THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 222

Record No. 2017/265

Record No. 2017/302

Dunne J.
Peart J.
Hogan J.

BETWEEN/

RYANAIR LIMITED

APPELLANT/

RESPONDENT

- AND -

THE REVENUE COMMISSIONERS, IRELAND, THE ATTORNEY GENERAL AND THE MINISTER FOR FINANCE

RESPONDENTS/

CROSS-APPELLANTS

BETWEEN/

AER LINGUS plc

APPELLANT/

RESPONDENT

- AND -

THE MINISTER FOR FINANCE, THE REVENUE COMMISSIONERS, IRELAND THE ATTORNEY GENERAL

RESPONDENT/

CROSS-APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 22nd day of June 2018

1. If, in proceedings between A. and B., B. can successfully claim litigation privilege in respect of certain classes of documents during the currency of those proceedings, does this mean that these self same documents are also automatically protected by litigation privilege in respect of separate, later litigation between B. and C.? That is essentially the issue which now arises in this appeal from the decision of the High Court (Barrett J.) delivered on the 15th December 2016: see *Ryanair Ltd. v. Revenue Commissioners* [2016] IEHC 727.

2. In his judgment Barrett J. held that the State was entitled to claim litigation privilege in respect of documents deployed by it in the course of defending proceedings brought by the European Commission and that privilege endured for the purposes of defending separate proceedings subsequently brought by the two major airlines who are the litigants in those proceedings. Aer Lingus and Ryanair have both appealed to this Court against that decision.

Background facts

3. Before considering any of these issues, it is necessary first to set out the background to the proceedings. Section 55(2)(b) of the Finance (No.2) Act 2008 provided for the establishment of an airport travel tax. As Barrett J. noted in his judgment in the High Court this was "a differentiated tax whereby certain short-distance flights were subject to a (per passenger) €2 air travel tax-rate, with longer-distance flights being subject to a €10 air travel tax-rate." He continued:

> "This air travel tax was announced in Budget 2008; less than two months later, on 23rd November, 2008, the European Commission indicated an interest in whether this tax was valid by reference to European Union law. On 17th April, 2009, the European Commission gave warning that there was a possibility of formal proceedings against Ireland because of the free movement implications of the travel tax that had been imposed. Separately, on 21st July, 2009, Ryanair made a formal complaint to the European Commission that the tax amounted to State aid."

4. The establishment of the tax certainly set in motion a series of litigation and counter-litigation. The Commission ultimately concluded on the 25th July 2012 that the tax amounted to an unlawful State aid: see Commission Decision 2013/199/EU, O.J. L 119/30.

5. That finding was, however, set aside on appeal to the General Court, but that latter decision was itself successfully appealed by

the Commission to the Court of Justice: see Cases C-164/15 and C-165/15 *Commission v. Aer Lingus plc.* EU:C:2016:990. (As it happens, the Court of Justice delivered its judgment on the 21st December 2016, a few days after Barrett J. had delivered his judgment in this matter.) The net effect of that judgment is that the State is itself obliged to recover the difference between the lower rate of travel tax and the higher rate from both Aer Lingus and Ryanair Ltd. and it has issued proceedings for this purpose.

The present applications for discovery

6. Both Ryanair and Aer Lingus have brought motions seeking discovery of material generated by the State in its dealings with the Commission in relation to this issue. The State parties object to making discovery of this material on a number of grounds, including what might be termed a public interest privilege on the one hand and the other relating to straightforward litigation privilege on the other.

7. It may be observed at the outset that it is accepted that the proceedings between the Commission and Ireland are not purely adversarial. Article 4(3) TEU provides, after all, for a duty of loyal co-operation between the Member States and the institutions of the Union in the achievement of the Union's tasks: see, *e.g.*, Case C-246/07 *Commission v. Sweden* EU:C:2010: 203. In these circumstances, it is clear that where the Commission investigates a possible breach of EU law by a Member State then, as Barrett J. put it:

> "when the European Commission investigates a possible breach of European Union law by a member state, case-law accepts that there is a public interest in both parties being able to engage in free dialogue….The same applies when the European Commission is investigating possible State aid. (See Case C-139/07 P *Commission v. Technische Glaswerke Ilmeneau* [2010] E.C.R. I-5885, para.61). The end-result of the foregoing is that a member state cannot take an adversarial role *vis-à-vis* the European Commission in the situations aforesaid. It cannot simply say to the European Commission, 'I hear your case, and if that is what you think go prove it'. Instead, Ireland has a duty of cooperation with the Commission. What arises then in the types of situation that have presented for the State *vis-à-vis* the European Commission in the umbrella of events that form the background to the within application is not the normal adversarial relationship that might, for example, exist between Ireland and the airlines in any one set of commercial proceedings; it is a fundamentally different process"

8. While this is so, that question is not directly before this Court. In particular, while the question of whether the State can raise a *public interest privilege* by reason of its dealing with the Commission remains live, ultimately the question so far as this appeal is concerned is simply whether the State can raise a *litigation privilege* arising from the Commission proceedings in order to defend the motions for discovery in the separate Ryanair and Aer Lingus proceedings. It was apparently agreed before Barrett J. that the question of whether there was any public interest privilege would be stood over pending the resolution of the litigation privilege issue.

