Neutral Citation Number: [2007] IEHC 263

THE HIGH COURT

2000 No. 1628 P

BETWEEN

MICHAEL COLIN GEOFFREY McMULLEN

APPLICANT/PLAINTIFF

AND

GILES J. KENNEDY, PRACTISING UNDER THE STYLE AND TITLE OF GILES J. KENNEDY AND COMPANY, SOLICITORS

RESPONDENT/DEFENDANT

Judgment of Mr. Justice Roderick Murphy the 17th day of July, 2007.

1. Motion

The applicant's notice of motion, returnable on 26th March, 2007, was heard on 6th June, 2007. The applicant sought full and unimpeded access to the documents recited in the second part of the First Schedule of the respondent's affidavit of discovery sworn on 11th October, 2006, or in the alternative, a direction that the documents be made available to the court and for an order striking out the defence in default. The respondent had objected to produce those documents on the grounds that they consisted of privileged communication between himself, his client, counsel and witnesses in connection with and for the purposes of High Court proceedings 62188/1998 between the applicant and his former solicitors Kent, Carty and Company in May, 1992 (the second proceedings).

The Master's order made 6th July, 2006 required the defendant personally to make discovery on oath of the following documents which then were or had been in his possession or power:

> 1. The defendant's litigation file in the proceedings when he acted for Kent Carty & Co.
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> 2. The defendant's letter to Admiral Ireland in May, 1989, together with any subsequent correspondence between the defendant and Admiral Ireland concerning the content of some or any follow-up contact between the defendant and Mr. Clancy.
>
> 3. Any document recording the communication by the defendant of all or any part of the content of the same letter (whether by letter or conversation) to any person other than Mr. Clancy prior to July, 1999.
>
> 4. Any correspondence or memoranda concerning evidence to be adduced on behalf of Kent Carty at the hearing in May, 1992.

The defendant duly made discovery on oath on 11th October, 2006 of 491 documents. Privilege was claimed in respect of documents 162 to 491 which were listed in the second part of the First Schedule.

The applicant's notice of motion does not claim further or better discovery but seeks an order:

> A. Allowing the plaintiff and his witness or witnesses full and unimpeded access to the entire authentic files as per the order of discovery of 6th June, 2006, in particular all of the documents recited in the First Schedule, second part of the affidavit of discovery of the defendant, Mr. Kennedy, sworn on October 11th, 2006 on the compelling grounds set out in the plaintiff's affidavit of March 9th, 2007 attached and the exhibits A to F.
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> B. In the alternative, should the court see fit, a direction that the full files, as recited above, be placed in the hands of Mr. Justice Murphy, in order for the court to verify at the very least the outline of the issues as set out in the plenary summons, the statement of claim and the said affidavit of the plaintiff herein.
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> C. Should the defendant fail to defer to the court's decision, bearing in mind in particular the censure of the Supreme Court and the 'disturbing evidence' which the plaintiff herewith presents to the court, an order striking out the defence forthwith.
>
> D. Such further or other orders as this Court shall consider to be meet and just.
>
> E. The costs of this application.

In the present proceedings the applicant claims undue influence and interference with a principal witness in those proceedings.

Before dealing with the grounding affidavit dated 9th March, 2007, it is instructive to consider the background to the application.

2. Background

Over twenty years ago litigation between the applicant and his lessor was settled. The settlement broke down and the applicant sued his solicitor, Kent Carty & Co., and subsequently, his counsel.

Mr. Clancy S.C., now deceased, was the principal witness in the second proceedings, who, the plaintiff avers, had accepted responsibility in relation to the wording of a settlement consent dated July, 1985 in an action between the plaintiff and his lessor, the Charleville Estate Company (the first proceedings).

The defendant in the present proceedings had acted for and on behalf of Kent Carty & Company (hereinafter Kent Carty & Co.) in the second proceedings.

A third, subsequent action was taken by the applicant against Mr. Clancy S.C. (1995) 8124 P, (the third proceedings).

The second and third proceedings were unsuccessful in the High Court and were appealed together to the Supreme Court. During the course of that Supreme Court appeal a seven-page letter from Giles Kennedy and Co., to their client Admiral Underwriting Agencies (Ireland) Ltd., ("Admiral") the insurers of Kent Carty & Co. dated 17th May, 1989, was produced and, the applicant avers, confirmed his worst fears that pressure and threats had been applied to his then counsel in April, 1989.

