently, the Courts have set out that more is required than a bald assertion made in an affidavit of discovery that a document or documents "were prepared in contemplation of legal proceedings" or were "created in the course of, and for the purpose of, the defence of the within proceedings". Whilst the following statement by Finlay Geoghegan J. in *Woori Bank v. KDB Ireland Limited* [2005] IEHC 451 concerns an averment as to what was stated to be the dominant purpose of a particular document in respect of which litigation privilege was claimed, her observations apply equally to a straightforward claim that a particular document or documents were prepared for the sole purpose of apprehended proceedings. This is what she said at para. 6 :-

> "…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….the court should not make a finding that the dominant purpose of the document is litigation based upon a bald assertion, even on affidavit, of such motivation or intention [on the part] of the creator of the document."

31. Similarly in *Rawlinson and Hunter Trustees v. Ackers* [2014] EWCA 136 Tomlinson L.J. remarked at para. 13:-

> " The court will look at "purpose" from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose … The evidence in support must be specific enough to show something of the deponent's analysis of the purpose for which the documents were created, and should refer to such contemporary material as is possible without disclosing the privilege material."

32. What emerges from these cases is that the Court must apply an objective test. Assertions as to the subjective state of mind of the party asserting privilege are not sufficient without evidence to support them. To discharge the evidential burden, the evidence must be of such quality and character as to enable the Court to make definitive findings about the motivation and/or intention of the creator of any document in respect of which privilege is claimed.

33. Consequently, the party asserting litigation privilege should provide the Court with what McDonald J. in *Artisan Glass Studio Limited* [2018] IEHC 278 described as detailed affidavits "explaining the nature, genesis and purpose of the documents in issue". A bald assertion that documents were prepared "in contemplation of legal proceedings" accompanied by a claim of litigation privilege is unacceptable and does not discharge the burden of proof. This is clearly because the opposing party has no means of challenging such a statement, absent sight of the documents. If a party insists on withholding documents which are relevant to the issues in the proceedings on the basis that they are privileged, they must set out in their affidavit information and evidence sufficient to demonstrate the claim to privilege. They cannot maintain privilege and yet refuse to explain all of the relevant circumstances which would demonstrate that, objectively assessed, the documents were created in circumstances where litigation was reasonably apprehended.

34. Whilst many of the leading authorities on the subject of litigation privilege concern cases in which it was accepted that the documents in respect of which privilege was claimed were created for more than one purpose, the affidavits relied upon by the parties claiming privilege provide good guidance as to the type of evidence that is required to discharge the burden of proof when faced with a challenge to the privilege claimed. I will refer briefly to three such authorities for the purposes of demonstrating the type of evidence that allows a Court and an opposing party to examine in a rigorous fashion a claim to litigation privilege.

35. The first decision to which I will refer is that of *Waugh v. British Railways Board* [1980] A.C. 521. That case concerned a collision between two locomotives which caused the death of the plaintiff's husband. The practice of the Board, when an accident occurred, was to prepare a brief report that day which would be sent to the Railway Inspectorate. Soon after, a "joint inquiry report" would be prepared and this would incorporate witness statements. This would also be sent to the Inspectorate. On the facts under consideration by the Court, the joint inquiry report stated that, eventually, it had to be sent to the Board's solicitor for the purpose of enabling him to advise the Board. The plaintiff, who had brought an action in respect of the death of her husband sought discovery of the joint inquiry report. The Board claimed that the report was the subject of legal professional privilege. That fact notwithstanding, it was accepted that the report had also been prepared for the purpose of ensuring the safe operation of the railway.

36. Whilst the decision in *Waugh* is perhaps best known for the principle that, where a document is prepared for a dual purpose, the party claiming privilege must establish that the dominant purpose was apprehended litigation, the affidavit filed on behalf of the Board provides good guidance as to the type of detail that might be expected in an affidavit where there is a challenge to litigation privilege. I take the opportunity of quoting the following extract from the affidavit of Mr. G.T. Hastings, which is set out in full in the judgment of Lord Wilberforce (p.530). I do so also because the written submissions of Dunnes, which seek to introduce to this Court evidence which was not before the High Court concerning the policy of Dunnes following an incident resulting in personal injuries, follow closely the basis upon which the Railway Board maintained its claim for privilege. I will return later to the said written submissions on company policy.

> "3. The general manager of the Eastern Region is required (as are general managers of the other railways' regions) to

submit returns to the Department of [the] Environment in respect of accidents occurring on or about any railway….