Litigation privilege: some general principles

9. This appeal accordingly brings into sharp relief the nature and rationale of litigation privilege. At one level litigation privilege shares some of the characteristics of legal professional privilege in terms of creating a zone of privacy and confidentiality whereby a litigant can safely consult his or her legal advisers. As Bradley J. stated in *Connecticut Mutual Life Insurance v. Schaefer* 94 U.S. 457, 458 (1876):

> "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance."

10. Litigation privilege is nonetheless different from legal professional privilege because the latter privilege is, broadly speaking, permanent and inviolable. By contrast, litigation privilege is essentially temporal in scope and is designed to prevent premature disclosure of a litigant's case to his or her opponent. As McGrath observes: "Litigation privilege operates to protect a party's case from disclosure to an adverse party…": see *Evidence* (Dublin 2014) at 690. As Hutton L.C.J. put it in *McKay v. McKay* [1988] N.I. 611, 617:

> "…the basis of the privilege is that the communications which a party makes to his professional lawyer should be kept secret from the adverse party and that the adverse party cannot ask to see them before trial….."

11. To anticipate somewhat, I would qualify that statement slightly by saying that litigation privilege is not necessarily concerned with disclosure to a solicitor at all (although, it can, of course, do so). A draft opening statement prepared by a personal litigant for possible use at some later hearing of the proceedings is just as much protected by litigation privilege, even though it might never cross the desk of a professional lawyer.

12. This entire matter was examined in some detail by Finlay Geoghegan J. in her judgment in *University College, Cork v. ESB* [2014] IEHC 135, [2014] 2 I.R. 525. The *UCC* proceedings involved a claim for damages arising from a flood which occurred on the river Lee in November 2009. In this particular application, the plaintiff, UCC, was seeking inspection of certain documents over which ESB claimed privilege, specifically litigation privilege. Broadly speaking, the documents were divided into two categories: four documents created since the 2009 flood; and three reports created in relation to earlier floods.

13. So far as the post-2009 documents were concerned, Finlay Geoghegan J. held that while litigation privilege might have attached to some or all of these documents, she was not satisfied that, applying the principles enunciated by the Supreme Court in *Gallagher v. Stanley* [1998] 2 I.R. 267, the dominant purpose for the creation of these documents was the existence of "apprehended or threatened litigation."

14. So far as the pre-2009 documents were concerned, the significant document was one created in 1990 for the purposes of defending a claim arising from a previous flooding incident. Finlay Geoghegan J. held that this document *prima facie* attracted litigation privilege. The central issue for determination thereafter was whether this litigation privilege endured beyond the conclusion of those earlier proceedings dating from the early 1990s.

15. Following a thorough review of the authorities, Finlay Geoghegan J. concluded that she should not follow some earlier High Court decisions (in particular, *Bord na Móna v. John Sisk and Son Ltd.* [1990] 1 I.R. 85 and *Quinlivan v. Tuohy*, High Court, 29th July 1992) which had held that litigation privilege survived the conclusion of the litigation. Even though this Court is not, in any event, bound by those earlier High Court decisions, in my view, Finlay Geoghegan J. was quite correct not to follow them, as they were, with respect, entirely contrary to principle and they conflated in an important respect the distinction between litigation privilege and legal professional privilege. The latter privilege concerns the solicitor-client relationship, whereas litigation privilege applies to all litigants

(including the self represented) by creating a zone of privacy around their preparations for the litigation and by giving protection against the premature disclosure of documents prior to the litigation.

16. Almost by definition, therefore, the litigation privilege ends with the conclusion of the litigation. As Fish J. said for the Supreme Court of Canada in *Blank v. Canada* [2006] SCC 39, [2006] 2 S.C.R. 319, 330:

> "Litigation privilege….is not directed at, still less restricted to, communications between solicitor and client. It contemplates as well communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and to promote the solicitor-client relationship. And to achieve this purpose, parties to the litigation represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."

17. This point had also been by Kelly J. in *Porter v. Scott* [1979] N.I. 7. That was an action for personal injuries where the defendant sought discovery of a medical report which the plaintiff had obtained for the purpose of earlier criminal injuries proceedings. Those criminal injuries proceedings had been concluded with a settlement in September 1975, but the subsequent road traffic accident took place a few months later in November 1975.