In that letter, under the heading of Assessment of negligence/civil liability, reference was made to the specific instructions of the claimant (the applicant in this motion) that he should have an opportunity to re-enter his case should a dispute arise in the implementation of the settlement of the first proceedings. It was alleged that, contrary to instructions, counsel had advised a term in the settlement of *liberty to apply* rather than *liberty to re-enter* which, the applicant submitted, had resulted in loss and damage to him when the settlement broke down.

3. Grounding affidavit
The applicant's affidavit, sworn 9th March, 2007, refers to his surprise at Mr. Clancy's appearance as a witness for Kent Carty & Co. in the second proceedings and to the circumstance whereby the letter from the respondent herein to Admiral, dated 17th May, 1989 came into his possession on 3rd September, 1999, relating to the conduct of the respondent in meeting Mr. Clancy.

In his affidavit the applicant exhibited certain transcripts in support of his averment that the Supreme Court had made many comments about the "dubious" nature of the conduct of the defendant, in approaching Mr. Clancy on Friday, 28th April, 1989, "to have an unofficial without prejudice word" with him. The applicant alleges that the Supreme Court censured Mr. Kennedy's conduct as being "undoubtedly illegal".

The transcripts do not appear to substantiate this averment. While Mr. Justice Fennelly at p. 60 of the transcript of 17th December, 2003, had said: "I mean, isn't that pretty dubious …" He had not used the phrase "undoubtedly illegal" at p. 105 of the transcript of the same day. Mr. Justice Fennelly had said that "Mr. Kennedy arguably chose to interfere in that relationship."

Mr. Hayden S.C., instructed by the defendant, appeared in the appeal on behalf of Admiral, the insurers of Kent Carty & Co.

The full extracts of the transcript of 17th December, 2003, exhibited in the applicant's affidavit, are:

> Mr. Justice Fennelly: Mr. Hayden, if its true, if what is said in the letter is true, Mr. Kennedy was using two matters: one, the fact that Mr. Clancy was acting for the plaintiff, for Mr. McMullen in a personal injuries action where, as it happened, Mr. Kennedy was also acting for the insurers, and secondly, the possibility of joining Mr. Clancy personally as a third party in the action against the solicitors. These two things, the letter would seem to suggest very clearly, were being deployed in order to put pressure on Mr. Clancy to ask his client to desist from the action. I mean, isn't that pretty dubious, stating, using no stronger words, to a solicitor. Mr. Clancy, in those circumstances, was -- his character or his capacity, in those circumstances, was as barrister who had been or was still advising Mr. McMullen. …
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> Mr. Justice Murray: Could it not be capable of constituting an abuse of process?
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> Mr. Hayden: If Mr. Clancy receives it in the context of the claim against him, then I would entirely agree with you. It would be an issue that was inappropriate.
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> Mr. Justice Hardiman: Mr. Hayden, look at the last four lines of the fourth last paragraph: "We were aware at the time of our discussions that Mr. Clancy was acting for the Claimant instructed by O'Connor's in respect of a rather serious motor accident. Accordingly, it would seem as if Mr. Clancy may still have some influence over the claimant." The next sentence is, "As a tactic, we indicated to Mr. Clancy that our client (the Insured) wished to join him in the proceedings and we were not keen to do so. This little chat might provide an opportunity and incentive to Mr. Clancy to dissuade the claimant." Now, what is the incentive referred to?

The applicant referred to the conflict between the sworn evidence of Mr. Hugh Carty and Mrs. Pamela Madigan of Kent Carty & Co.

The applicant averred that both protested that they had nothing to do with and had no knowledge of Mr. Kennedy's contact with Mr. Clancy. However, there were references in the affidavit of discovery to 29 contacts between Mr. Kennedy and his clients at Kent Carty & Co. which, he says, were the very times and dates when Mr. Carty & Co. swore they knew nothing about the way Mr. Kennedy was running their defence.

The averment of Mr. McMullen at para. (s) of his affidavit referred to the final submissions of Mr. Bradley S.C. for Kent Carty & Co. Mr. Bradley had doubted that Kent Carty could have resisted their former client's negligence suit without the evidence of Mr. Clancy S.C.

