Neutral Citation [2016] IEHC 727

THE HIGH COURT

[2012 No. 6736P]

[2013 No. 7517P]

RYANAIR LIMITED

PLAINTIFF

– AND –

THE REVENUE COMMISSIONERS, IRELAND,

THE ATTORNEY GENERAL AND MINISTER FOR FINANCE

DEFENDANTS

AER LINGUS LTD

PLAINTIFF

– AND –

MINISTER FOR FINANCE, THE REVENUE COMMISSIONERS,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 15th December, 2016.

I. Overview

1. These proceedings arise ultimately from the establishment of an airport travel tax pursuant to s.55(2)(b) of the Finance (No. 2) Act, 2008. 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. 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.

2. Arising from the foregoing, a number of broad issues are currently at play between the parties. From the perspective of the State parties, they are faced with a situation in which the European Commission at one point determined that Ireland did provide a State aid via the differentiated rates and directed Ireland to recover the difference between the high rate and the low rate from the various airlines. (This last task has seen proceedings commenced by the State against the airlines). So far as the airlines are concerned, their claims focus on allegations that: the tax was an attack on free travel and the freedom of the airlines to carry on their business; the tax was an illegal State aid; the €8 difference between the two tax rates should be refunded to the airlines by Ireland; and the Commission's direction to Ireland to collect the difference was invalid.

3. At the European level, as of the date of hearing of the within application, the Court of Instance had decided that the European Commission erred in finding that the two airlines had benefitted to the entire extent of the difference between the two taxes. On appeal, however, the Advocate General had issued an opinion which was more favourable to Ireland's point of view, with a final judgment from the Court of Justice still awaited.

4. The court has deliberately kept its analysis of the factual matrix of the within application at 'headline level'. For the purpose of the within application, what is of central importance is that the within proceedings do not simply involve two airlines suing Ireland. Quite the contrary. What presents is what counsel for the State referred to as, and what the court accepts is, "*a triangulated situation*" in which Ireland is effectively fighting on two fronts. Thus it is fighting, on the one front, a challenge to the validity of the travel tax; meanwhile, on a separate front, it has been directed to recover the €8 difference between the two tax rates from the airlines and has instituted proceedings in which it seeks to do so. (Those proceedings are stayed pending the outcome of the European-level proceedings). Thus it cannot be said, or at least said properly, that the engagement between the State parties and the European Commission concerns some subject-matter separate to the above-mentioned engagements with the two airlines. The issues arising are related, and there is a triangulated relationship between the various parties, between Ireland and the airlines, and between Ireland and the Commission.

5. One further point that might neatly be juxtaposed with the foregoing is that 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. (See Case T-105/95 *World Wide Fund for Nature v. Commission* [1997] ECR II-313, para.63, Case T-309/97 *Bavarian Lager v. Commission* [1999] ECR II-3217, para. 46, Case T-191/99 *Petrie v. Commission* [2001] ECR II-3677, para. 68, and Case T-36/04 *Association de la presse internationale* ASBL (API) *v. Commission* [2007] ECR II-3201, paras. 120-1). The same applies when the European Commission is investigating possible State aid. (See Case C-139/07 P *Commission v. Technische Glaswerke Ilmeneau* [2010] ECR 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.

II. Reliefs Sought

6. Aer Lingus' application commenced by notice of motion of 1st March, 2016. That motion seeks, *inter alia*, (1) an order striking out the defendants' defence for want of compliance with their discovery obligations, (2) an order for further and better discovery, (3) certain orders concerning inspection of documentation, and (4) an order requiring the defendants to comply in substance and form with a previous order for discovery that has issued.

7. Ryanair's application commenced by notice of motion of 2nd March, 2016. That motion seeks, *inter alia*, (1) certain orders for further and better discovery, (2) an order for discovery and/or inspection in respect of the documents over which public interest

immunity and/or Commission privilege has been claimed, (3) an order compelling the State parties to deliver a supplemental affidavit detailing the full and precise basis for each of the claims to litigation privilege and/or legal advice privilege claimed, and (4) an order for a supplemental affidavit of discovery in the prescribed form, containing full and proper descriptions of each of the documents listed in the State parties' discovery schedule.