6. It has long been the practice of the board and its predecessors to require that returns and reports on all accidents occurring on the railway and joint internal departmental inquiries into the causes of the said accident be made by the local officers of the board who would forward them to their superiors in order to assist in establishing the causes of such accident.

7. Such reports and the statements of witnesses to such accidents are made for the purposes mentioned in paras. 3 and 6 of this affidavit and equally for the purpose of being submitted to the board's solicitor as material upon which he can advise the board upon its legal liability and for the purpose of conducting on behalf of the board any proceedings arising out of such accidents…

9. It is commonly anticipated by the Board that:

(a) where an employee of the Board suffers personal injury or death at work or;

(b) where a passenger suffers loss [or] personal injury or death while on or about the railway a claim for damages will be made against the Board and proceedings will ensue if liability is repudiated

The present action is brought as the result of a fatal accident suffered at work by the late husband of the plaintiff and it was anticipated from the very outset that a claim for damages would almost certainly ensue.

10. The documents in this action, namely the reports made by the Board's officers and servants and the report referred to in correspondence as the internal inquiry report for which the defendants' have claimed privilege in part II of the first schedule of their list of documents dated November 11th 1997, came into existence by reason of the fact that the appropriate officer, in this case the divisional manager of Newcastle, in accordance with longstanding practice was required to and did so call for such reports and statements. One of the principal purposes for so doing was so that they could be passed to the Board's chief solicitor to enable him to advise the board on its legal liability and if necessary, conduct its defence to these proceedings.

11. The internal inquiry board in fact states on the face of it that it has finally to be sent to the solicitor for the purpose of him enabling him to advise the board."

37. As is apparent from the affidavit of Mr. Hastings, the Court and Mrs. Waugh were given very significant detail concerning the circumstances in which the documentation over which privilege was claimed had been brought into being and that being so, it was possible for the Court and the plaintiff to properly interrogate the claim of privilege.

38. Another decision which serves a similar purpose is that of O'Flaherty J. in *Gallagher v. Stanley* [1998] 2 I.R. 267, a medical negligence claim arising out of an injury sustained by the plaintiff at birth. In that case privilege was claimed over statements made by nurses who were on duty in the hospital at the relevant time. It was asserted that the statements had come into being for the purposes of or in contemplation of litigation. The evidence established that the statements concerned had been prepared by the nurses at the request of the matron on the morning after the plaintiff's birth.

39. What is clear from the judgment of O'Flaherty J. is that for the purposes of standing over its claim to privilege, detailed replying affidavits were filed by Mr. Michael Lenihan, who had claimed privilege over the statements in the hospital's affidavit of discovery, and also the matron of the hospital. Mr. Lenihan averred that the statements were not made in the ordinary course of treatment and were not part of the medical or treatment records. He stated that because the plaintiff had had a difficult birth and suffered very serious injuries the statements had been gathered on a confidential basis to provide the hospital's solicitors with material which would allow them to advise the hospital in the event of a claim being made. Likewise, the matron explained that when she procured the statements she did so in order that they could be furnished to the legal secretary of the hospital and furthermore that she had done so at a time when she considered that the unfortunate circumstances surrounding the birth could result in litigation.

40. Most recently in *Artisan Glass Studio Limited*, proceedings in which the plaintiff claimed damages as a result of a fire which escaped from an adjacent property, a claim for privilege was made in respect of a number of documents which predated the proceedings. Once again, detailed replying affidavits were sworn in support of the privilege claimed over certain correspondence and reports. The first was sworn by Mr. Michael Corrigan, solicitor on record for the defendant and another was sworn by an employee of the relevant insurance company, Aviva. Mr. Corrigan explained that he had been retained long before proceedings had been instituted or intimated. The Court had sworn evidence to the effect that a fire of the scale which had occurred in this case would always result in third party claims such that, when the documents in respect of which privilege was claimed were generated, it was apprehended there would be legal proceedings arising therefrom.

41. In all of the aforementioned cases the evidence advanced to support the claim of litigation privilege extended significantly beyond the mere assertion that the documents in question were created with litigation in mind. A full account of the circumstances in which the documents were created was provided. Likewise, there was an explanation of the procedures deployed at the time the documents were created as there was of the motivation for so doing.

