THE HIGH COURT

[2024] IEHC 228

Record No. 2010/6011P

BETWEEN:

ORLA McNULTY

Plaintiff

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND TRADING AS BANK OF IRELAND GROUP

Defendant

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 5th day of April 2024.

INTRODUCTION

1. Order 31 Rule 20(2) of the Rules of the Superior Courts states:

> *'(2) Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding as to the validity of the claim for privilege.'*

The motion to be determined herein is the Plaintiff's application that the Court would inspect documentation discovered by the Defendant, in respect of which privilege has been claimed, in order to decide the validity of such claim.

LITIGATION BACKGROUND

2. These are proceedings of some antiquity with significant procedural complexity so far as discovery is concerned. The Plaintiff instituted proceedings on or about the 23rd day of June 2010 in which she sought damages against the Defendant in respect of alleged "personal injuries, breach of contract, bullying, intimidation, ageism, breach of

contractual relations/attempted breach of contractual relations and loss of legitimate expectation and the tort of interfering with contractual relations as well as breach of constitutional and personal rights". These allegations arose in the context of the termination of her employment with the Defendant in or about April 2008.

3. The Defendant filed a Defence on or about the 8th July 2011. Preliminary objections were raised including that the claim was statute barred and that the claim ought to be dismissed due to non-compliance with the Civil Liability and Court Officers Act, 2004 as regards the manner in which the claim was pleaded. These preliminary objections were denied by the Plaintiff in a Reply delivered on the 9th December 2011.

4. Notices for Particulars were raised by both the Plaintiff and the Defendant and replies were furnished.

5. No issue of fraud or criminality or other turpitude was pleaded by the Plaintiff up to this time, although the issue of a secondary accounting system being operated by the Defendant and a link between this activity and the Plaintiff's work circumstances was referenced in Replies to Particulars furnished by the Plaintiff dated the 6th August 2013.[1] At Paragraph 6 thereof, with reference to an alleged change of workplace atmosphere subsequent to a meeting held in April 2008, the Plaintiff states: *"The plaintiff believes that she was being blamed and scapegoated for disclosing the duplicate accounting system to the newly appointed Manager ..."* and further that *"..., the Foreign Exchange Bureau had continued to operate as before but with an entirely new staff and operating system and discontinued the secondary accounting system which filtered out all transactions in excess of 2000 euro from recorded turnover figures as disclosed to Dublin Airport Authority as part of their rental agreement."* This matter was further referenced by the Plaintiff (in some detail) at Paragraph 15 of the said Replies. At Paragraph 16 of the said Replies, alleged breaches of contract by the Defendant are set out and include, *inter alia*, *"– Forcing the plaintiff to engage in a duplicate accounting system."*

[1] It should further be noted that, although the documents discovered by the Plaintiff herein were not provided to me, the Affidavit as to Documents sworn by the Plaintiff herein on the 20th October 2023 would appear to support the Plaintiff's assertion that she informed her then solicitors of the background circumstances, as alleged by her, at a much earlier date. The Plaintiff waived privilege in respect of such documents.

6. Liberty to amend the Personal Injuries Summons was granted to the Plaintiff by Order of this Court of the 19th January 2015. Pertinent to the present application, the Amended Personal Injuries Summons included, *inter alia*, the following new pleadings:
   (a) With reference to the alleged terms and conditions of the Plaintiff's employment, it is alleged (Paragraph 4(g)) *"The Plaintiff would be permitted to undertake her work in an open and honest manner."*
   (b) With reference to the alleged breaches by the Defendant, it is alleged (Paragraph 5(g)) *"The Plaintiff was obliged to undertake unethical and unscrupulous work and was required to behave in an underhanded manner."*
   (c) At Paragraphs 9 – 12 thereof:

   "9. The Plaintiff was involved at all stages in the design and development of the foreign currency accounting devices built and manufactured by Forde Electronics Limited situate at Carrigaline in the County of Cork. In conjunction with its founder Mr. Denis Forde the Plaintiff consulted in regard to all aspects to configure hardware and operating software to accommodate each and every currency transaction to be recorded and accounted for. The Plaintiff was responsible to ensure all relevant feedback was made and whatever necessary adjustments, modifications be incorporated to improve the operation of this accounting technology which was new and in its infancy at the time of its introduction to Dublin Airport. The Plaintiff had gained extensive and in depth knowledge from her experience operating a manual system prior to the introduction of the electronic Forde Machine and was key to its implementation.

