Neutral Citation Number: [2008] IEHC 296

THE HIGH COURT

2006 No. 3411P

IN THE MATTER OF THE ESTATE OF PATRICK DEMPSEY, LATE OF BALLINAMONA, CLARA IN THE COUNTY OF KILKENNY

BETWEEN

MICHAEL PRENDERGAST

PLAINTIFF

AND
LIAM McLOUGHLIN

DEFENDANT

Judgment of Mr. Justice Clarke delivered the 25th day of September, 2008

1. Introduction

1.1 In these proceedings the plaintiff ("Mr. Prendergast") claims to be entitled to property at Ballinamona, Clara in County Kilkenny, as a result of a promise which he says was made to him by Patrick Dempsey, the Deceased, named in the title to these proceedings and by a brother of Patrick Dempsey, John Dempsey, also deceased. It is said that in return for Mr. Prendergast (for a period of twenty-five years) doing significant works connected with the farming of the lands in question, both Mr. Patrick Dempsey and Mr. John Dempsey promised that the lands would be left to Mr. Prendergast on the death of the survivor of Patrick and John Dempsey. Mr. John Dempsey predeceased his brother.

1.2 The pleadings have closed and a number of issues of defence have been put forward including a contention that any claim which the plaintiff may have is barred pursuant to certain provisions of the Civil Liability Act, 1961 and the Statute of Limitations, 1957. In addition a full defence has been filed denying the factual basis put forward by Mr. Prendergast for his claim. The defendant ("Mr. McLoughlin") is the nephew and personal representative of the late Patrick Dempsey.

1.3 While it is clear that there are likely to be significant legal issues which require to be resolved in these proceedings, it is also the case that the resolution of contested facts is likely to become material to the ultimate outcome of the proceedings. In that context Mr. Prendergast sought discovery of documents which he maintained were relevant to the proceedings. The Master, by order of 12th October 2007, directed that discovery be made of a category of documents to which I will refer in more detail in due course. That order was upheld on appeal and an affidavit of discovery was duly sworn by Mr. McLoughlin. However all of the documents referred to in that affidavit of discovery (with the exception of an original and copy of the grant of probate of John Dempsey and a copy of the will of John Dempsey), were subject to a claim of privilege. Mr. Prendergast contests that claim of privilege, and this judgment is directed towards the issues which arose between the parties in that context.

1.4 I propose referring first to the procedural history of the matter.

2. Procedural History

2.1 By a motion returnable before the Master on 20th July, 2007, Mr. Prendergast sought discovery of the following documents:-

> "Any paper, parchment or writing at any time made or written by or under the direction of the late John Dempsey, Deceased or the late Patrick Dempsey, Deceased, both formally of Ballinamona, Clara in the County of Kilkenny, being or purporting to be a will, codicil, draft or copy of a will or codicil, or any part of a will or codicil, or written instructions for a will or codicil, or a part of a will, codicil or other testamentary disposition of either of the said Deceased."

2.2 That application had been preceded by the exchange of correspondence required by the rules of court. The relevant letter of request was dated the 12th February, 2007, and in that letter the reason for seeking the documents concerned was said to be that:-

> "the Plaintiff maintains in these proceedings that the Plaintiff assisted both of the said Deceased in working and maintaining farmlands at Ballinamona, Clara in the County of Kilkenny during their respective life times and that the plaintiff was repeatedly told by both Deceased that the said farm lands would be left to him after they had both died. The Plaintiff therefore needs to obtain discovery of the aforesaid documentation so as to establish whether either or both of the said Deceased had stated their respective contentions to a party other than the Plaintiff, prior to their deaths, to bequeath the said lands to the Plaintiff and to ascertain the extent to which their said intentions were recorded in writing."

2.3 In a replying letter dated the 9th May, 2007, solicitors for Mr. McLoughlin declined to make discovery and asserted that the documentation, the subject of the letter of request, was not relevant to the proceedings and was, in any event, privileged.

2.4 On the 12th October, 2007, the Master made an order requiring Mr. McLoughlin to make discovery of the specified category of documents within six weeks of the date of the order. An appeal was brought against the order of the Master. However, by order of this court (Lavan J.) of the 26th November, 2007, the order of the Master was affirmed. The relevance of the specified category of documentation is no longer, therefore, in issue.

2.5 Thereafter, on 9th January, 2008, Mr. McLoughlin swore an affidavit of discovery which included in the first part of the first schedule, only an original and copy of the grant of probate in the estate of the late John Dempsey and a copy of the will of the same John Dempsey.

2.6 There was set out in the second part of the first schedule (being those documents in respect of which privilege was claimed), a series of nine documents which consist either of attendances by Messrs. M.J. Crotty and Son, Solicitors, on both John and Patrick Dempsey concerning the making of their respective wills, and certain documents given to those solicitors in the same context together with a draft will. At para. 3 of the affidavit of discovery, Mr. McLoughlin objected to the production of those documents on the grounds "that the said documents consist of privileged correspondence, draft Will, instruction sheet and attendances between Solicitor and client".