8. What appears to have prompted the airlines to bring their respective motions was, *inter alia*: (1) delay that has presented as regards the production by the State parties of their affidavit of discovery; (2) a claim of litigation privilege made by the State parties, in particular a claim of litigation privilege made in respect of certain interactions with the European Commission, allied in certain instances with a public interest immunity claim (so-called 'Commission privilege'); (3) the fact that a number of documents were the subject of a claim of Commission privilege (the European Commission later indicated that it was happy for these documents to be released, subject to minor redactions, so this particular issue is no longer live, though the more general issue of Commission privilege remains live); and (4) a concern, a lesser concern but still a concern, as to the form of the affidavit of discovery sworn for the State defendants, in particular as regards overly general claims of privilege and some inconvenience arising for the plaintiffs from the fact that there are some 45 schedules to the said affidavit of discovery, yielding associated difficulties of document management. It appeared at hearing that this last difficulty may not be as pressing a concern as it may previously have been.

9. For a variety of reasons there were some delays before the within applications came on for hearing. These delays in fact proved fruitful, yielding an eventual narrowing down of the issues arising between the parties, with the result that the net dispute which came before the court was one of litigation privilege. The issue is this. The airlines object to the State parties' claim of litigation privilege in respect of their communications with the European Commission. They observe that if and insofar as a party communicates with its adversary in the context of apprehended litigation that is not the type of communication to which litigation privilege properly applies. And why not? Because, the airlines maintain, the fundamental element or principle which underpins litigation privilege is the idea that it enables someone to prepare for proceedings in what has been characterised in some of the relevant case-law as a 'zone of privacy' from one's adversary. Engagement with one's adversary, the airlines contend, does not engender or require such a 'zone of privacy'.

10. Most but not all of the documents in respect of which the State has claimed litigation privilege are also documents in respect of which Commission privilege has been claimed. By the date of hearing, a pragmatic approach had been agreed between the parties. As mentioned, the European Commission has previously been satisfied for documentation in respect of which Commission privilege was previously claimed to be released, so long as certain minor redactions were made. It is hoped by all of the parties that the European Commission may yet take a like approach in respect of the balance of documents in respect of which Commission privilege is contended to arise. So, for now at least, pending further interaction between the State parties and the Commission, it is only the issue of litigation privilege with which this Court needs to be concerned. Any issue as to Commission privilege will, hopefully, be resolved without the need for further adjudication by the court…though the airlines have reserved the right to return to the court if the planned engagement with the European Commission yields a less than satisfactory result from the airlines' perspectives.

III. Once Privileged, Always Privileged?

11. What is the proper extent of the litigation privilege that Ireland may claim in the context of the discovery sought, having regard to the particular circumstances of the case presenting, including most especially (i) the legal duty to which Ireland is subject when dealing with the European Commission in the context of a State aid investigation, and (ii) the triangulated relationship that arises here between Ireland and the airlines and Ireland and the European Commission? The court turns now to an analysis of the most relevant case-law.

a. *UCC v. ESB*

[2014] IEHC 135

12. This was a case in which damages were sought following 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. It was held by Finlay Geoghegan J., in granting inspection of the documents, that litigation privilege did not attach to the documents created since the 2009 flood. In relation to the three documents created prior to the floods, in her view only one report (that of 1990) *prima facie* attracted litigation privilege. The central issue for determination thereafter was whether this litigation privilege endured.

13. No little emphasis was placed by the airlines, at the hearing of the within applications, on the judgment of Finlay Geoghegan J. in *UCC*. But, having re-read the judgment, the court is inclined to ask 'to what purpose has this emphasis been placed?' As the court reads the judgment of Finlay Geoghegan J., when it comes to the proposition 'once privileged, always privileged', a proposition of focus in the within application, Finlay Geoghegan J. merely concludes that this proposition does not apply to litigation privilege which arose in an historic context. So, to borrow from the judgment of Finlay Geoghegan J., at para. 46, she concludes as follows: "[A]*s the objective purpose* [of litigation privilege] *is 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…closely related litigation".*

14. Turning more fully to the text of the judgment of Finlay Geoghegan J., at para. 36 she looks to the Northern Irish case of *Porter v. Scott* [1979] N.I. 6, observing as follows:

> *"36. There was consideration of the policy underlying litigation privilege in the High Court of Northern Ireland in* Porter v. Scott *[1979] N.I. 6, by Kelly J. The defendant in that action for damages for personal injuries sustained in a car accident sought the medical report of the plaintiff which had been obtained in prior criminal injury proceedings which had been settled. Kelly J., having referred to the above obiter dicta in* Kerry County Council*, then stated:*
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> > *'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."