   10. Fully aware of the Plaintiff's concern as to her ongoing position of employment, the Plaintiff was forced to operate a duplicate accounting system designed by the Defendant, its servants and/or agents to financially understate reported turnover figures to its landlord, the D.A.A. (formerly Aer Rianta) which were then used in the computation of a monthly rental charge payable under the terms of the lease.

   11. The Plaintiff was forced to engage in the irregular and/or inappropriate recording of daily turnover and the concealment of material facts, which jeopardized her standing and position of trust, which was an express condition of the Plaintiff's contract of employment with the Defendant.

   12. After the Plaintiff's disclosure to the newly appointed Manager of Operations, namely one Sheilagh McGirl, of the duplicate accounting system on 10th April 2008

the Plaintiff's position was seriously compromised and she was "scapegoated", shunned and avoided with no future at Bank of Ireland Dublin Airport, notwithstanding having provided over 25 years uninterrupted service there."

(d) At Paragraph 18 of the Amended Summons, the Plaintiff alleges a direct link between the termination of her employment and the alleged duplicate accounting system: *"The unlawful and summary removal of the Plaintiff from her position of employment, despite previous assurances to the contrary, was as a direct consequence of the Plaintiff's disclosure of the duplicate accounting system and was further bullying and harassment of the Plaintiff in an attempt to continue to coerce her into maintaining the duplicate system."*

(e) The reliefs being sought are expanded to include damages for harassment, negligence, nuisance and breach of duty, including breach of statutory duty and the relevant European Regulations.

7. An Amended Defence was delivered dated the 18th May 2015 which places all of these allegations at issue.

8. An Order for Discovery by the Defendant was made on the 6th March 2017. It is clear that certain of the categories of discovery ordered, directly relate to the allegations relating to duplicate accounting and, in particular, Paragraphs 1 and 2 of the categories of discovery so ordered:

> *"1. The most recent lease/license in respect of the Defendant's Dublin Airport premises in the period prior to 2010. It is agreed that the Defendant will be permitted to redact any commercially sensitive information.*
> *2. (i) Turnover figures in respect of the Dublin Airport premises submitted to Dublin Airport Authority/Aer Rianta for the month of July 2007;*
> *(ii) Documents recording the actual total of turnover achieved at the Dublin Airport Branch and submitted to Bob Hamilton for the month of July 2007;*
> *(iii) Trading Accounts Foreign Note Sales in respect of Shifts A, B and C for July 2007;*
> *(iv) Foreign Note Sales Reserve Account for July 2007; and*
> *(v) Daily tally rolls generated from the Forde Electronics Calculators for July 2007."*

9. This matter was further addressed in the Notice for Further and Better Particulars raised by the Defendant on the 6th April 2017, at Paragraphs 3, 4, 5 and 9 thereof, with Replies furnished on the 13th October 2017. There is considerable detail in the Replies furnished.

10. There have been a number of motions herein relating to discovery and, of particular relevance to the current matter, motions relating to an alleged failure on the part of the Defendant to comply with the Order of the 6th March 2017. I was referred in the course of the hearing herein to the Judgment of the Court of Appeal (Collins J.) of the 29th June 2021. This relates to an appeal by the Plaintiff pertaining to two motions.
    A) A motion to compel discovery per the consent order of the 6th March 2017 or, in the alternative an order striking out the Defence or relevant part thereof for failure to reply to a Notice for Further and Better Discovery (dated the 10th December 2018).
    B) A motion directing the then Group Chief Executive of the Defendant Bank to swear an Affidavit of Discovery providing discovery pursuant to the Order of this Court of the 6th March 2017.

