

THE HIGH COURT

BORD NA MONA

PLAINTIFF

AND

JOHN SISK AND SON LTD AND OTHERS

DEFENDANTS

Judgment of Mr. Justice Costello delivered 30th November 1989.

This is a motion for better discovery arising in the following circumstances. John Sisk and Son Ltd. (the first named Defendants) were the main contractors under a building contract for the erection of offices in Baggot Street in the City of Dublin for Bord na Mona, the plaintiffs herein. Disputes arose between Sisks and the Board and also between the Board and the architect under the contract Mr. Samuel Stephenson (the second named defendant) and between the Board and one of the sub-contractors, Mercury Engineering Co. Ltd. (the third named defendant). All these disputes were referred to an arbitrator, Mr. John O'Reilly, (the fourth named Defendant). He made a number of awards in favour of the Board against both Sisks, Mr. Stephenson and Mercury Engineering. In these proceedings Bord na Mona seek to set aside these awards on the ground of the arbitrator's misconduct, the misconduct alleged being a conflict of interest arising from a prior professional engagement undertaken by the arbitrator with an associated company of Sisks called Sisk Properties Ltd.

An order for discovery was made on 24th July 1989 and the Board was ordered to discover all notes, correspondence, memoranda of communications between it and Mr. Stephenson in relation to the role of the arbitrator, Mr. O'Reilly, in the arbitration and the involvement of the arbitrator with Sisk Properties Ltd. An affidavit was sworn on 25th August 1989 on the Board's behalf. From this it was revealed that proceedings last year had been taken in England by the Board against Mr. Stephenson to enforce the award which it is now sought to set aside in this action, that correspondence took place between the Board's English solicitors and Mr. Stephenson's English solicitors, that in early February 1989 representations were made to the effect that Mr. Stephenson intended to move to set

aside the arbitrator's award and that by consent on 1st May 1989 the Board's enforcement proceedings in England were ajourned generally and the mareva injunction against Mr. Stephenson discharged. Mr. Stephenson has in fact also instituted proceedings in this country to set aside the award.

It will be noted that the order for discovery was a limited one. But another issue has arisen in this action. The final award by the arbitrator was made in June 1988 and the proceedings to set it aside were not instituted until February, 1989, that is well outside the six week limitation period fixed by O.56 r. 4. The application to extend the time for instituting the proceedings is to be strenuously contested and Sisks say that all documents relevant to the exercise of the court's discretion should also be discovered. They assert that documents relevant to this issue exist and should be disclosed to them and so have brought this motion for better discovery claiming production and inspection of all documents arising from the compromise in the Board's English proceedings against Mr. Stephenson. Some correspondence between the Board's English solicitors and Mr. Stephenson's English solicitors relating to the English proceedings against him have been discovered and no objection to their inspection has been taken. But Sisks say there is, "complete silence" between the 4th February 1989 and the making of the consent order, 1st May and it is claimed that discussions must have taken place "in connection with an overture made by Sam Stephenson in relation to setting aside the Arbitrator's award" and it is claimed in the affidavit grounding this application that "an agreement has been reached between the Plaintiff and Mr. Stephenson in relation to the U.K. enforcement proceedings and to

commencement of the present proceedings before the High Court in the Republic of Ireland", and that documents in relation to these discussions and agreement must exist.

At the hearing of the motion no replying affidavit was filed and there was no denial that an agreement had been reached between the Board and Mr. Stephenson relating to the adjournment of the English proceedings and the institution of these present proceedings. Nor has it been claimed that documents relating to these matters are not relevant to the plaintiff's claim that the time be extended in this action. The motion is resisted because a claim of privilege has been advanced in respect of certain documents in the Board's possession. It has been agreed that I should adjudicate on this claim and that for this purpose should examine the documents.

My conclusions on the documents forwarded to me are as follows:-

- (1) The letter of 30th November, 1988 from Messrs Powell Magrath and Spencer (Mr. Stephenson's English solicitors) to Messrs Mende-King (the plaintiff's English solicitors) was written without prejudice and is privileged as between the Board and Mr. Stephenson. In addition, it is not relevant to any of the issues in these proceedings. It is therefore not discoverable.
- (2) Confidential reports dated October and December 1988 obtained by the Board relating to Mr. Stephenson's activities are not relevant to any issues in these proceedings and are not discoverable.
- (3) There are a number of documents comprising
 - (a) a letter of the 14th February, 1989 arranging a

meeting between the parties,

(b) a letter of 24th February referring to the meeting and the agreement reached

(c) two telephone attendances on 1st March, 1989

(d) a letter from the Board's solicitor headed "without prejudice" and enclosing a note of the meeting also headed "without prejudice"

(e) further correspondence relating to the settlement of 3, 10, 24, 27 March, 24, 26 April.

I think that it is clear that the discussions which were held between the parties were held on a "without prejudice" basis and that even though only one of the letters is so headed that the correspondence between the parties took place on the same basis. It seems to me therefore that the Board is entitled to claim that they are all privileged communications in its proceedings against Mr. Stephenson. These documents are, I think, relevant to the issue in these present proceedings as to the Board's claim for extension of time. The question for determination therefore is whether the privilege attached to the documents in the earlier action can be claimed in this one.

The point has recently been considered in the Court of Appeal in England ("The Aegis Blaze", 1986 Lloyds Rep. 203) in which the earlier authorities were reviewed. The case concerned a surveyor's report on the condition of a ship which was admittedly privileged as it was obtained in contemplation of legal proceedings. A second accident occurred to the ship which gave rise to litigation and the question for determination was whether the owners could properly claim

privilege in the second action for the report. It was held that they could. The principle to be applied was stated by Parker L.J. as follows:-

"Unless the party claiming privilege or his successor is a party to the subsequent action no question of a claim to privilege will arise If, however, the person claiming privilege in the second action is the person entitled to privilege in the first action but there is no connection of subject matter whatsoever it is most improbable that the question will arise for in such circumstances the document will not be relevant and will not therefore be disclosable and there will therefore be no question of privilege. If however there is sufficient connection for the document to be relevant then it is in my view right that the party entitled to the privilege should be able to assert it in the second action... The right has been stated time and time again over a very long period."

I find no difficulty in following the principle enunciated by Parker L.J. and respectfully do so. It follows therefore that as these documents are relevant in both actions in which the Board is plaintiff the Board is entitled to claim privilege for these in this action. They can of course waive this privilege, but this is a matter entirely for decision by them and their advisers.

I have drawn attention to the somewhat limited scope of the order for discovery of the 24th July 1989. It is clear that Sisks are entitled to an order that the Board should disclose, in addition, documents in their possession relating to the plaintiff's claim for an order to extend the time for bringing this application. To regularise the situation I will make such an order and direct that an affidavit to comply with it be filed within two weeks. I will also order that the documents referred to at (3) above are relevant to this claim but that the plaintiffs are entitled to claim privilege for them. Should it transpire that there are other relevant documents in existence for which the Board may wish to claim privilege the matter can be re-entered for further debate.

Approved
30.11.89 JK-