42. All that said, litigation in this jurisdiction is adversarial in nature, and that being so, there is nothing improper in a party standing on their right to privilege where it is properly made out. Nonetheless, when a claim of privilege is upheld the consequences are, first, that material which has already been determined as relevant to the issues the Court will have to decide, will not be available to the other party. Neither will it be available to the Court to enable it to do justice between the parties. For this reason, the Court must be diligent to ensure that the party claiming privilege, discharges the requisite burden of proof. Privilege has the potential to interfere with the Court's ability to establish the truth. Thus a party claiming privilege must discharge the onus upon them to satisfy the court that privilege is properly claimed.

43. Therefore, from the case law cited, the following principles may be stated to apply when a challenge is made to a claim of privilege over documents which predate either notification of an intended claim or the commencement of proceedings:-

(1) Every application for inspection of documents in respect of which litigation privilege is claimed, must be decided on its own facts.

(2) The Court must be satisfied, on the evidence, that the party claiming privilege has demonstrated that they reasonably apprehended litigation when the documents were created. This is an objective test and is one to be decided on the basis of the evidence.

(3) If the documents in respect of which principle is claimed were created for more than one purpose, the Court must be satisfied that the evidence demonstrates that apprehended litigation was the dominant purpose for the creation of the documents.

44. In the present case, Dunnes proceeds upon the basis that the Court should conclude that Mr. Downey's averment that the privileged documentation was prepared in contemplation of legal proceedings is sufficient evidence to warrant the Court concluding that said documentation was prepared in contemplation of apprehended litigation.

45. The danger of a Court accepting a bald averment as to the purpose/dominant purpose for which a document was created, is demonstrated by Mr. Downey's own affidavit. The averment made at para. 5 of his affidavit is simply false, but fortuitously on the facts of the present case can be shown to be false because the documents were clearly created before proceedings were "in course". However, in many cases where privilege is claimed over documents which predate a letter of claim, a plaintiff met with an averment that the documents were created because of apprehended litigation, has no way of challenging the truth of that statement which might equally be false. The only way that a Court can ascertain whether the purpose for which a document was created was apprehended litigation is for the deponent to explain all of the relevant facts and processes which led to the creation of the documents. The Court and the opposing party must be in a position to subject the claim of privilege to rigorous examination.

46. In lieu of Mr. Downey's averments, Mr. Leonard S.C. repeatedly emphasised the fact that the *only* evidence before the Court was that the documents were created in apprehension of litigation and for the purpose of defending the within proceedings. However, just because the appellant's affidavit states this, does not make it so. The Court is permitted to find other purposes or intentions, in spite of subjective averments that only identify a singular purpose. As discussed above, the Court assesses the evidence objectively and then makes a finding. If, on the evidence, another purpose or intention may be demonstrated to displace the dominance of litigation as a purpose, then the Court is entitled to so find. More importantly, if the affidavits submitted in order to demonstrate the requisite motivation and/or intention do not discharge the burden of proof which is upon the party claiming privilege, then the absence of other concrete purposes or intentions does not cure this shortfall in the appellant's case. In other words, if a party cannot establish that the purpose of the documentation is litigation or that they were created in apprehension of litigation, it is irrelevant that there is no evidence establishing other definitive motives and intentions. A weak evidential basis for the claim of privilege, so minimal that it cannot be challenged, will not suffice to establish the claim.

47. This objective test applies equally to the supplemental submissions made by counsel. He submits that the headings on the documentation identify the dominant purpose as litigation and an apprehension for legal proceedings and that the creation of a separate accident report form indicates that the documentation in question has been created for another purpose. However, the findings of the High Court judge were made in accordance with the law as set out above and were therefore within the discretion afforded to him. The High Court judge was entitled to place emphasis on the word "may" just as much as he was entitled to find that other purposes aside from litigation may attach to the documentation in this appeal. The evidence presented could reasonably have been interpreted in that manner and the judge did not err in his interpretation or application of the law.

48. Lastly, what is also of some relevance in this case is that the averred apprehension of litigation or the contemplation of the purpose predates a notification of a claim. Although Mr. Leonard S.C. is right when he says that Rhatigan is good authority for the contention that litigation privilege may in principle be claimed over documents which come into existence prior to the "actual commencements of litigation", where that is the case, the party claiming privilege must still prove that even in the absence of actual litigation there had been a reasonable basis on which to apprehend litigation. An applicant must show that he or she contemplated litigation without being actually confronted with a claim or having lodged a claim.

49. Counsel for the appellant also refers to the company policy of Dunnes. The following is what is stated at paras. 24 and 25 of those submissions.