11. While no further discovery was ordered, the Court of Appeal ordered the swearing of an Affidavit by the legal department of the Defendant in relation to document preservation in respect of these proceedings and, if arising, in relation to document preservation policies or protocols within the Defendant bank. It was also directed that the Stor System be retained and, on request, made available for inspection by the Plaintiff. It would appear that such inspection has taken place.

12. However, while it is fair to say that the Court of Appeal was more concerned with the Second Schedules to the various Affidavits of Discovery (non-preservation of documents) whereas I am concerned with the First Schedule, Second Part (documents in respect of which privilege is asserted), there are *dicta* in the Judgment of Collins J. which are extremely pertinent in the context of the present application. He found that:

> ’24. *On 17 December 2018, the Plaintiff (who was by then representing herself) served a Notice to Admit Documents on the Bank. 95 documents are listed in*

the schedule to that Notice. Most (if not indeed all) of those documents were documents emanating from the Bank which had not, however, been discovered by it.'

Collins J. further stated:

"64. The availability of discovery is an essential element of civil litigation in this jurisdiction and its importance was recently re-affirmed by the Supreme Court in Tobin v. Minister for Defence [2019] IESC 57. Discovery "improves the chances of the court being able to get at the truth in cases where facts are contested" and, in that way, "makes a significant contribution to the administration of justice" (per Clarke CJ, at para 7.5)….

65. The value of discovery and its potential to assist a court in getting at the truth in contested cases, such as the claim of the Plaintiff herein, is obviously undermined if potentially relevant documents are permitted to be destroyed while litigation in contemplated and, a fortiori, while litigation is actually pending."

13. In considering the conduct of the Defendant, the Court of Appeal was addressing the issue of the culpability in the context of making discovery i.e., in what circumstances would a strike out of all or part of proceedings be appropriate due to discovery failures?

'75. That said, there is in my view no question of making an order striking out the Bank's defence, at least at this stage of the proceedings. There is no evidence on which this Court could properly conclude that the Bank's failures in respect of discovery were the result of "wilful default" or, as it was put by Ryan J in Green Pastures (Donegal) v Aurivo Co-Operative Society Limited, a "malicious determination to evade the obligation to make discovery". As I have said, the weight of authority indicates that some deliberate attempt to avoid the obligation to make discovery must be established before such an order could be made. Whether, and if so in what circumstances, culpable conduct short of deliberate avoidance may suffice in this context are issues which could only be determined following much more detailed argument than the Court has had on this appeal. Even if, in principle, negligence may suffice the evidence before the

Court would not allow for any reliable or informed conclusion to be reached on this point at this stage. '

The Plaintiff continues to assert that there has been wilful default on the part of the Defendant in respect of discovery. The Court of Appeal had before it and considered the Composite Affidavit of Discovery of David Coleman of the 21st May 2021 which contains considerable detail in relation to loss or destruction of documents and the circumstances of same. The Plaintiff, in the course of this application, indicated that she did not accept the averments in the Affidavit of Mr. Coleman aforementioned and that she had sworn an Affidavit of the 14th October 2022 which detailed her position in this regard. The issue before me is not whether or not discovery is satisfactory or sufficient or in compliance with the discovery order made herein. The issue before me relates to the application of legal professional privilege in the context of inspection of discovered documents and exceptions arising in this regard.

CHRONOLOGY OF DISCOVERY MADE BY THE DEFENDANT HEREIN

- 6th March 2017 - An Order for Discovery by the Defendant was made on consent. 12 weeks from the date of perfection (23rd March 2017) was the permitted time period within which discovery was to be made.
- 17th October 2017 – Motion issued by the Plaintiff seeking relief for failure to comply with Order for Discovery. This Motion had a return date for the 17th November 2017.
- 7th December 2017 – Motion above struck out with costs to the Plaintiff by Order of the Master, an Affidavit of Discovery, sworn by Colin Kingston on the 25th October 2017, having been received.
- 17th December 2018 – the Plaintiff served a Notice to Admit Documents with accompanying documentation.
- 26th February 2019 – Motion issued by the Plaintiff in relation to alleged discovery deficiencies. The First Supplemental Affidavit of Discovery was sworn on the 9th May 2019.
- 31st May 2019 – Motion issued by the Plaintiff seeking that the Affidavit of Discovery be sworn by the Group Chief Executive of the Defendant bank.
- 9th October 2019 – the Second Supplemental Affidavit of Discovery was sworn (relating to the Stor System).