2.7 A motion was then brought before this court on behalf of Mr. Prendergast which sought to contest the privilege claimed. The nett issue between the parties is, therefore, as to whether the privilege asserted by Mr. McLoughlin in his affidavit of discovery is properly claimed.

3. The Issues

3.1 The issue raised in this application is, therefore, both far-reaching and, to a certain extent, novel. It concerns whether, as a matter of principle, communications between a potential testator and a solicitor for the purposes of the solicitor concerned drawing up a will can be said to be privileged, or at least privileged in proceedings such as these.

3.2 Before going on to consider that issue, it is important to note that there are undoubtedly aspects of the types of communication which might typically be expected to arise between a potential testator and a solicitor, which would undoubtedly be the subject of legal advice privilege in the ordinary way. In some cases it may be necessary, or at least desirable, for a testator to obtain legal advice prior to formulating the precise terms of a will. A few examples will suffice. In the case of persons with reasonably significant assets, questions of taxation may well arise, which can be affected by the precise way in which a will is formulated. Instructions given and advice tendered in relation to such matters are clearly *prima facie* covered by legal advice privilege. In addition, in certain cases, potential testators may require advice as to their legal obligations to spouses (including separated spouses) and children. Again, advice tendered or instructions given to obtain such advice, in that context are also clearly *prima facie* privileged. Other examples could readily be given.

3.3 However, what I am concerned with in this case is, at least to a large extent, the giving of instructions by a potential testator, so that the solicitor instructed can incorporate those instructions in to a properly drafted will. In many simple cases the task which the solicitor undertakes in such circumstances does not involve the giving of legal advice as such, but rather involves ensuring that the will as drafted conforms with the potential testator's instructions and is in an appropriate form to constitute a valid will. The issue which I have to decide is as to whether such instructions (or drafts incorporating those instructions) or attendances or notes or correspondence reflecting those instructions can be said to be privileged when no specific legal advice is sought, tendered, or could reasonably be expected to be tendered.

3.4 In substance the argument put forward on behalf of Mr. Prendergast is that such documents amount to legal assistance as opposed to legal advice, and are not privileged. I, therefore, turn to that issue.

4. Legal Assistance

4.1 In *Smurfit Paribas Bank Limited v. AAB. Export Finance Limited*, [1990] 1 I.R. 469, Finlay C.J. drew a distinction between communications seeking legal advice, which are privileged, and those seeking legal assistance which are not exempt from disclosure. In distinguishing between the two types of legal communications, Finlay C.J. outlined why legal advice attracts privilege from disclosure:-

> *"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 in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts."*

The decision in *Smurfit Paribas* went some way to setting out a test defining what will constitute legal advice as opposed to legal assistance. Finlay C.J. held that legal privilege should only be extended to communications which were "*closely and proximately linked to the conduct of litigation and the function of administering justice in the courts*" See p. 478

Finlay CJ continued, stating:

> *"Where a person seeks or obtains legal advice there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or query as to the correctness or effectiveness of some step which a person is contemplating. Whether such query or challenge develops or not, it is clear that a person is then entering the area of possible litigation."*

Therefore, the predominant element of the test formulated by Finlay C.J. concerns proximity to the area of possible litigation. Finlay C.J. stated that tasks carried out by lawyers for their clients, event though within a legal sphere, which did not contain any real relationship with the area of potential litigation could not justifiably be exempted from disclosure.

4.2 In *Ochre Ridge Limited v. Cork Bonded Warehouses Limited and Port of Cork Company Limited,* (Unreported, High Court, Lavan J., 13th July, 2004) Lavan J. set out twelve criteria which can assist in determining whether a relevant communication can be said to be made in the context of legal advice on the one hand or legal assistance on the other. These are gleaned from the judgment of Finlay C.J. in *Smurfit Paribas* and other case law. The criteria may be summarised as follows:

> i. The communication must be made between a person and a lawyer acting on behalf of such person as a lawyer for the purpose of obtaining from such lawyer legal advice;
>
> ii. The dominant purpose of the communication must be the seeking or giving of legal advice. *Three Rivers Council v. Governor and Company of the Bank of England (No. 5)* [2003] Q.B. 1156.
>
> iii. Advice does not extend to business matters nor to conveyancing documents but does cover correspondence associated with a conveyance for the purpose of seeking or giving legal advice; *Balabel v. Air India* [1988] Ch. 317.
>
> iv. The necessity to obtain legal advice envisages the possibility of a legal challenged or query as to the correctness or effectives of some step which a person is contemplating; *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1990] 1 I.R. 469, at 478.
>
> v. The provision of legal assistance may, in certain circumstances, also entail the provision of legal advice because of the fact that a solicitor's duty of care extends beyond the scope of instructions and requires the solicitor concerned to consider the legal implications of the facts;
>
> vi. There may be circumstances where surrounding documents consulted for the purpose of drafting and for the purpose of obtaining legal advice which included elements of assistance, are privileged; *Hurstridge Finance Ltd v. Lismore Homes* (Unreported, High Court, Costello J., 15th February, 1991).
>
> vii. Communications between solicitor and client giving advice in respect of conveyancing transactions may be privileged if they contain legal advice; *R. v. Crown Court exp. Baines* [1988] 1 Q.B. 579, where at p. 587, Watkins L.J. explained that:-

