

THE HIGH COURT

[2012 No. 319 P.]

BETWEEN

COLUM LYONS

PLAINTIFF

AND

DECLAN O'MAHONEY

DEFENDANT

JUDGMENT of Mr. Justice Paul Gilligan on the 27th day of July, 2017

1. The issue to be determined on this application is as to whether or not a small number of documents which have been furnished to and considered by the court are entitled to the benefit of legal professional privilege.

2. The thirteen documents involved concern attendances by the plaintiff's solicitor upon him in relation to the property the subject matter of these proceedings, correspondence which is marked strictly private and confidential as between the plaintiff and his solicitor, further correspondence between the plaintiff and his solicitor, and a note of fees due and owing marked strictly private and confidential.

3. The rationale for the existence privilege is as set out in the judgment of Smyth J. in *Shell E&P Ireland Ltd v. McGrath* (No. 2) [2007] 2 I.R. 574 wherein the learned judge stated;

"the rationale for legal professional privilege was to ensure that a client might fully instruct his lawyer freely and openly safe in the knowledge that what he says to his lawyer in confidence would never be revealed without consent."

4. The plaintiff who is asserting the privilege bears the onus of proof.

5. The first element is that there must be a communication between the client and the lawyer. The second feature is that the communication must be made in confidence. The third feature of legal advice privilege is that the communication was made either to or by a lawyer during the course of a professional legal relationship and the final condition is that the communication must have been made for the purpose of the giving or receiving of legal advice.

6. Without going through all the conditions I take the view that there are only two documents out of the thirteen which merit a decision in favour of legal professional privilege and these are the attendance of the plaintiff's solicitor upon him by way of a telephone attendance note as dated the 1st March, 2006 being document 6 of the thirteen. The other document that merits the attachment of privilege is a memorandum as dated the 13th April, 2006 being document 13 which relates to a telephone conversation between Elaine O'Driscoll and the plaintiff's solicitor which leads into a telephone call between the plaintiff and his solicitor in which certain legal issues are discussed.

7. In respect of both these documents it is clear that the four relevant conditions are met and accordingly both of these documents are entitled to a claim of legal professional privilege.

8. The remaining eleven documents in the view of this Court do not satisfy the four criteria that are necessary to satisfy the court that a claim for legal professional privilege is justified.

9. Accordingly, I direct production of documents 1-5 and 7-12 inclusive but specifically not the production of document 6 being the attendance note of the 1st March, 2006 and not document 13 being the attendance note of the 6th June, 2006.