- 29th June 2021 – Court of Appeal judgment in respect of the last two motions mentioned above. The Court refused to strike out the Defence finding there was *"no evidence on which this Court could properly conclude that the Bank's failures in respect of discovery were the result of "wilful default" or, ..., a "malicious determination to evade the obligation to make discovery"*. The Court of Appeal did direct a further affidavit be sworn in relation to document preservation ordering: *"Such affidavit should be sworn by someone in the legal department of the Bank rather than by Mr. Coleman. If Ms Kelly is available, the affidavit should be sworn by her; if she is not available, the affidavit should be sworn by some other solicitor in the Bank's legal department. The deponent should, in due course, be made available for cross-examination at trial. Obviously, the Bank is not required to disclose privileged information in such affidavit."*

- Affidavits:
  A. First Affidavit of Discovery 25th October 2017 (Colin Kingston). There is no listing of documents in the First Schedule Second Part of this Affidavit but simply a short generic referencing professionally privileged communications for the purpose of obtaining legal advice.
  B. Supplemental Affidavit of Discovery of the 9th May 2019 (David Coleman). There is no First Schedule Second Part in this Affidavit.
  C. Second Supplemental Affidavit of Discovery of the 1st October 2019 (David Coleman). There is no listing of documents in the First Schedule Second Part of this Affidavit but simply a short generic referencing professionally privileged communications for the purpose of obtaining legal advice.
  D. Composite Affidavit as to Documents of the 21st May 2021 (David Coleman). There is a list of documents set out in the First Schedule Second Part in this Affidavit but it is sparse in detail. I will refer to this further hereinafter.
  E. Affidavit of Irene Gleeson of the 10th August 2021 (per Judgment of Court of Appeal of the 29th June 2021). No reason is given as to Ms. Kelly's unavailability. At Paragraph 4 it is averred – *"Ms Kelly is not currently available to swear an affidavit on behalf of the Bank in relation to the issues directed by the Judgment, however, I confirm that I am in a position to do so from facts within my own knowledge and based upon inquiries which I have made for this purpose."* It is

unsatisfactory, having regard to the Judgment and Order of the Court of Appeal, that Ms. Kelly's unavailability is unexplained. The Affidavit is lacking in specificity, in my view, and clearly so having regard to the *dicta* at Paragraph 74 of the Judgment of Collins J.. While there was clearly an alternative offered by that court in relation to the deponent, it is amply clear from the judgment of Collins J. that the preferred deponent was Ms. Kelly. Given her longstanding role in relation to these proceedings, this preference is entirely understandable.

F. Schedule of Privileged Documentation (referenced and exhibited in the Affidavit of Comhnall Tuohy of the 6th June 2023 and described as *"a further, more detailed schedule of every document in respect of which legal professional privilege is claimed in these proceedings"*). It does not appear to me that the details in this further schedule are other than the applicable legal principles require.

- 31st January 2023 – the motion currently under consideration issues.

SUBMISSIONS OF THE PARTIES

14. The Plaintiff disputes that privilege arises in respect of the documentation under consideration based upon the nature of the relationship between the Defendant and the lawyers representing it. It is argued that the employment/quasi-in house situation which arises should negative the attribution of privilege. She further asserts that the crime/fraud exception arises and that this case comes within the category of case in which the exception ought to be applied and that she satisfies the necessary proofs in this regard namely that she has clearly stated the impropriety arising and that she has adduce evidence in this regard which reaches the required standard of proof being that there is some prima facie evidence in support of the case being made. She asserts that the standard of proof required is somewhat lower according to the Irish authorities than that which is contained within the English authorities.