The transcript exhibited for 16th December, 1997, p. 55, urged the Supreme Court not to alter the findings of primary fact by the trial judge which were supported by credible evidence. He referred to Mr. Clancy as being the most essential witness:

> " … and indeed it was one of the issues put in the case by the Plaintiff as to the competence of his solicitors and their defence, was that they relied on senior counsel, and to run the case without his evidence, I think, would have been unfair to any judge. And indeed, I don't think any judge would have decided the case without hearing Mr. Clancy.

In any event, I know Mr. McMullan feels aggrieved that Mr. Clancy broke what he calls the 'client-barrister relationship', but he was legally represented in the High Court and there was no objection taken by his legal representatives to Mr. Clancy giving evidence and no submissions were made whether it was correct of proper for …" (Mr. McMullen objected).

Mr. McMullen refers to the same transcript at Exhibit E and says that Mr. Hayden S.C. was not claiming privilege for the letter of 17th May, 1989.

The reference is, in fact, to Exhibit A of 17th December, 2003 where Mr. Hayden S.C. maintained that that document was always privileged and had not been given to Mr. McMullen by individuals who were entitled to privilege. Murray J. (as he then was) interjected: "It is now a moot point, the privilege": Mr. Hayden S.C. then said that he was not raising a privilege issue.

4. Letter dated 17th May, 1989
The letter from Giles J. Kennedy & Co. to Admiral Underwriting Agencies (Ireland) Limited in Ltd. was headed as follows:

> Insured – Kent Carty & Co.
>
> Insurers – Irish National per Admiral
>
> Claimant – Michael McMullan

The letter referred to the history of the first action and the settlement negotiated on behalf of the claimant by Mr. Clancy which was signed by him and by the managing director of Charleville Estate Company and by the plaintiff's solicitors, Kent Carty & Co. The plaintiff sought to have the case re-entered as he was not happy with the implementation of the settlement. On 11th February, 1987, the case was dismissed by Costello J. and was struck out with costs to the defendants.

The general comment on the last page of that letter referred to what was termed an unofficial without prejudice contact between Mr. Kennedy and Mr. Clancy, referred to in the transcripts of the Supreme Court hearing.

5. Settlement of first action
The consent referred to in the Order of the Court dated 12th July, 1985 was signed by the plaintiff in the presence of his solicitor, Pamela Madigan; on behalf of the defendant by Mr. Barry in the presence of Michael Byrne; by the plaintiff's solicitors, Kent Carty & Co., in the presence of Noel Clancy S.C., and by the defendant's solicitors, Michael Byrne, in the presence of G.R.G. Matthews.

It was provided that each party thereto should bear his or its own costs and that each party thereto should have liberty to reply.

6. Supreme Court decision
The judgment of the Supreme Court (O'Flaherty, Barrington, Lynch JJ.) was delivered on 27th January, 1998, by Lynch J. The judgment recited the history, the consent, the evidence of Mr. McMullen, as appellant, that Ms. Madigan had assured him that he could go back to court if the settlement did not work and the submissions of Mr. McMullen and of counsel for Kent Carty & Co.

The court, in its conclusions, commented on the law relating to the disclosure of confidential communications between lawyer and client. Lynch J. continued at p. 9 and 10 as follows:

> "When a client sues his solicitor for damages for alleged negligence arising out of the conduct of previous litigation against third parties and especially as in this case arising out of the settlement of such previous litigation the client thereby puts in issue all the communications as between the solicitor and the client and the barrister and the client and also between the barrister and the solicitor relevant to the settlement of the case and thereby impliedly waives the privilege of confidentiality.
>
> …
>
> It is in issue whether the client was advised [one way or another] and clearly the barrister if called by either party may and can be compelled to give evidence as to his advices to the client … and likewise as to his advices to the solicitor as that is relevant also to the issue as to whether the solicitor was or was not negligent.
>
> …
>
> It follows that the Appellants (sic) submission that counsel should not have given evidence in the High Court is misconceived and is not a valid ground of appeal."