"In many conveyancing transactions advice will be given by the solicitor to his client on factors which serve to assist toward a successful completion, the wisdom or otherwise of proceeding with it, the arranging of a mortgage and so on. I doubt if it can possibly be denied that advice of that kind is a privileged communication."

viii. A solicitor will not be required to disclose information as to the details of a client where it is so intertwined with the legal advice that the effect of revealing it would be to disclose the advice; *Miley v. Flood* [2001] 2 I.R. 50.

ix Privilege does not attach to copies of pre-existing documents which are made for the purposes of obtaining legal advice; *Tromso Sparebank v. Beirne* [1989] ILRM 257.

x. The details of when a client met with their lawyer are usually not the subject of legal advice privilege unless in the exceptional instance of where such details are required by a solicitor to give legal advice; *R. v. Manchester Crown Court, ex. P. Rogers* [1991] 4 All E.R. 35.

xi Communications from an opponent's solicitor to a client do not benefit from legal advice privilege as such communication is hardly likely to convey legal advice, unless it contemplates settlement; and

xii Finally, the objective, as stated by Finlay C.J. in *Smurfit Paribas* that, "*the public interest in the proper conduct of the administration of justice*" arising from the restriction of a disclosure should be kept in mind in any discussion on legal privilege. *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1990] 1 IR 469, at 473

4.3 I accept that the criteria identified by Lavan J. in *Ochre Ridge Limited* are of very considerable assistance in attempting to define the often difficult boundary between legal advice and legal assistance. It will obviously be the case that the criteria that are relevant in any particular circumstances will vary significantly depending on the facts of the case and on the nature of the contact between the client and the solicitor concerned.

4.4 For the purposes of the issue with which I am concerned, it seems to me that the following criteria are of particular relevance in this case.

4.5 Firstly, Items (iii) and (vii), while in terms concerned with conveyancing documents, seem to me to logically apply equally to equivalent documents which arise in the context of the making of a will. It is clear that the giving of instructions in the context of a conveyancing transaction is not, of itself, privileged. It may, however, be the case that certain aspects of such instructions may be properly categorised as being for the purposes of seeking or giving legal advice. Thus, the giving to a solicitor of details of an oral agreement reached, so that a written contract can be drawn up reflecting that agreement, is not, of itself, privileged. Likewise the giving of details necessary to answer requisitions is not, of itself, privileged. However, it is possible, in the context of either of those situations, that the client concerned may also require legal advice. For example instructions given for the purposes of obtaining advice as to whether an oral contract may be binding would *prima facie* attract legal advice privilege. Likewise instructions given for the purposes of obtaining advice on the planning status of a property would, *prima facie*, attract legal advice privilege, even though it might well be that the consequences of those instructions, in the light of the advice given, might find their way into replies to requisitions.

4.6 In addition, Point (v) may also be of some relevance. It is clear that legal advice privilege may also arise in circumstances were the client concerned does not expressly seek legal advice, but where it would, in the ordinary way, be the duty of the solicitor concerned, to tender legal advice in the light of the instructions obtained.

4.7 Finally, it seems to me that Point (ii) is of some general relevance. It is necessary to determine whether the dominant purpose of the communication concerned is such that it relates to legal advice on the one hand, or legal assistance on the other. Where the dominant purpose is the obtaining of legal advice, then it seems to me that it is not appropriate to engage in a detailed analysis of the document concerned for the purposes of attempting to identify whether some minor aspects of the relevant document might not be properly be characterised as being designed for the purposes of obtaining or giving legal advice. In *Moorview Development Ltd and Ors v. First Active Plc and Ors*, [2008] IEHC 274, I had to consider the analogous area of without prejudice privilege. At para. 6.8 of that judgment I noted, relying on *Unilever v. Proctor and Gamble*, [2000] F.S.R. 344 and *Rush & Tomkins Ltd. v. Greater London Council*, [1989] A.C. at 1300, that it would be inappropriate to require those engaged in without prejudice negotiations to monitor every sentence to ensure that it conformed to a narrow view of the scope of privilege. Likewise a client seeking or a solicitor giving advice, as opposed to assistance, should not be required to monitor every sentence. When the dominant purpose of the relevant communication is genuinely the seeking or giving of advice then the entire communication will, *prima facie*, be privileged.