15. The Defendant asserts that legal professional privilege arises and that the nature of the relationship between the Defendant's lawyers and the Defendant does not preclude this. The Defendant asserts that the importance of legal professional privilege has long been supported by judicial authority, that it is a fundamental principle of law and that something weighty and significant is required to displace it. The Defendant

acknowledges that there are exceptions to this privilege and acknowledges that the crime/fraud exception is one such exception but asserts that the Plaintiff's case falls far short of the required standard, in that she has failed both to clearly set out her claim in respect of the necessary moral turpitude which claim must be expressed beyond a generality and also to adduce prima facie evidence in support of this claim.

LEGAL PRINCIPLES APPLICABLE

<u>How should documents in respect of which privilege is claimed be dealt with in an Affidavit of Discovery?</u>

16. In **Ryanair Ltd v Channel 4 Television Corporation** [2017] IEHC 651, Meehan J considers this at Paragraphs 34-37:

> "*34 The issue as to the adequacy of the description of the documentation over which privilege is being claimed is difficult to resolve. The party claiming privilege does not want to give such a detailed description as to set the privilege claimed at nought whereas the opposing party wants as much information as it can get from the description of the documentation. In resolving this, the court was referred to a number of authorities. In Bula Limited v. Tara Mines Limited (No.4) [1991] 1 I.R. 217, Walsh J. stated at p.218: -*
>
> > *'The format suggested by the plaintiffs in their claim appears to me to be in effect what the Rules of Court require. Unless documents are identified and properly indicated no particular claim of privilege should be made about anything. One must know what the claim of privilege is...'*
>
> *35 This passage was cited with approval by Finlay C.J. in Bula Limited (In Receivership) v. Crowley [1991] 1 I.R. 221 at p.222.*
>
> *36 In Keating v. RTE [2013] IESC 22, McKechnie J. stated at p. 23: -*
>
> > *'43. Accordingly, the normal Rules of Court apply which means that all relevant documents must be listed in Part Two of the First Schedule, if privilege is sought in respect of them. Having done that, the nature both*

of the asserted privilege and of the document the subject thereof, must be sufficiently particularised so as to permit the court to evaluate the claim...'

37 Finally, in IBRC v. Quinn [2015] IECA 84, Mahon J. stated: -

'48. Firstly, in respect of every document, its date should be identified. It is not clear from the spread sheets that the dates referenced to each documents necessarily identifies the date of the document itself as opposed to the date upon which it was either inputted or accessed within the computer programme being used for the disclosure process. Secondly, in respect of correspondence, it is insufficient to, for example, refer to "letter" as the narrative relied upon to demonstrate that the document is privileged. A meaningful narrative requires that at least some generic category of correspondent be identified. For example, "letter from junior counsel to the defendant's solicitor", or 'letter from one of the personal defendants to their solicitor' is at a minimum required.'"

17. In the present case, notwithstanding the number of Affidavits filed in respect of discovery, the required standard was not achieved until the Affidavit of Mr. Tuohy of the 6th June 2023 (ref. Exhibit "CT3" in that Affidavit).

<u>What legal professionals may claim legal professional privilege and in respect of what communications may it be claimed?</u>

18. This is considered by Reynolds J. in **Director of Corporate Enforcement v. Cumann Peile na hEireann** [2022] IEHC 593 at paragraphs 21 and 22:

"21. Firstly, the communication must be between solicitor and client although this can be extended to include an agent of the client where such agent is appointed for the purposes of obtaining legal advice from the lawyer on the client's behalf.

22. Secondly, the solicitor must be acting in a professional capacity. In Bramwell v. Lucas (1824) 2 B & C 745, at 749, Abbott C.J. stated:

> *"Whereas the privilege extends to all confidential communications between attorney and client or not there is no doubt that it is confined to communications, and to communications to the attorney in this character as attorney.""*

19. The onus of proving that a document is one to which privilege attaches rests with the party making such a claim, in this instance the Defendant. The Plaintiff questioned that privilege attached to the documents herein on the basis that the solicitor representing the Defendant was an in house solicitor and that legal professional privilege did not attach to communications between an in house solicitor and their employer. In this regard, she referenced the decision of the CJEU in **Akzo Nobel Chemicals and Akcros v. European Commission** Case C-550/07. The **Akzo** decision occurred in a very particular context (investigations by the European Commission in relation to competition law) and the Court therein was clear in this regard and acknowledged that the rules relating to legal professional privilege may vary in different circumstances. The CJEU acknowledged a distinction between applicable rules in the context of the Commission and national competition authorities. Importantly, (at paragraph 113), the Court stated:

> *"It must be recalled that, in accordance with the principle of national procedural autonomy, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law ...."*.