15. In the context of the within application, the court notes the rider "*unless their subject-matter is the same*". This, it seems to the court, is of considerable significance in the factual matrix outlined at the outset of the judgment and also the triangulated relationship arising between the parties.

16. Finlay Geoghegan J. continues with some further text from the above-quoted judgment of Kelly J. in *Porter*, before moving on with her analysis:

> "[Kelly J. *(cont'd)] 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.'*
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> 37. *As appears, this judgment is consistent with the approach of the Supreme Court of Canada in* Blank.
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> 38. *The contrary view that litigation privilege does last forever in this jurisdiction, as stated in the High Court judgments in* Bord na Mona *and* Quinlivan, *is based upon the judgment of the English Court of Appeal in* The Aegis Blaze *[1986] 1 Lloyd's Rep. 203. In that case, a surveyor's report which had been obtained in contemplation of a claim in connection with an incident during a voyage in December 1980, in which cargo on the* Aegis Blaze *was damaged, was sought to be disclosed in subsequent proceedings relating to a claim for damaged cargo in a voyage in 1981. In the High Court, the judge had followed the views expressed in* Kerry County Council *and refused to allow the claim for privilege, holding that the correct principle was as stated in* Kerry County Council *that 'a document does not retain its privilege in subsequent proceedings concerning different parties and subject matters'. Parker L.J., who delivered the lead judgment in the Court of Appeal, conducted a detailed analysis of the judgments, both at first instance and on appeal in* Kerry County Council *and their consistency with a number of earlier English decisions and then stated:*
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> > *'Those cases* - Calcraft v. Guest, Bullock v. Corry *and* Pearce v. Foster - *appear to me to establish clearly that although the privilege which prevailed in the first action may only be claimed in a subsequent action by the person originally entitled to it or his successor, there is no other requirement such as is advanced here by the respondents.*
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> > *The matter in the end appears to me to stand thus. Unless the party claiming the privilege or his successor is a party to the subsequent action, no question of a clam to privilege will arise. That is established by* Schneider v. Leigh. *If, however, the party claiming privilege in the second action is the person entitled to privilege in the first action, but there is no connection of subject matter whatever, it is most improbable that the question will arise, for in such circumstances the document will not be relevant and will not therefore be disclosable, and there will therefore be no question of production. If, however, there is a sufficient connection for the document to be relevant, then it is, in my view, right that the party entitled to the privilege should be able to assert it in the second action. I accept, of course, that that may mean that the court trying the second action is deprived of full information, but so would the court have been in the first action, and so also may it be in any case where privilege is asserted.*
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> > *The rule has been stated time and time again over a very long period, and in my view it would not be right to depart from it now even if we are not bound by authority, and even if we desired to change it. For my part I do not desire to change it. I think it is a correct rule, subject to the qualification of course that the privilege may be waived; and if we were to accept the submissions made on behalf of the respondents, it appears to me that there would arise again and again questions of discovery which would involve the court trying to weigh up, in the case of an individual case and an individual document, whether the public interest that parties may resort to their solicitors and their solicitors may obtain information to enable them to advise on litigation and prepare for cases, which is the basis of the privilege here relied on. Such matters should not be open for dispute in interlocutory applications, and I can see no reason whatever in this case to depart from the general rule.*
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> > *In my judgment, the learned judge read too much into* Kerry County Council v. Liverpool Salvage Association*, and his judgment must be set aside and the respondents' application for production be dismissed.'*
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> *39. In the second judgment delivered in* The Aegis Blaze, *Croom-Johnson L.J. took the view that the Court of Appeal was bound by the earlier decision of* Calcraft v. Guest *and that the* Kerry County Council *case was not authority contrary to that judgment.*
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> *40. Respectfully, it appears to me that the analysis of Parker L.J. does not distinguish between the policy underlying litigation privilege as distinct from legal advice privilege, as those terms are now understood. Nevertheless, it appears that it remains the position in England and Wales that litigation privilege automatically lasts forever, notwithstanding that there appear to have been some subsequent observations suggesting that the matter might be revisited, see Malek (ed.),* Phipson on Evidence, 17th ed., (London, 2010) at pp. 655 to 656, paras. 23-29 and 23-30.
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> *41. Similarly, it appears to me that neither in the decision in* Bord na Mona *nor in…* Quinlivan *did the High Court judge consider the objective of or policy underlying litigation privilege. The decision in* Bord na Mona *[1990] 1 I.R. 85 presents a number of difficulties. Costello J. appears from the judgment to have been considering an application to disclose documents which were communications between the plaintiff both in the current and earlier proceedings and a defendant in earlier proceedings which were on a 'without prejudice' basis, which gives rise to a different form of privilege i.e. against being referred to in evidence or before the Court. Hence, the documents in question were not, in*

