

THE HIGH COURT

[2011 No. 466 COS]

IN THE MATTER OF SECTION 150 AND SECTION 160 OF THE COMPANIES ACT, 1990

AND

IN THE MATTER OF SECTION 297A OF THE COMPANIES ACT, 1963

AND

IN THE MATTER OF SECTIONS 202 AND SECTION 204 OF THE COMPANIES ACT 1990

AND

**IN THE MATTER OF TSON
(IN OFFICIAL LIQUIDATION)**

BETWEEN

AIDEN MURPHY

APPLICANT

AND

BRENDAN O'HALLORAN AND PATRICK O'HALLORAN

RESPONDENTS

Ruling of Mr. Justice David Keane delivered on the 29th July 2016

Introduction

1. This ruling concerns the respondents' challenge to the applicant's claim of privilege against the inspection of certain documents discovered in an affidavit sworn by him on the 17th of April 2015.

Background

2. The applicant was appointed as official liquidator of TSON Limited ("the company") by order of this court dated the 13th of September 2011, on foot of a petition presented by Allied Irish Banks plc.

3. In the context of those winding up proceedings the applicant seeks an order making the respondent directors ("the respondents") of the company personally liable for its debts pursuant to the provisions of s. 204 and s. 297A of the Companies Act 1990 ("the 1990 Act").

4. As part of the same application, the applicant seeks the following declarations: that the company failed to keep proper books and records, as required by s. 202 of the 1990 Act; that the respondents carried on the business of the company in a reckless manner and with the intent to defraud creditors; and a declaration of disqualification in respect of each of the respondents pursuant to s. 160 of the 1990 Act or, in the alternative, a declaration of restriction in respect of each pursuant to s. 150 of the 1990 Act. The applicant also seeks the usual ancillary reliefs.

The present application

5. On the 1st of December 2014 this court (*per* Barrett J.) made an order requiring the applicant to make discovery of a number of categories of documents. On foot of that order, on the 17th of April 2014, the applicant swore an affidavit in which he indicated that he objected to the production of certain of the documents covered by the order ("the documents") on the basis that they consisted entirely of communications between him and his legal representatives, or between his legal representatives and third parties, or between other persons, which were designed either to obtain material to be used as evidence in these proceedings or to enable his legal representatives to conduct these proceedings on his behalf. The applicant averred that these documents were produced for the purpose of obtaining legal advice and, thus, were covered by professional privilege.

6. In a letter dated the 4th of November 2015, the solicitors for the respondents raised certain questions regarding the applicant's assertion of privilege. In that letter, the respondents' solicitors stated that they assumed that the privilege being claimed was litigation privilege but noted that the application to have the respondents made liable for the company's debts, and to have them each disqualified or, in the alternative, restricted, had begun by notice of motion dated the 5th of July 2013, whereas some of the documents over which privilege was claimed predated the commencement of that application by more than two years. The letter then went on to state that the respondents' solicitors considered the basis for the applicant's assertion of privilege to be "wholly unclear." Clarification was then sought concerning the precise basis upon which the applicant was claiming privilege over the documents failing which, the letter stated, the respondent would bring an application to have them disclosed.

7. In a replying letter dated the 10th of November 2015 the applicant's solicitors acknowledged an error in the original affidavit of discovery sworn by the applicant on the 17th of April 2014. That letter states in relevant part as follows:

"[I]legal professional privilege is asserted in circumstances where the documents in question were for the purpose of obtaining legal advice and/or in contemplation of litigation generally. We enclose herewith a Supplementary Affidavit of Discovery to place this matter upon oath in the ordinary way."

8. In the supplemental affidavit of discovery, which was enclosed with the letter of the 10th of November 2015, the applicant avers that "[p]rivilege is asserted on the basis that such documents were for the purpose of obtaining legal advice, and/or in contemplation of litigation, not confined to these proceedings themselves."

9. The respondents' solicitors wrote to the solicitors for the applicant once more on the 13th of November 2015, again raising concerns relating to the alleged failure of the applicant to clearly set out the basis upon which he was claiming privilege in respect of

the documents, on the basis that the applicant's supplementary affidavit "does not specify precisely what litigation is referred to in any way whatsoever."

10. In a replying letter dated the 17th of November 2015 the solicitors for the applicant stated that it was too late for the respondents to raise these issues, in circumstances where a trial date had been fixed on the 1st of July of that year, and the respondents had raised no objection at the time. In dealing with the complaint that the applicant had not identified the litigation to which his claim of privilege related, the solicitors for the applicant stated that they were under no obligation to do so and that their omission in that regard did not form a basis for challenging the applicant's assertion of privilege.

