



## Legal Privilege Update: Part 2 of 3

February 2019

This is the second article in our three part update series and deals with the maintenance and loss of a claim of litigation privilege in subsequent proceedings (See [Parts 1](#) and [Part 3](#)).

### Litigation Privilege in subsequent proceedings

In [\*Ryanair Ltd v. The Revenue Commissioners & ors\*](#) [2018] IECA 222, the issue before the Court of Appeal was whether a successful claim of litigation privilege in respect of certain classes of documents arising in an initial set of proceedings (between A and B) could continue to a separate subsequent set of proceedings (between B and C).

#### *Background*

The case concerned an appeal by Aer Lingus plc and Ryanair Limited against the High Court decision of Barrett J. who held that the State was entitled to claim litigation privilege in respect of documents deployed by it in the course of defending proceeding brought by the European Commission and that privilege endured for the purposes of defending separate proceedings subsequently brought by the two major airlines, who are the litigants in those proceedings.

#### *Conclusion*

The Court of Appeal held that the documents which were protected by litigation privilege in the initial set of legal proceedings were not protected by litigation privilege in

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separate subsequent proceedings in circumstances where the initial proceedings had concluded and the subsequent proceedings were not “*closely related*”.

In deciding that the two sets of proceedings were not “*closely related*”, the Court of Appeal considered two factors: (i) that the parties named in each of the proceedings were entirely different; and (ii) that there was no clear link between the two proceedings.

### *Comment*

This judgment shows that parties in litigation should not assume, just because there is a connection between two separate sets of proceedings, that a court will automatically consider that the proceedings are “*closely related*” so as to preserve a claim for litigation privilege.

## Litigation Privilege and witness statements

The question considered in [\*Defender Limited v. HSBC Institutional Trust Services \(Ireland\) Limited\*](#) [2018] IEHC 587 was whether a witness statement loses privilege when it is served on the opposing party or whether it remains privileged until it is adopted by a witness in open court.

### *Background*

This case related to litigation arising from the Madoff fraud. The plaintiff, Defender Limited, requested discovery of witness statements and expert reports from two sets of earlier proceedings involving the defendant in these proceedings, HSBC Institutional Trust Services (Ireland) Limited, and HSBC Securities Services Luxembourg SA (a member of the HSBC group of companies) (the “**Thema case**” and the “**Primeo case**”), in order to establish whether there were any inconsistencies between the evidence given by witnesses in the earlier cases and the evidence given by the same witnesses in the current Defender case. The Thema case was settled after 17 days of hearing in the High Court. Judgment was delivered by the Cayman Island High Court in the Primeo case on 23 August 2017.

### *Conclusion*

Twomey J. considered whether litigation privilege is lost once a witness statement is served on an opposing party and concluded that litigation privilege is retained until the witness statement is put into the public arena – and decided that as the Primeo case witness statements had been relied on in court, the privilege was lost. However, as the Thema case had settled, the witness statements had never been adopted in open court and, therefore, retained privilege. Twomey J. further noted that a witness statement has no evidential value until it is put into the public arena ([\*Moorview v First Active\*](#) [2009] IEHC 214).

Twomey J. also held that litigation privilege may be lost when the proceedings are concluded, unless the concluded proceedings are “*closely connected*” to the proceedings in which discovery is sought. There was a “*very close connection*” between both the Thema Case and the Primeo Case on the one hand, and the Defender case on the other hand, and on that basis, the witness statements that had not been relied on as evidence in court, retained their litigation privilege due to the close connection of the cases.

Twomey J. took into account the English rules albeit that the court rules regarding witness statements are very different from those in Ireland. Those rules specifically state that witness statements may not be put into evidence by any other party if the witness is not called to give evidence (Order 38 Rule 2A(4) of the English Rules). The English courts take this approach on policy grounds to encourage settlement between parties. The Irish rules are silent on the privileged status of witness statements once proceedings are at an end. Twomey J. noted that there are good reasons for the retention of privilege over witness statements until the very last minute (until they have been adopted by the witness or put into the public arena and expressed the importance of encouraging settlement in this jurisdiction).

### *Comment*

This judgment confirms that litigation privilege may be lost when proceedings are concluded, unless the concluded proceedings are “*closely connected*” to the subsequent proceedings. Further, witness statements retain their privilege until they have been adopted by the witness or put into the public arena.

### **Summary**

These two judgments show that the connection between previous and subsequent proceedings must be either “*closely related*” or “*closely connected*” to allow for litigation privilege to prevail.

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