the earlier proceedings, subject to litigation privilege which is at issue in these proceedings. Nevertheless, Costello J. did cite with approval from the judgment of Parker L.J. in the Aegis Blaze *which relates to litigation privilege. The principle, as stated by Parker L.J. set out above was simply cited by Costello J. with approval at pp. 88 to 89 and applied.*

42. *In the subsequent decision of Barron J. in* Quinlivan *(Unreported, High Court, Barron J., 29th July, 1992), the application did relate to the disclosure of a document in respect of which litigation privilege existed in the first set of proceedings. The document was a medical report obtained by the plaintiff in relation to injuries for the purpose of an earlier action. Barron J. referred to the approval by Costello J. of the decision in* The Aegis Blaze *and identified that 'the question was whether the earlier report was discoverable in the latter proceedings' and stated that 'it was held in that case that once a document was privileged it remained privileged'."*

17. Finlay Geoghegan J. then moves on to consider certain other aspects of previous case-law and existing commentary, before stating as follows, at para. 46, as already touched upon above:

"46. Applying the principles set out above to litigation privilege, it appears to me that the objective of litigation privilege, which is 'in the public interest in the proper conduct of the administration of justice', is the creation of what has been referred to as a 'zone of privacy' in the interests of the efficacy of the adversarial system to permit a party in litigation to prepare its position without adversarial interference and without fear of premature disclosure."

18. In the within application, Ireland places some reliance, and properly so, on the just-quoted text. 'Properly so' because, as can be seen from the court's outline of facts elsewhere above, Ireland, in its dealings with the European Commission, has clearly been operating in a 'zone of privacy'. It was a distinctive 'zone of privacy' because: (i) within that zone were two parties whose interests were not, at least in the particular circumstances presenting, necessarily and/or naturally aligned in the manner that one would typically expect to see in a 'zone of privacy'; and (ii) despite the 'not quite allied-not quite adversarial' nature of the relationship between the two parties within the 'zone of privacy', one of those parties – Ireland – was compelled by law to approach its dealings with the other party in a particular way. In the typical 'zone of privacy' situation, a 'protective hemisphere' encloses that zone from unwarranted intrusion because, to borrow from the above-quoted text, it is "*in the interests of the efficacy of the adversarial system to permit a party in litigation to prepare its position without adversarial interference and without fear of premature disclosure.*" In a situation where (i) a party within a zone of privacy is required by law, and ultimately by the public interest, to treat frankly with another party with whom its interests are not necessarily and/or naturally aligned, at least in the particular circumstances presenting, (ii) the party subject to that legal obligation finds itself both suing and being sued in closely related litigation that all springs ultimately from the same source, being here the imposition of the travel tax, and (iii) there is a triangulated relationship of the type that arises here, then it seems to the court to be a logical extension of the just-quoted rationale, if it be extension at all (as opposed to the application of existing principle in a particular and particularly complicated triangulated relationship) that a like 'protective hemisphere' should descend over the interactions between Ireland and the European Commission. The only difference the court sees to present as regards this last 'protective hemisphere', and that which generally presents, is that it protects Ireland *both* in its dealings with (i) the European Commission, as regards the State aid investigation arising from the imposition of the air travel tax and (ii) each of the airlines, in the context of litigation arising from the imposition of the air travel tax. But that difference it seems to the court is both attributable to, and a facet of, the triangulated relationship to which the court has previously referred and the peculiar duties that arise for Ireland in the context of its relations with one of the parties to that triangulated relationship, *i.e.* the European Commission.