18. Kelly J. first stated ([1979] N.I. 7, 16-17):

> 'In my view, the rule 'once privileged always privileged' has a limited application to legal professional privilege. It does apply to what has been called, the strict legal privilege, to lawyer/client communications made for professional purposes. It means that such privilege remains and is maintained in all subsequent legal proceedings notwithstanding the nature of the subject-matter of those proceedings or the parties thereto. It remains until it is waived by the client. The rule however does not seem to have general application to the other kind of legal professional privilege, i.e. to communications made between lawyers and third parties which came into existence after litigation is contemplated or commenced and made for the purpose of such litigation. In such cases no privilege attaches to those communications in subsequent proceedings unless their subject-matter is the same. There is sound public policy in applying this rule 'once privileged always privileged' to strict legal privilege i.e. lawyer/client communications. What a client reveals to his lawyer for professional purposes should not only be secret but is intended to remain permanently so or at least until the client decides otherwise. To reduce or qualify the permanency of the secret would be to inhibit free and unreserved communication and this is essential to our system of law. The element of permanency does not seem to pervade communications made in contemplation of litigation. Such communications are not generally intended to remain unrevealed - indeed, more often than not it is intended that they should be revealed at the appropriate time in one form or another during the course of legal proceedings. They come into existence for the precise and limited purpose of use in contemplated litigation and I do not see on any grounds of public policy or otherwise why they should remain clothed with privilege when the proceedings for which they were made have been disposed of or abandoned."

19. Kelly J. then concluded that the litigation privilege which had attached to the medical report for the criminal injuries claim ended with the settlement of those proceedings, so that it was discoverable for the purposes of the subsequent – and quite separate – personal injuries action.

20. And to return briefly to the judgment in *UCC*, Finlay Geoghegan J. concluded that, having referred to decisions such as *Blank* and *Porter*, the object and purpose of the litigation privilege was ([2014] 2 I.R. 525, 546-547) to give a party:

> "the opportunity to properly prepare its case without premature disclosure or interference from the opposing party, it appears to me that such objective purpose does not require such privilege to automatically continue beyond the final determination of either that litigation or, as has been identified by the Supreme Court of Canada in *Blank*, closely related litigation."

The decision of the High Court

21. These were the principles which fell to be applied by Barrett J. in the present case. He nonetheless held that litigation privilege applied to the documents generated in the Commission proceedings, saying:

> "Is what presents on the facts of the within case the same litigation or "closely related litigation"? In some ways, the court is surprised that it should fall to it to adjudicate on this point because it cannot see how the triangulated proceedings described by it at the outset of the within judgment could be described as other than "closely related litigation". If they are not "closely related litigation", then what is? This being so, the proceedings being such, it appears to the court that Ireland's communications with the European Commission were done clearly and completely within that 'zone of privacy' contemplated by Finlay Geoghegan J. [in *UCC*] as necessary to give a party, here Ireland, "the opportunity to properly prepare its case without premature disclosure or interference from the opposing party" (or parties)."

22. There is no doubt but that the present proceedings traverse similar ground to the earlier proceedings concerning the Commission involving as they do the nature of the travel tax, State aid and the repayment of the differential payments generated by the tax. This, after all, is presumably why this discovery has been sought. But where, with respect, I differ from Barrett J. is that the present proceedings are not "closely related litigation" in the sense described by Finlay Geoghegan J. in *UCC*, chiefly because the parties are entirely different and there is no direct linkage between the (now concluded) Commission proceedings and present litigation.

23. Accordingly, the zone of privacy which the State required to defend the Commission proceedings – and which gave rise to the litigation privilege in the first place – is no longer required as those proceedings have ended. Nor can it be said that Ryanair or Aer Lingus are somehow proxies for the Commission or that the outcome of the present litigation can in any way affect the Commission proceedings involving the State which, to repeat, have long concluded. The situation is, in reality, no different from that which obtained in *Porter* where the litigation privilege attaching to the medical report which had been prepared for the criminal injuries claim ended once that claim was settled, so that this privilege no longer availed the plaintiff when discovery of that medical report was sought in the course of the second, unrelated personal injuries case.

Conclusions

24. In these circumstances it must be concluded that the litigation privilege which the State enjoyed for the purposes of defending the Commission proceedings has now ended once those proceedings have themselves terminated. It follows, therefore, that contrary to the view of the High Court judge, the State is not now entitled to plead litigation privilege in respect of these documents. It may

be – and I express no view on this at all – that the State will be able to assert legal professional privilege or, for that matter, public interest privilege in respect of some or all of these documents.

25. Such arguments – if they are to be advanced at all – are for another day. For the present it is sufficient to say that the State cannot successfully advance the defence of litigation privilege by way of response to the discovery of the documents now sought by Ryanair and Aer Lingus. I would accordingly allow the appeal.