> "24. As outlined above, it is the appellant's corporate policy following upon the occurrence of any accident that the matter is fully investigated in contemplation and in apprehension of litigation as it is the appellant's experience that accidents which occur on its premises usually result in litigation. Accordingly, it is respectfully submitted that litigation was apprehended by the appellant from the moment of the occurrence of the alleged incident on 7 April 2013. In this apprehension, the appellant, its servants and/or agents commenced an investigation in respect of the said incident resulting in the creation of the aforementioned documents on 7 April 2013. The appellant's apprehension of litigation by the respondent was vindicated when it received a letter of claim dated 11 April 2013 from the respondent solicitors.
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> 25. More particularly, the dominant purpose of the appellant's investigation of the incident and the documents (i.e. the internal investigation form and appended witnesses' statements) created on foot of the said investigation was to inform the contents of the appellant's defence to the within proceedings. Accordingly, the aforesaid investigation and resulting documents are bound with an assessment by the appellant's legal advisers as to the ability of the appellant to stand over the contents of its defence. This is a vital consideration in the context of personal injuries proceedings where there is an obligation on defendants to verify on affidavit the assertions and allegations contained in their defence pursuant to section 14 (two) of the civil liability and Courts act, 2004."

50. It is nonetheless undoubtedly the case that had Dunnes, when faced with Ms. Colston's application for inspection, filed a replying affidavit sworn by a suitably qualified person who could, of their own knowledge, speak to the policy of the company in relation to claims and its experience of litigation, it might well have successfully resisted the application. I want to make clear, nonetheless, that I am offering no concluded view on the matter given the appellate role of this Court and the fact that no argument was made out in this regard. However, in such circumstances, the deponent of any such affidavit would, of course, have to explain how any policy implemented by the company was implemented on a day-to-day basis and what documents were generated for that purpose. The deponent must show that on the facts of this case it was reasonable for the company to have anticipated litigation, and demonstrate how the documents in respect of which privilege was claimed were created either solely for that purpose or predominantly for that purpose. And, of course, in support of the stated policy of Dunnes and the reasonableness of its conclusion concerning apprehended litigation it could seek to rely upon the letter of claim in the hope of satisfying the Court that it was reasonable to anticipate a claim in every case. However, I must re-emphasise the fact that my observations regarding the company policy are strictly obiter.

Conclusions

51. The question which the High Court judge was required to consider on the application made by Ms. Colston for inspection of the

aforementioned documents was whether Dunnes had discharged the burden of proof to establish the privilege claimed.

52. It is true to say, as was argued by Mr. Leonard S.C., that the fact that documents predate the commencement of legal proceedings or a letter of claim is not fatal to a defendant's claim to litigation privilege over documents predating either event. However, in circumstances where they do, a great deal more is called for than the type of bald statement made by Mr. Downey at para. 3 of his affidavit that the documents were prepared in contemplation of legal proceedings.

53. The High Court judge was correct to conclude that the averments made by Mr Downey did not amount to evidence sufficient to *demonstrate* [my emphasis] that the purpose/dominant purpose for which the documents were created was apprehended litigation.

54. Left as he was, without any sworn testimony as to the apprehension on the part of Dunnes of litigation following any injury on its premises and of any policy of creating particular documents as a result of that apprehension to assist in the defence of any future claim, the High Court judge was correct as a matter of law and fact to conclude that the onus of proof to maintain the privilege claimed had not been met.

55. It is, of course, the case that it is very difficult in a litigious society for any occupier to protect themselves against claims which they consider to be unmeritorious and which may ultimately impact upon their commercial viability. To seek to construct a system, by adopting a corporate policy which will ensure that no plaintiff will be able to use any documentation in the possession of Dunnes, to their advantage, may well be valid. However, if that is the approach to be taken by Dunnes in this and every other case, and this policy is to be relied on to deny a plaintiff discovery that would be permitted against occupiers of premises other than those owned by Dunnes who do not have such a policy, then that policy should have been deposed to on affidavit as the basis for the privileged claimed. Any plaintiff faced with a claim of privilege based upon such a corporate policy, could then, if they so wished, seek to challenge either the evidence advanced concerning the existence of that policy or the legal sustainability of that argument.

56. Having concluded that the High Court judge was correct as a matter of law and fact when he determined that Dunnes had not discharged the burden of proving its claim for litigation privilege over the documents set out in the First Part of the First Schedule to the affidavit of Mr. James Downey of the 9th June 2016, I would dismiss the appeal.