



LITIGATION AND DISPUTE RESOLUTION

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# Does Litigation Privilege Apply? It's not as clear as you think. A Review of Recent Irish Cases

by **Muireann Granville**

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If a communication is subject to litigation privilege it is protected and does not have to be produced for inspection by third parties, but to be protected, the communication must have been made in connection with existing or potential litigation.

That litigation must either be in progress or there must be a reasonable prospect of it happening. The applicable test for determining whether a claim to litigation privilege can be upheld is the dominant purpose test: i.e. the document must have been made with the dominant purpose of conducting actual or anticipated litigation.

This article examines a number of recent decisions in Ireland on litigation privilege, and offers practical tips to help in seeking to ensure claims to litigation privilege are upheld.

## **Artisan Glass Studio v The Liffey Trust Limited, Slovak Limited (substituted by Aviva Limited and Anor) [2018] IEHC 278**

This case concerned a fire which caused damage to Artisan Glass Studio's premises. The High Court considered a claim to litigation privilege over an engineer's report and a record of the engineer's inspection.

The Court considered the following as relevant factors when determining a claim of litigation privilege:

- (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.*

In considering whether litigation was reasonably apprehended at the time the documents were brought into being, the Court considered the dates on which loss adjusters were engaged and solicitors were appointed. It was noted that considerable communications took place between those parties before the date of the inspection. The Court found that litigation was reasonably apprehended when the documents were created but that this was "not itself determinative that they are protected by litigation privilege". On the basis of the facts put before the Court, the dominant purpose of the engineer's report was held to be anticipated litigation. However, in relation to the inspection record, the Court was not satisfied that litigation was the dominant purpose of this document as there was nothing that would indicate that the dominant purpose of the inspection was litigation with third parties.

The case is a useful reminder that the party claiming litigation privilege must be able to prove that litigation was in contemplation at the time the document was created, and that the dominant purpose of the document was for conducting that litigation. In particular the Court also held that a party claiming privilege should provide all explanations and materials to allow the court to assess whether litigation was the dominant

purpose.

### **Anne Kurtz v Dunnes Stores [2019] IEHC 441**

The principles outlined in *Artisan Glass* were cited more recently in the High Court decision of *Anne Kurtz v Dunnes Stores*, concerning a 'trip and fall' incident that allegedly occurred at Dunnes Stores. Dunnes made discovery of an accident report form but refused to make discovery of an internal investigation form and certain witness statements. Litigation privilege was claimed over the documents, on the basis that they "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."

In applying the test identified in *Artisan Glass*, the Court found that (1) litigation was reasonably apprehended at the time of the creation of the documents, (2) the documents came into being for the purpose of the litigation, (3) there was nothing before the court to suggest that the documents were created for more than one purpose (i.e. the litigation) and (4) the party claiming privilege discharged the onus of proving that the documents are protected by privilege. In examining whether litigation was apprehended when the documents were created, the Court took on board the fact that litigation consequent upon alleged 'trip and fall' incidents in supermarket stores is not rare. The Court was also persuaded by affidavit evidence from Dunnes which discharged the onus of proof.

### **Ryanair Ltd v The Revenue Commissioners & Ors [2018] IECA**

The Court of Appeal in the above case considered whether litigation privilege could be claimed in relation to subsequent proceedings. A claim of litigation privilege was allowed in earlier proceedings which were connected to the subsequent set of proceedings. However, the Court held that the sets of proceedings were not closely related as they concerned different parties and there was no clear link between the two cases. Accordingly, the claim to litigation privilege in the subsequent proceedings was not upheld.

This is in line with an earlier High Court decision in *UCC and NUI v ESB [2014] IEHC 135* which clarified that litigation privilege does not last forever and does not extend beyond the life of a litigation, except where another set of proceedings are deemed to be closely related. This decision reflects the rationale of litigation privilege which is to allow a litigant to prepare for litigation without the danger of any documents produced for that purpose being disclosed to another party.

### **Quinn & Ors v IBRC & Ors [2018] IEHC 418**

In *Quinn*, the Court examined a claim to litigation privilege over documents held by Quinn's former solicitors, which arose in the context of anticipated litigation. Quinn had waived litigation privilege and partially disclosed some of the documents to IBRC. The Court noted that this partial disclosure presented a real risk of Quinn achieving an unfair litigious advantage by giving a partial and incomplete picture of the transactions in question. Accordingly the Court directed IBRC to identify the documents in the privileged schedule which they believed related to the transaction and which if not disclosed, would result in a partial and misleading picture being presented by the disclosed privileged documents.

### **Celtic Trustees v Christopher Lehane (As Official Assignee in Bankruptcy In the Estate of Sean Dunne) [2018] IEHC 745**

This case concerned a claim to litigation privilege made by the Official Assignee in bankruptcy over the transcript of an examination carried out by him.

The Court held that in order to make a successful claim to litigation privilege, the party must establish that what is sought to be protected is a communication, whether written or oral, that is made:

- *between either (i) himself or (ii) his lawyer (who is acting for him in a professional capacity) and a third party;*
- *in either case under conditions of confidentiality;*
- *for the dominant purpose of use in litigation, thus, that at the time the communication is made (i) is either preceding or pending, or reasonably anticipated or in contemplation, and (ii) is litigation in which the client, or reasonably anticipates becoming a party; and*

- *for the purpose of either (i) enabling legal advice to be either sought or given and for/ or (ii) seeking or obtaining information to be used in or in connection with the litigation concerned.*

The Court was not satisfied that the examination of the subject of the document was undertaken under conditions of confidentiality and the claim to litigation privilege failed on that ground alone. Further, although the Court accepted that at the time of the interview the Official Assignee was anticipating litigation, the Court noted that he was still at the investigation stage, and that proceedings did not begin until two years after the interview took place. On that basis, he was not satisfied that litigation was the dominant purpose of the interview and the claim to litigation privilege was not upheld.

### **Comment and practical tips on preserving litigation privilege**

- Instruct lawyers at the earliest opportunity to maximise the protection afforded by legal professional privilege and to obtain advice from the outset on issues of privilege.
- Preserve confidentiality over documents (including emails) which are created in contemplation of litigation: clearly mark such documents as private and confidential and ensure the documents are not circulated to any third parties, beside legal advisers.
- Record in writing when you consider litigation to be reasonably anticipated.
- Where a document is prepared in contemplation of litigation note this clearly on the document, this may assist in maintaining a claim for privilege if it is challenged.
- The date of engagement with external solicitors also can be instructive to the Court when deciding when it could be said that litigation was anticipated.
- Consider the purpose of the document and whether litigation is the sole or dominant purpose of the document.
- Ensure that issues which do not relate to the conduct of anticipated or ongoing litigation are kept in separate communications to avoid a claim that litigation was not the dominant purpose of the document.
- If a claim to litigation privilege is challenged, provide the Court on affidavit with all explanations and materials to allow the Court to assess whether litigation was the dominant purpose of the document.

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For more information on the above, please contact [Muireann Granville](#) or [Michael Kavanagh](#).

## About the Author



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