At pp. 13 and 14 the judgment continued:

> "There was ample evidence before the learned trial judge to support the conclusion that, having relied on senior counsel's advices (the counsel whom the plaintiff insisted on briefing) there was no negligence on the part of the defendants in respect of the re-entry. The Supreme Court would not interfere with those findings and was satisfied that they were sound in principle and that there was no basis for upsetting them.
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> …
>
> Assume (sic) a finding of negligence, a plaintiff would have to prove loss or damage resulting from the failure to provide a clause allowing re-entry, the appellant would have to prove that he would probably have succeeded in the re-entered action and have obtained at least a significant proportion of the relief claimed in it so as to be entitled to an award of costs against the Charleville Estate."

Mr. Justice Lynch referred to searching the transcripts of evidence in detail but in vain, for evidence which might establish that the appellant would probably have won the action if it had been re-entered. The advice of all counsel for the applicant, including Mr. Clancy S.C. was that there were substantial difficulties in the way of the appellant succeeding in the action.

7. Decision
7.1 The Master's order had been complied with in the affidavit of discovery sworn by the defendant on 11th October, 2006. Mr. Kennedy claimed privilege in respect of the documents listed in the second part of the First Schedule, being documents from 162 to 491. The documents enumerated consist of correspondence between the insurer, (Admiral, the defendant's client) and the defendant (162 to 230). Documents 231 to 489 consist of correspondence between the insured, (Kent Carty & Co. and P. Madigan & Co.) and the defendant and between the defendant and counsel, cost accountants and internal memoranda/file notes.

The meeting between Mr. Kennedy and Mr. Clancy took place in April, 1989. The critical letter of 17th May, 1989, GJK & Co. to Admiral, is document No. 174. Documents 171 and 172 being copy letters/fax dated 24th April, 1989, from GJK & Co. to Admiral and from Admiral to GJK & Co. are immediately prior to that critical letter. All fall within the second part of the First Schedule and were averred to have been made and prepared on a confidential solicitor-client basis during the presentation and defence of the proceedings between Mr. McMullen and Kent Carty & Co.

On a *prima facie* basis each of these documents relate to the litigation initiated by the plaintiff against Kent Carty & Co., his former solicitors and that firm's insurers for whom Giles Kennedy & Co. were then acting, and, being the litigation file, are, accordingly, privileged.

7.2 The affidavit of Mr. McMullen refers to alleged differences between the evidence given by his former solicitors protesting that they had nothing to do with and had no knowledge of Mr. Kennedy's contact with Mr. Clancy S.C., notwithstanding what he submitted were 29 mutual contacts between Mr. Kennedy and Kent Carty & Co. referred to in the affidavit of discovery. He seeks access to the entire litigation file. It is necessary to examine the claim made in the present case, the law relating to privilege and whether the exceptions thereto permit access to and disclosure of all or part of that file.

7.3 The endorsement of claim as against the defendant is that he:

> "did use and employ undue influence, improper incentives and coercion to induce [his counsel] to collaborate and undertaken to give evidence without reference to privilege in the action entitled Michael Colin Geoffrey McMullen, plaintiff v. Hugh A. Carty & Ors. practising as Kent Carty & Co. … which conspiracy arranged by this defendant, Mr. Kennedy, was successful in defeating a well set out and just complaint …"

The plaintiff seeks a declaration:

> "That contrary to law, natural justice and the right of access to the courts the defendant acted improperly in putting to the plaintiff's counsel "incentives" to ensure by underhand, deceitful and coercive means that the said counsel, Mr. Clancy S.C., complied in the giving of privilege to testimony against his lay client, the plaintiff herein, (whether or not the said evidence is deemed to have been true)."

7.4 The plaintiff must satisfy the court that there are cogent reasons why the privilege which attaches to those documents should be varied in order that he, his agents or, indeed, the court, should be entitled to inspect them.

A solicitor's duty is to protect his client's interests. Solicitors as officers of the court also owe duties to the court which may, on occasions, conflict with instructions from the client.

The defendant, the respondent to this motion, acted for Admiral as indemnifiers of Kent Carty & Co., the defendants in the action taken by Mr. McMullen. Mr. McMullen was unsuccessful in his action against Kent Carty & Co. and his action against Mr. Clancy S.C. In doing so, he put in issue all the communications as between the solicitor and client and the barrister and client relevant to the settlement of the case and thereby impliedly waived the privilege of confidentiality. This was so held by the Supreme Court in its judgment of 25th January, 1998.