19. Finlay Geoghegan J. continues as follows, at para. 46:

"In current litigation procedures, there may come a time in advance of the actual trial where disclosure is required. In other instances, disclosure may not occur in the course of the litigation e.g. if the action settles prior to trial. However, as the objective purpose is 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 [v. Canada 2006 SCC 39, [2006] S.C.C. 39], *closely related litigation*."

20. 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. 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).

b. *Bord na Móna v. Sisk*

[1990] 1 I.R. 85

21. In this case, John Sisk and Son Ltd. brought a motion seeking further and better discovery of all documentation in the possession of Bord na Móna related to an alleged compromise of certain proceedings between the latter and Mercury Engineering, the second-named defendants. Bord na *Móna* resisted the application on the ground that the documents were privileged. In the High Court, Costello J. refused the application. In her judgment in *UCC*, Finlay Geoghegan J. said nothing to upset the following finding of Costello J., at 88:

"I think that it is clear that the discussions which were held between the parties were held on a 'without prejudice' basis and that even though only one of the letters is so headed that the correspondence between the parties took place on the same basis. It seems to me therefore that the plaintiff is entitled to claim that they are all privileged communications….These documents are, I think, relevant to the issue in these present proceedings as to the plaintiff's claim for extension of time. The question for determination therefore is whether the privilege attached to the documents in the earlier action can be claimed in this one."

22. Continuing in a similar thread, all that Finlay Geoghegan J. held in *UCC*, in effect, was that a document which was 20 or 30 years old and related to different circumstances did not carry with it the eternal status of being privileged. That is a world apart from what presents here. Perhaps reinforcing the pertinence of Costello J.'s observations, in the context of the within application, is the fact that what transpired between Ireland and the European Commission in the context of the within proceedings was a form of 'without prejudice' conversation in which the law, rather than mercenary self-interest, required a level of open-handed dealing not so very far removed from the type of discussions that occur in the 'without prejudice' context when a party to some extent reveals her cards to

another in an attempt to secure a compromise that enables all parties to leave the table with some semblance of satisfaction.

c. *Quinlivan v. Tuohy*

(Unreported, High Court, Barron J., 29th July, 1992)

23. Ms Quinlivan claimed damages from the defendants for alleged personal injuries arising from a car accident. She had, prior to the incident in respect of which she made claim, been involved in a previous accident in which she had suffered similar injuries. Messrs Tuohy and Curtin, the defendants, sought discovery of documents and, in the course of that discovery, Ms Quinlivan discovered two medical reports from her surgeon. Privilege was claimed in respect of the reports. Directing further and better discovery of such undiscovered documents as were relevant and had been discovered, Barron J. observed as follows, at pages 1-2 of his judgment:

> *"It is clear from the fact that the reports have been discovered that they are regarded as being relevant to the issues in the current proceedings. Clearly that is so because the condition of the Plaintiff an the date of her present accident must be material to the damages to which she may be entitled. The question however is whether or not these reports which were, it has been accepted, furnished to the Plaintiff's solicitors for the purpose of prosecuting her first claim and therefore privileged in that action remain privileged for all time.*
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> *Counsel for the plaintiff has referred me to* Smurfit Paribas v. AAB Export Finance *[1990] I.L.R.M. 588. He relies upon the following passage from the judgment of Chief Justice at page 594:-*
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> *'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 and the proper conduct of the administration of justice can be said to outweigh the disadvantages arising from the restriction of disclosure of all the facts.'*
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> *In that case, the question was whether documents coming into being for the purpose of obtaining legal assistance rather than legal advice should come within the scope of legal professional privilege."*

24. The last-quoted sentence, the court notes, puts beyond any doubt that Barron J. was alive to, and one would expect no less of so distinguished a judge, the distinction between legal assistance and legal advice.