4.8 On the other hand where it is clear that the dominant purpose of a document is for the purposes of obtaining legal assistance, then it may well be that the document should be discovered without privilege being claimed, subject to the entitlement of the deponent to redact, on production, any subsidiary portion of the document which could be said to involve the seeking or the giving of legal advice. The relevant advice and assistance could, of course, have been separated into two documents. The fact that both are contained in one should not expose the legal advice element to disclosure.

4.9 It is also necessary to have regard to the fact that, in testamentary litigation, the plaintiff and defendant must file what it know as an affidavit of scripts or affidavits as to scripts. The relevant requirement is to disclose, by affidavit, all testamentary scripts of the deceased, executed or unexecuted, which have at any time come into the possession or knowledge or the parties. The affidavit concerned must describe any testamentary script of the deceased whose estate is the subject of the action of which the deponent has any knowledge, or if it be the case, that the deponent know of no such script.

The terms "scripts", in that context, denotes any papers made or written by or under the direction of the deceased, being or purporting to be a will, codicil, draft or copy of a will or codicil, or of any part of a will or codicil, or written instructions for a will or codicil, or for any part of a will or codicil, or having the form or effect of a will or codicil, or of any part of a will, codicil, or other testamentary disposition of the deceased. See O. 12, Rules 27 and 28 and form 22 of the Rules of the Superior Courts.

As can be seen from the above, procedural rules on affidavits as to scripts clearly envisage that such an affidavit should disclose all written instructions which are in the possession or knowledge of the deponent. The definition of scripts does not seem to cover any oral instructions.

It is clear that the categories of discovery sought in this case are, in fact, very closely based on the definition of "scripts" as specified in the Rules of the Superior Courts.

4.10 It seems clear, therefore, that, in testamentary proceedings, it would not be open to either party to decline to reveal the contents of any such documents on the grounds of privilege. It has often been said that a document once privileged, remains privileged. While there are exceptions to that general rule it is, I think, clear that in ordinary circumstances a document which is privileged for one purpose and in one set of circumstances, will also be privileged in all others. It follows that the converse is also true. If it is not possible to claim privilege in testamentary proceedings for, for example, a document containing the written instructions of a client as to the making of a will, then how can it be said that such a document is privileged in different proceedings, where it remains relevant.

4.11 Counsel on behalf of Mr. McLoughlin suggests that there are strong policy reasons why, in the context of testamentary proceedings concerning, for example, the validity of a will, all relevant materials should be before the court because of the public interest in ensuring that estates of deceased persons are dealt with in accordance with law. While that may well be so, it does not, in my view, provide an adequate explanation as to how it could be possible that such documents are privileged in one context but not in another.

5. Conclusions on Privilege

5.1 I am, therefore, satisfied that documents produced for the purposes of giving instructions for the making of a will are not, by reason of that status alone, privileged. There may, however, be documents which pass between a client and the client's solicitor, in the context of making a will, which may be privileged, where the dominant purpose of the document concerned is designed for the purposes of obtaining or giving legal advice connected with the making of a will, as opposed to legal assistance in the drawing of the will concerned. This will be the case where the client concerned expressly seeks legal advice as to matters such as those which I have noted earlier, or where it is implicit in the nature of the instructions tendered that the relevant solicitor was under a duty to give legal advice, arising out the circumstances concerned, rather than simply perform the task of converting the client's instructions into a properly drafted will.

5.2 Likewise, where the dominant purpose of a document which arises in the context of the giving or receiving of instructions for the making of a will is not, either expressly or by implication, for the purposes of obtaining or giving legal advice, then it may nonetheless be possible that a portion of such a document can properly be redacted, if it contains instructions necessary for obtaining legal advice, or the tendering of the advice concerned. Like considerations seem to me to apply where a document, such as an attendance, records oral versions of the above.

6. Application to Facts of this Case

6.1 I have been given access to copies of all of the documents in respect of which privilege has been claimed in this case. On the copies made available to me I have marked two passages. The first is the third paragraph of an attendance sheet of 26th August, 1996. The second is the final sentence of the first paragraph of an attendance of the 23rd July, 2003. I am satisfied that, while both of those documents, in general terms, can be described as being for the dominant purpose of obtaining legal assistance, rather than legal advice, the relevant passages marked constitute a record of the seeking and giving of legal advice, and can properly be redacted.

6.2 I am also satisfied that the balance of all of the documents are properly described as arising in the context of legal assistance, rather than legal advice and cannot be said to be privileged. In the circumstances I propose disallowing the privilege claimed by Mr. McLoughlin and directing that the plaintiff be entitled to inspection of all of the relevant documents with the exception of the redactions to which I have referred.