11. However, on a 'without prejudice' basis, the solicitors for the applicant stated as follows:

"insofar as legal privilege has been asserted on the basis that the documents are in contemplation of litigation, that principally concerns litigation which was in contemplation by AIB, the Receiver of Plerin Investments Limited, Craven Foods Limited and Others against the Respondents and/or other parties having dealings with Plerin Investments Limited, Craven Foods Limited and/or AIB and/or the Company or in respect of other proceedings or legal options available to the creditors of the Company or other companies within the group of companies under the control or stewardship of the Respondents or the Respondents themselves for recovery of debts or the discharge of the Company Law obligations or the performance of obligations by the Respondents in support of liabilities incurred by those companies."

12. On the 15th of January 2016 the applicant's solicitor wrote to the respondents' solicitors. In that letter a schedule is provided, identifying both the broad nature of the documents over which privilege is claimed and the nature of the privilege asserted in respect of each document. The letter concludes by stating that "[s]ince the issue raised by you have (sic) now been dealt with, we now propose to apply to the Chancery List at 10.30 on Thursday next, 21st January 2016, for a trial date in these proceedings."

13. The respondents issued a motion seeking discovery on the 4th of March 2016. In their notice of motion the respondents sought discovery of all documents upon which the applicant proposed to rely at trial. When the motion came on for hearing before me on the 6th of May 2016 I refused that category of discovery on the basis that no authority could be identified in support of an entitlement to such an order and it does not seem to me correct in principle to make one. In their notice of motion the respondents also sought an order permitting them to inspect the books and records of the company, which are now in the possession or control of the applicant. The court considered that the inspection of the companies' books and records should be facilitated but that this was a matter that ought more properly to be resolved through correspondence between the parties and I made no order in relation to the inspection of the company's books and records.

The law

14. The applicant submits that all of the documents are privileged against inspection. However, he relies upon two different forms of privilege in making that claim, namely litigation privilege and without prejudice privilege.

15. In the case of *University College Cork v. Electricity Supply Board* [2014] IEHC 135, Finlay Geoghegan J. approved the following pithy definition of litigation privilege, derived from Malik (ed.), *Phipson on Evidence*, 17th ed., (London, 2010) at p. 646, paras 23-18:

"Litigation privilege only applies where adversarial proceedings are in reasonable contemplation... It protects communications which come into existence for the dominant purpose of gathering evidence for use in proceedings, and will include communications with third parties if they come into existence for that dominant purpose."

16. In the present application, as disclosed in the correspondence summarised above, one of the points made on behalf of the respondents, in disputing the applicant's claim of privilege over certain of the documents, is that they came into existence some time prior to the initiation of the application to have the respondents made liable for the company's debts, and to have them each disqualified or, in the alternative, restricted. As noted above, that application was initiated on the 5th of July 2013.

17. In *Rhatigan & Ors v. Eagle Star Life Assurance Company of Ireland Ltd* [2013] IEHC 139, which also concerned an application to inspect documents over which litigation privilege was claimed, Cooke J. stated as follows, at para. 18 of his judgment:

'[a]lthough the letters may appear in this particular case to be distant in point of time from the ultimate commencement of proceedings, it is the dominant purpose for which they were written which attracts the application of the principle.'

18. In McGrath, *Evidence*, 2nd ed., (Dublin, 2014), at para. 10-258 the author provides the following useful summary of without prejudice privilege:

"the party claiming it must establish that the communication in question was made: (i) in a *bona fide* attempt to settle a dispute between the parties; and (ii) with the intention that, if negotiations failed, it could not be disclosed without the consent of the parties."

Conclusions

19. I have reviewed all of the documents over which privilege is asserted. In what follows I shall refer to each document by the number which has been assigned to it in the respondents' notice of motion.

20. I have reached the following conclusions:

Document No.

1-5 These documents consist of confidential communications between the applicant and a third party for the dominant purpose of use in contemplated winding up proceedings, specifically the present winding up, and therefore come under the rubric of litigation privilege;

11, 13, 14, and 22 These documents are subject to without prejudice privilege and/or litigation privilege as they comprise communications which involved a *bona fide* attempt to settle or resolve a dispute (that which culminated in the presentation of a petition to wind up the company) with the intention that they not otherwise be disclosed, or communications the dominant purpose of which was to prepare for reasonably apprehended litigation (these winding up proceedings) or both;

49 I understand by reference to the terms of a letter from the applicant's solicitors to the respondents' solicitors, dated the 15th of January 2016, that the claim of privilege in respect of this document is not being maintained and that the document has either been provided or is to be provided to the respondents;

60- 65 These documents are subject to litigation privilege because they record communications between the applicant and a third party, the dominant purpose of which was for the purpose of assisting in the preparation or conduct of litigation, specifically the winding up proceedings in the context of which the present application is brought.

66-86 These documents are subject to litigation privilege because they record communications between the applicant and a third party, the dominant purpose of which was for the purpose of assisting in the preparation or conduct of litigation, specifically the winding up proceedings in the context of which the present application is brought.

21. I will therefore refuse the application for inspection.