25. Barron J. continued, at 2:

> *"No issue arose as to whether or not legal professional privilege might extend beyond the particular proceedings in respect of which the advice was sought. In my view, the passage does not assist the defendant. If I were to apply it to the facts of the present case in the absence of authority, I would regard the public interest as requiring the legal professional privilege to be maintained in these proceedings also. However, there is authority."*

26. So what Barron J. was saying in effect was that in the absence of authority, he would have deemed the documents to be privileged on the basis that, notwithstanding that they did not amount to legal advice, they arose in a previous case. And he clearly indicated that he would regard the public interest to require legal professional privilege to be maintained in the proceedings before him also. Any suggestion, therefore, that Barron J. delivered his judgment at a time when there was no live distinction between legal advice and legal assistance is just wrong. It is obvious from the above-quoted text that Barron J. was entirely conscious of the distinction and that in the absence of authority he would have held the documents before him to be privileged.

27. When one has proper regard to the judgment in *Quinlivan*, it becomes apparent that the judgment has not in some sense been overruled by Finlay Geoghegan J. in *UCC*. All Finlay Geoghegan J. said was that eternal privilege does not attach to legal assistance-type documents. In the within case, of course, it would be folly to speak of the eternal nature of any privilege arising. Here the State aid issue remains a live issue, here Ireland's alleged liability to reimburse the airlines or their obligation to make some kind of recompense to the State in respect of State aid is still alive. And even in relation to the freedom of movement matter, where the investigation has closed, it need not be closed forever, it is something which could easily re-emerge. This within application is not, therefore, concerned with dead issues located in a long-distant and scarce-remembered past. It is a case in which Ireland is battling away on a triangulated, three-fronted basis. It is in that context, where the crash of ongoing battle between the parties still resounds and the potential for now-dormant battle to be re-commenced still presents, that it is claimed there are particular documents which continue to attract litigation privilege.

d. *Irish Haemophilia Society Ltd. v. Judge Lindsay and Blood Transfusion Service Board*

[2001] IEHC 240

28. Among the complaints made in the within proceedings, are that the claims of privilege made by Ireland are overly broad. It seems to the court that the answer to this issue lies in the decision in *Irish Haemophilia Society*. That was a case arising from the Tribunal of Inquiry into the Blood Transfusion Service Board that was conducted by Judge Alison Lindsay. The tribunal inquired into the infection of haemophiliacs with HIV and Hepatitis C from contaminated blood products supplied by the Blood Transfusion Board. The judgment of Kelly J. to which the court now refers arose from an application by the Haemophilia Society for leave to seek judicial review of a ruling made by Judge Lindsay upholding a claim of legal professional privilege made by the Blood Transfusion Service Board in respect of certain documents. The documents had been set forth in an affidavit sworn by a doctor giving evidence at the Tribunal. The Tribunal declined to inspect the documents and refused to allow the Society to cross-examine the doctor in question. Kelly J. held that the Haemophilia Society had failed to meet the standard required for leave to be granted. In dismissing the application, he observed as follows,

> *"…[S]pecifically in regard to the specific documents mentioned…I am satisfied that these are documents over which legal professional privilege exists. I am satisfied that they are not entitled to know the contents. I think there would be very little point in giving the protection of legal professional privilege if one had to state the nature of the advice one was seeking or giving, and that, in my view, would defeat the very purpose for which the legal right was given in the first instance."*

29. Kelly J. later went on to consider the judgment in *Bula Ltd.(In Receivership) v. Crowley* [1991] 1 I.R. 220. (That was a case in which Bula had sued the various defendants in relation to certain lending transactions. The defendants made discovery. The first and fifth defendants claimed legal professional privilege in respect of classes of documents. The first defendant did not list certain

communications between himself and the fifth defendants, believing they were not relevant to the issues in the action. The second defendant originally discovered documents which it subsequently deleted from its affidavit of discovery by a second affidavit, claiming the documents were not relevant and had been included in error. The plaintiffs brought motions seeking further and better discovery. In the High Court, Murphy J. refused to make any order for further and better discovery. The plaintiffs successfully appealed this decision). In *Irish Haemophilia Society*, Kelly J. observed as follows:

