

Between:

ANNE KURTZ

Plaintiff

– and –

DUNNES STORES

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 14th January, 2018.

1. Ms Kurtz is suing Dunnes Stores over a 'trip and fall' incident that allegedly occurred at Dunnes' premises in Blanchardstown Shopping Centre on 29.12.2010. Dunnes (i) has made discovery of an accident report form dated 29.12.2010 (the '*Discovered Form*'); (ii) refuses to make discovery of (a) a Dunnes internal investigation form dated 08.03.2014 (the '*Refused Form*'), and (b) certain witness statements of 29.12.2010 (the '*Refused Statements*'), (items (a) and (b) being the '*Refused Documents*'), claiming that the Refused Documents came into existence in contemplation of litigation and are clothed by litigation privilege. Ms Kurtz seeks an order compelling discovery of the Refused Statements.

2. In *Artisan Glass Studio Ltd v. The Liffey Trust Ltd* [2018] IEHC 278, para.3, McDonald J. does not demur from the proposition that case-law points to four matters of relevance when it comes to assessing whether litigation privilege arises over particular documents: "*(a) whether litigation was reasonably apprehended at the time the documents in question were brought into being; (b) whether the documents in question were brought into being for the purpose of that litigation; (c) if the documents were created for more than one purpose, the documents will be protected by litigation privilege in the event that the litigation was the dominant purpose; (d) the party claiming privilege has the onus of proving that the documents are protected by privilege.*"

3. The court in determining any application must proceed on the evidence before it. Here a Dunnes manager has averred that discovery of the Refused Statements is being refused because the Refused Documents "*came into existence for the purpose of this litigation and were made with a view thereto and all such documentation was made for the purpose of these proceedings or whilst same was contemplated or commenced*". That evidence is uncontroverted. The grounding affidavit asserts that Dunnes is wrong to claim privilege and advances the proposition that post-discovery of the Discovered Form, the Refused Statements are (or might be) necessarily discoverable; but the just-quoted text is uncontroverted.

4. Ms Kurtz's solicitor, in her grounding affidavit avers that (1) she sought the Refused Statements early on (she did but that does not affect their discoverability), (2) Dunnes has discovered the Discovered Form and "[s]hould the [said]...Form require the contemporaneous witness statements to be taken in order for same to be completed then the contemporaneous witness statements should be discovered as being comprised in the [said]...Form". Even if the court were to accept that once part of a document is discovered, all of it is necessarily discoverable (and the court does not accept this is so) there is nothing in the Discovered Form to suggest, nor does the evidence otherwise suggest, that the Refused Statements form a part, let alone an inseparable part, of the Discovered Form.

5. Returning to the issues identified in *Artisan Glass*:

(1) *Was litigation reasonably apprehended at the time the documents in question were brought into being?* The evidence from Dunnes' manager is that the Refused Documents "*came into existence for the purpose of this litigation and were made with a view thereto...*". He might perhaps more accurately have averred that the Refused Documents "*came into existence for the purpose of [reasonably apprehended litigation which has now taken the form of the action comprised in] this litigation*". However, it is clear that he means that the Refused Documents came into being when litigation was reasonably apprehended (and the court considers it can take judicial notice of the fact that that apprehension was formed in a context where litigation consequent upon alleged 'trip and fall' incidents in supermarket stores is not rare). Thus the court's answer to question (1), on the evidence before it, is 'yes'.

(2) *Were the documents in question brought into being for the purpose of the action now comprised in this litigation?* The focus of question (1) is the reasonable apprehension of litigation. The focus of question (2) is why the documents in respect of which privilege is claimed came into being. The evidence from Dunnes' manager is that the Refused Documents were "*made for the purpose of these proceedings or whilst same was contemplated or commenced*". (Chronologically, the "...or commenced" portion can only refer to the Refused Form, of which discovery is not being sought). So far as the Refused Statements are concerned, the manager is clear that all Refused Documents came into being for the purpose of the action now comprised in these proceedings. Thus the court's answer to question (2), on the evidence before it, is 'yes'.

(3) *Were the documents created for more than one purpose?* There is nothing before the court to suggest that the witness statements were created for more than one purpose. Dunnes' manager has averred that the Refused Documents "*came into existence for the purpose of this litigation and were made with a view thereto and all such documentation was made for the purpose of these proceedings or whilst same was contemplated or commenced*". There is nothing before the court to suggest, e.g., that Dunnes was also engaged in some form of interrogation of the alleged episode in a bid to improve its operations. Thus the court's answer to question (3), on the evidence before it, is 'no'.

(4) *Has the party claiming privilege discharged the onus of proving that the documents are protected by privilege?* Dunnes has placed affidavit evidence before the court that discharges the referenced onus. There is nothing before the court to suggest that Dunnes or its manager is being coy with the truth, let alone untruthful. Thus the court's answer to question (4), on the evidence before it, is 'yes'.

6. For the reasons aforesaid, the court must respectfully refuse the relief sought.