There is no such waiver applicable to the communications contained in the second part of the First Schedule.

Mr. McMullan seeks a remedy against the respondent who was, of course, not acting for Mr. McMullen. On the contrary, he was acting for the party sued by Mr. McMullen. As such, the respondent cannot be compelled to disclose communications, whether oral or written, passing directly or indirectly between themselves and their client for the purpose of giving or receiving legal professional advice if they are legitimate communications in the sense that they are not made in furtherance of fraud or crime.

The general principle is stated in Halsbury: 4th Edition; Vol. 44: Solicitors at para. 74:

> "The effect of the privilege is that neither the client, nor the solicitor without his consent, can be compelled to disclose the communications in the course of legal proceedings. The privilege is the client's, not the solicitor's, and accordingly the client may restrain the solicitor from making disclosure or may waive the privilege. Until the client has waived the privilege it is the solicitor's duty, if he is requested to make disclosure, to claim the privilege."

7.5 Mr. McMullen relies on *The People v. William H. Coleman* [1945] I.R. 237, where a document which the accused dropped to the floor during an interview with his wife, while he was in prison awaiting trial, and possession of which was taken by a warder, was given in evidence on cross-examination of the accused. The Court of Criminal Appeal held that, as on a fair reading of the document, it was an attempt to suborn witnesses and suggested the commission of a crime, it was not privileged from production, either as a communication between husband and wife, or as a communication between the accused and his solicitor. Further, it was clearly evidence of bad character, and the fact that it came into existence subsequently to the date of the offence charged did not affect its admissibility as such evidence.

O'Sullivan C.J. at p. 247 referred to the document and the contention that it was privileged as a document that had been written by the accused for the purpose of submission to his solicitor or as a communication between the accused and his wife. O'Sullivan J. held:

> "The learned judge having read it held that it was an attempt to procure subordination of witnesses, and this Court is satisfied that it cannot reasonably bear any other meaning. That being so, even if it had reached the solicitor, it would not be a privileged communication as it contemplated and suggested the commission of a crime: *R v. Cox and Railton* [14 Q.B.D. 153]."

It was clearly not a legitimate communication as it was made in the furtherance of a crime.

There is no suggestion in the present case that the seven-page memorandum of 17th May, 1989, was written in contemplation of either fraud or crime. What is alleged is undue influence not subordination which, if proved, would permit the court to interfere not on the ground of a wrongful act but on public policy grounds. In *Carroll v. Carroll* [1999] 4 I.R. 241 the Supreme Court upheld a High Court decision setting aside a conveyance of land where a presumption of undue influence arose. Barron J. referred to a solicitor's duty to exercise his skill and judgment: which was not fulfilled by following instructions without stopping to consider whether to do so was appropriate.

What is also mentioned in the statement of claim is "conspiracy arranged by this defendant" as a reference to "undue influence". What was claimed was that there was conspiracy to induce Mr. Clancy "to collaborate and undertake to give evidence without reference to privilege" and nothing more.

It is not clear whether criminal or tortious conspiracy is alleged. To collaborate and undertake to give evidence is not conspiracy to do a civil wrong nor, *a fortiori*, to commit a crime. The reference to an arrangement in the same circumstance could not amount to an actionable wrong.

The issue of conspiracy arose in both the Duncan and in the Quinlivan cases which the court should now consider.

7.6 The law relating to professional privilege was examined in the decision of Kelly J. in *Duncan v. The Governor of Portlaoise Prison* [1997] 1 I.R. 558 and that of *Quinlivan v. The Governor of Portlaoise Prison* [1997] I.E.H.C.16, both being applications for an inquiry pursuant to Article 40.4.2 of the Constitution. The issue related to legal professional privilege in respect of documents held by the Minister for Justice, Garda Síochána and the Director of Public Prosecutions which referred to the arrest or re-arrest of each of the applicants.

Kelly J. refused the relief sought in both cases.

He held that there was no rule in Irish law that an affidavit of discovery was to be considered as conclusive and incapable of ever being subject of cross-examination. The administration of justice, vested by the Constitution in the courts, required that the courts have the ability to adjudicate fully upon the adequacy of an affidavit of discovery. In exceptional circumstances, this might involve cross-examination of the deponent of such affidavit. To hold otherwise would mean the court would be prevented from investigating the accuracy or adequacy of an affidavit of discovery and would have to accept at face value whatever was averred therein.