> *"The Supreme Court has in recent times twice addressed how the claim to privilege should be made. In* Bula Ltd. v Tara Mines Ltd. *(No. 4) [1991] 1 I.R. 217 Walsh J. said at p. 218 of the report:*
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> > *'The format suggested by the plaintiffs in his claim herein appears to me to be in effect what the Rules of Court require. Unless documents are identified and properly indicated no particular claim of privilege should be made about anything. One must know what the claim of privilege is. The Court directs that. 0.31, r. 13 of the Rules of Court should be followed in the format envisaged by the rules and set out in Appendix e, form 10. So far as lam concerned the format indicated or sought in the motion today by the plaintiff is in effect what the Rules require. Therefore, the schedule of documents should follow that format'.*
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> *In* Bula Ltd. v Crowley *[1990] I.L.R.M. 756 Finlay C.J. having quoted the above passage from the judgment of Walsh J. said at p. 758 of the report:*
>
> > *'A consideration of the motion in that case and the appeal from the order of the High Court clearly indicate that what was required by this judgment and what the plaintiff was seeking in that case was an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the affidavit the general nature of the document concerned in each individual case together with the broad heading of privilege being claimed for it. Such a requirement, irrespective of what may have been a habitual form of affidavit of discovery in the past, seems necessary to comply with the principles laid down by this court in the recent case of* Smurfit Paribas Bank Limited v AAB Export Finance Ltd. *[1990] ILRM 58 '.*
>
> *As is clear, that was the precise judgment relied on by the respondent in its ruling directing the filing of the supplemental affidavit in this case. I have carefully considered that affidavit and it appears to me to comply precisely with the directions of the Supreme Court.*
>
> *I cannot see that the applicant has demonstrated an arguable case to the effect that the respondent was wrong in so concluding. There is in my view no necessity to describe the documents in greater detail than has been done here. To do so would run the risk of diluting or perhaps even destroying the privilege which is being asserted. I therefore refuse leave on this ground."*

30. The foregoing seems to the court to involve an important point. If one says that one is claiming privilege for a letter or an e-mail to the Commission on a particular day, one does not have to go further and indicate anything that hints at the content of that letter. It suffices that the letter is described in a way that the documents can be identified and that, in general, as Finlay C.J. noted, the nature of the privilege being claimed is asserted. To go further, to ask that documents should be the subject of individual justification is to go down a road which the courts have not previously travailed, for the reason that Kelly J. identified in *Irish Haemophilia Society*, *viz.* that sometimes to describe in detail a document in respect of which privilege is claimed, or the basis on which privilege is claimed, would be, in effect, to withdraw the veil of privilege, because it would hint to the reader what precise point was being discussed between the parties who were party to the communication or what kind of information was likely to be in it.

IV. Delay and Formatting

31. During the past year, there has been some sparring between the parties regarding the issue of delay and the format of the affidavit of discovery. None of this sparring appears, with respect to all, to be of any relevance to the within application given that discovery has now been made and the issue outstanding is the issue as to litigation privilege. Likewise, when it comes to complaints as to the format in which the affidavit of discovery was delivered, the formatting may be somewhat inconvenient (and arises from the fact that discovery had to be made across a number of Government departments). However, such inconvenience as arises does not, it seems to the court, go to the validity of the discovery in the within proceedings (matters would be different the closer one came to the point where the inconvenience was of such a scale as to render the process of discovery unworkable or the material discovered incomprehensible), and there was, in any event, suggestion at hearing that the inconvenience arising may not be as great as was originally anticipated. All that said, to the extent that there is or has been difficulty presenting in this regard, this is an aspect of matters that may yet impact on any costs order to be made, a point effectively conceded by counsel for the State parties in the course of argument at the within application.

V. Conclusion

32. For the reasons identified above, the court respectfully declines to grant any of the orders sought, respectively, by each of Aer Lingus and Ryanair.