



Legal Privilege Update: Part 1 of 3

February 2019

The High Court has recently handed down a number of key decisions on legal privilege. These decisions, which are discussed in our three part update series (see Parts 2 and 3), confirm the criteria for sustaining a claim of litigation privilege, together with addressing the maintenance and loss of a claim of litigation privilege in subsequent proceedings. The High Court decision in [*Quinn & ors v. Irish Bank Resolution Corporation & ors*](#) [2018] IEHC 481 also deals with issues of privilege and waiver in the context of disclosure of privileged documents.

Criteria for sustaining a claim of litigation privilege

In [*Artisan Glass Studio Limited v. The Liffey Trust Limited and others*](#) [2018] IEHC 278, the plaintiff challenged the claim of privilege asserted by the second defendant in respect of a record of inspection and a report from its appointed engineers, Burgoynes, Consulting Scientists and Engineers (“**Burgoynes**”).

This case concerned a fire at a premises owned by the first defendant. The plaintiff and second defendant were unit holders in the premises. The plaintiff alleged that the fire started in the second defendant’s premises and escaped to the plaintiff’s premises causing substantial damage to it. The second defendant was insured with Hibernian Insurance, now Aviva (“**Aviva**”). Aviva claimed privilege over the documents prepared by Burgoynes.

In deciding whether the documents prepared by Burgoynes were protected by litigation privilege, the court examined the

For further information on any of the issues discussed in this article please contact:



[**David Kavanagh**](#)

Partner Litigation

DD: + 353 (0)1 673 1788

david.kavanagh@dilloneustace.ie



[**Rachel Turner**](#)

Senior Associate Litigation

DD: + 353 (0)1 673 1845

rachel.turner@dilloneustace.ie

following questions and considerations: i) whether litigation was reasonably apprehended as at that date of creation of the documents; ii) whether the documents in question were brought into being for the purpose of that litigation; iii) whether litigation was the dominant purpose of the documents (where there was more than one purpose); and iv) the party claiming privilege is required to prove that assertion.

Was litigation reasonably apprehended as at that date of creation of the documents?

In assessing whether litigation was reasonably apprehended as at that date of creation of the documents, the timing of the creation of the documents was closely considered in light of the background facts. The fire had broken out on the premises on 2 November 2002. The insurers for the second named defendant had appointed loss adjusters on 4 November 2002, who appointed Burgoyne on the same day. Solicitors were appointed on 16 November 2002. The record of inspection was created by Burgoyne on 15 November 2002 and their report was created on 20 March 2003.

As there had been communication between the solicitors, the loss adjusters and the insurers, on the issue of the potential for third party claims to be brought, it was held that litigation was reasonably apprehended by the time Burgoyne created their record of inspection. Further, there was no doubt that by the time the engineering report was created on 20 March 2003, litigation was contemplated. However, the fact that litigation was apprehended at the time of the creation of these documents did not mean that they were protected by litigation privilege.

Was litigation the dominant purpose?

The next question to be considered by the court was, on the basis of the materials before the court, whether the defendant had shown that the dominant purpose of the documents was apprehended litigation by third party claimants against the defendant in respect of the fire. In determining this, the court was not bound by a bald assertion on affidavit that the document's dominant purpose was for litigation. The question of dominant purpose is a matter for objective determination by the court.

The court commented that one of the difficulties facing it in dealing with the application arises from the approach adopted in the affidavits filed by Aviva in that while both affidavits asserted that the dominant purpose of the documents was the apprehended litigation, no attempt was made to explain what was (or were) the other purpose (or purposes). The court explained that it is essential that sufficient explanations or materials are placed before the court by a party claiming privilege to identify all of the purposes of the document (if the documents are created for more than one purpose), with a view to assisting the court in assessing whether or not it can properly be said that apprehended litigation was the dominant purpose of the creation of the document. Otherwise, the court will not be in a

position to carry out an objective determination, and may, in those circumstances, be left with no alternative but to conclude that the party has failed to establish the dominant purpose of the creation of the document.

The court considered the materials placed before the court in determining the application before it and concluded that Burgoyne's record of inspection considered the insurer's own exposure to its insured, and so it could not be held to have been created for the dominant purpose of the litigation. The engineering report, however, examined the cause of the fire and this would have given the insurer defences to any third party claim made against the second defendant. This document was, therefore, protected by litigation privilege.

Extracts from Privileged Documents and Attachments

The court, in addressing the plaintiff's submission that extracts of the Burgoyne report that contained a factual description of what was found by Burgoyne on site could be made available, held that it would be clearly inappropriate for it to direct that any part of the text of the report (which was found to be subject to litigation privilege) should be released to the plaintiff. However, the same issue did not arise in relation to the photographs appended to the report, if they pre-dated the time when apprehended litigation became the dominant purpose. The court held that if the photographs pre-dated the report and had an independent existence they should not be regarded as part of the report itself.

A similar issue arose in relation to the fire brigade report which was attached to the Burgoyne report. The court found that the fire brigade report had a separate and independent existence from the engineer's report.

Comment

This judgment is of interest as it confirms the criteria for sustaining a claim of privilege. It also highlights that a bald assertion on affidavit that the document's dominant purpose was for litigation will not be sufficient to ensure a claim of litigation privilege can be sustained. It is essential if a claim of litigation privilege is being made over a discoverable document that a court is provided with sufficient explanations or materials to identify all of the purposes of the document (if the documents are created for more than one purpose).

DILLON  EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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