However, the cross-examination on an affidavit of discovery was permissible only in extremely rare circumstances. Legal professional privilege was a fundamental condition upon which the administration of justice as a whole rested. The proposition that the court should direct the production of documents in respect of which legal professional privilege was claimed and, in effect, edit them so as to make the matter in them disclosable to the applicant was unprecedented and, apart from being impractical, would amount to serious interference with the whole notion and effect of legal professional privilege.

In the above cases, read in conjunction with one another, executive privilege was claimed and was a claim to legal professional privilege. It was inappropriate for the court to direct their production for the purpose of examination by it.

On the basis of the averments in the notice parties' affidavits counsel on behalf of the applicant in *Quinlivan* alleged a conspiracy on the part of the D.P.P., the Minister and the Attorney General, to deprive Mr. Quinlivan of his right to liberty on the basis that if the applicant were released at any time prior to 11 a.m. the following morning, that he should be arrested and brought back to the special Criminal Court to be charged with the offence with which he had been previously charged. In relation to that allegation the court decided as follows:

> "This was the only evidence to which I was referred as being supportive of the allegation of conspiracy. In the course of their replies both Mr. Ryan acting on behalf of the Attorney General and the Minister and Mr. McGuinness acting on behalf of the Director protested at the making of this allegation of conspiracy. They pointed out that no evidence to support it was contained in any of the grounding Affidavits sworn on behalf of the Applicant. They furthermore pointed out that there was no evidence whatsoever of such a conspiracy contained in the material to which I was referred by [counsel for the applicant]. The description given by Mr. Ryan of [counsel's] allegation as being one of extravagant speculation is, in my view, apposite.
>
> Counsel for the notice parties further described the making of this allegation as being unfounded and irresponsible. In the absence of any evidence to support it, this allegation of conspiracy should not have been made.
>
> It follows that as there is no evidence of any unlawful conspiracy, the legal submissions concerning the vitiation of legal professional privilege find no basis in fact and this contention is rejected."

7.7 While it is not the purpose of the motion before this Court to adjudicate on the merits of that claim it is noted that the claim, in part, alleges that the defendants acted improperly, in putting incentives to counsel to give privileged testimony against the plaintiff. This, of course, had been the subject of the action against Mr. Clancy S.C. [1995] 8142 P.

The plaintiff is basing his case on a document of 17th May, 1989, in respect of which professional privilege is claimed in order to require production of all privilege communications.

No basis for fraud or illegality has been established.

No evidential basis for a claim for conspiracy or arrangement has been established. Mr. Mullen, in para. (f) of his grounding affidavit, sworn 9th March, 2007, was aware of to the Supreme Court decision that there was no cogent evidence that there had been any arrangement for Mr. Clancy to give evidence. Indeed, McGuinness J. in her judgment in *McMullen v. Clancy* [1995] 8142 P had found no cogent evidence that there had been any arrangement for Mr. Clancy to give evidence against his former client.

7.8 A final ground for exception against legal professional privilege is where the communication is injurious to the interests of justice where the balance of public interest and disclosure clearly outweighs that of the maintenance of privilege.

In the case of an abuse of process of the court in falsely and maliciously bringing an action, Finlay C.J. in *Murphy v. Kirwan* [1993] 3 I.R. 501 at 511 held:

> "… the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct or moral turpitude or of dishonest conduct, even though it may not be fraud."

In *Bula Ltd. v. Crowley (No. 2)* [1994] 2 I.R. 54 the Supreme Court rejected the plaintiff's application for discovery of the defendant receiver's documents containing legal advice which the receiver obtained in the carrying out of his duties. Finlay C.J. held that the exemption in *Murphy v. Kirwan* did not extend to allegations of tortious conduct. The exemption was restricted to conduct which contained an element of fraud, dishonesty or moral turpitude and did not extend to allegations of tortious conduct.

The Chief Justice, with whom Egan J. and Denham J. agreed, held, at p. 59, as follows:

> "The contention made in this case that such an exception should be extended to any case where it was proved that the nature of the legal advice obtained by a party was clearly relevant to an issue as to the commission of a tort would be inconsistent with the principles which I have set out. It would be a massive undermining, in my view, of the important confidence in relation to communications between lawyers and their clients which is a fundamental part of our system of justice and is considered in all the authorities to be a major contributor to the proper administration of justice.
>
> With regard to the alternative suggestion that the court should look at the documents and if, as it were, it finds them highly relevant to the issue which appears to arise in the action, should, as a matter of discretion, order their production, this again seems to me to be unsound in principle. It shares with the contention for the extension of the exemption from charges of moral turpitude to cases where the existence and nature of legal advice is particularly relevant, what in my view is a fundamental error. Two conditions would exist before any question of a lifting of or exemption from this legal professional privilege could arise. The first is that the legal advice and the communications are probably relevant to one of the issues concerned, and the second is that the situation arising in the case comes within one of the special exemptions

> which have been identified so as to destroy the privilege. To contend, as is contended in this aspect of the case, as well as on the first general principle, that the more relevant or important the legal advice may be, the greater is the discretion of the court to lift the privilege, is to confuse two separate preconditions to the removal of the privilege.
>
> In the circumstances I am satisfied that the contention that there is applicable to this case an exemption from the privilege for legal communications which, it is admitted, is a brand new contention not identified in any decisions in this country, is not sound and that, accordingly, Murphy J. (the trial judge) was correct in his conclusion to that effect, and the appeal should be dismissed."

It is clear from this decision that the exception will only be applied where the conduct complained of is injurious to the interests of justice and this will be the case only if it involves some degree of moral turpitude.

Sufficient moral turpitude may well exist where legal advice is sought with the intention of defeating the legal rights and entitlements of a person as was alluded to by O'Sullivan J. in *Crawford v. Treacy* [1999] 2 I.R. 171 at 177, where it was suggested that if the purpose of the documents was to enable the deceased, in that case, to defeat the legal entitlement of the defendant there would be a sufficiency of inequity to qualify under the exception and then he would direct production of the documents. However, having considered the documents which were privileged under the ordinary rules, he concluded that there was no intent or purpose of seeking advice to set aside the legal entitlement of the first defendant.

Professional legal privilege is, of course, not confined to advising what the law is. It must, in the words of Taylor L.J. in *Balabel v. Air India* [1988] Ch. 317 at 330 D-331A "include advice as to what should prudently and sensibly be done in the relevant legal context". The same must apply to the continuum of communications in relation to privileged advice.

Finally, the court should consider the effect of waiver of privilege which, of course, is not an exception to the rule. The court has already observed that there was an implied waiver by Mr. McMullen once he had sued his solicitor and counsel in relation to the communications between them. (See *Lillicrap v. Nalder & So*n [1993] 1 W.E.R. 94 at 98B.

In this regard, the court notes that document No. 174: 17/05/89, GJK & Co. to Admiral, has already been the subject of comment in the Supreme Court (see transcript of 17/12/03 at pp. 94-95, exhibited in the applicant's affidavit. Having asserted that the letter was a document that was always privileged and, though given to the applicant, was not given by those who were entitled to the privilege. Murray J., as he then was, said that it was a moot point to which counsel replied:

> "MR. HAYDEN: Exactly. What's moot for one is moot for the other; I take your Lordship's point. I am not raising the privilege issue. It is because of the way things unfolded …
>
> MR. JUSTICE FENNELLY: It doesn't matter. He has that now and it is evidence, so far as it goes, of activity by Mr. Kennedy that may or may not be relevant.
>
> MR. HAYDEN: No, no, I accept that. I am not raising the privilege point. But whatever course …"

It seems to follow that this document should, accordingly, be disclosed.

In relation to the continuum of communications and, having regard to the claim in respect of undue influence in *Carroll v. Carroll* [1999] 4 I.R. 241, it seems appropriate that the court should examine and determine whether the applicant's allegations in relation thereto are viable and plausible in order to determine whether the following documents come within the scope of the exception.

These are the three documents immediately prior to document No. 174 as follows:

> 171 Copy letter/Fax 24/04/89 GJK and Co. to Admiral
>
> 172 Fax 24/04/89 Admiral to GJK and Co.
>
> 173 Letter 04/05/89 Admiral to GJK and Co.

The court refuses the application in respect of the remaining documents in the second part of the First Schedule.