20. I do not consider that it is necessary herein to address this issue at length as it is clear that Bank of Ireland Group Legal Services is a law firm operating as such which firm would appear to have been on record for the Defendant from the outset until in or about 2019 when Kane Tuohy LLP, the solicitors currently on record for the Defendant, came on record. In these circumstances, legal professional privilege clearly arises in respect of communications between Bank of Ireland Group Legal Services and the

professionals working within it and the Defendant. It is, however, useful to have regard to the Practice Note of the Law Society of Ireland (Guidance and Ethics, In-House and Public Sector 03/07/2020) which succinctly sets out the legal position in Ireland in this regard:

> *"In-house counsel as 'Professionally Qualified Lawyer'*
>
> *1) Irish law does not draw any distinction between in-house legal counsel and external legal counsel for the purposes of the application of the law of legal professional privilege (LPP). The High Court recently confirmed their qualifying status in this jurisdiction, noting that "the definition of 'lawyer' for this purpose includes solicitors, barristers, salaried in-house legal advisers, foreign lawyers and the Attorney General" (McMahon v Irish Aviation Authority [2016] IEHC 221, at paragraphs 16-17).*
> *2) The origin of the principle, which applies to in-house counsel practising in both the private and public sector, may be found in the decision of the Supreme Court in Geraghty v Minister for Local Government [1975] IR 300 (at page 312), in which Griffin J. approved of the decision reached by the English Court of Appeal in Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2) [1972] 2 QB 102, in which it was held that "there can be no difference between the position of a full-time salaried legal adviser employed by a government department, a local authority, an industrial concern or any single employer, and the position of a legal adviser who practises his profession independently and is rewarded for his services by fees".*
>
> *3) Therefore, the guidance contained in the practice note on the subject of 'Legal Professional Privilege' applies with equal force to in-house counsel insofar as they constitute professionally qualified lawyers under Irish law."*

In what circumstances may the crime/fraud exception be invoked?

21. The Plaintiff herein asserts that the privilege attaching to the documents in the Schedule of Privileged Documents should be lifted to permit inspection thereof and that this

should occur based upon the application to the crime/fraud exception. In the same way as the onus of proving privilege is on the Defendant, the onus of proving the exception rests with the Plaintiff.

The crime/fraud exception:

22. This was considered by the Supreme Court in **Murphy v Kirwan** [1993] 3 IR 501 with Finlay CJ making it clear that the exception goes beyond situations of criminality. He cited with approval the dictum of Kekewich J. in **Williams v. Quebrada Land and Copper Company Limited** [1895] 2 Ch. 751:

> *"On the other hand, where there is anything of an underhand nature or approaching fraud, especially in commercial matters where there should be verist good faith, the whole transaction should be ripped up and disclose in all its nakedness to the light of the court."*

23. In that case it was claimed that a charge had been entered into by a company while insolvent in order to defeat the holders of floating debentures. The dictum of Goff J. in the case of **The Crescent Farm (Sidcup) v Stirling Offices Limited** [1972] Ch. 553, involving a claim for interference with contract and conspiracy, was also cited with approval:

> *"I agree that fraud in this connection is not limited to the tort of deceit, and includes all forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances."*

24. The judgment further states that the exception was considered and applied in the context of conspiracy by former employees breaching their duty of fidelity and confidence to a company in **Gamlen Chemcial Company (UK) v. Rochem Limited and Others** [1983] RPC 1.

25. Having considered these applications of the exception in circumstances less draconian than criminality, Finlay CJ stated:

"I am satisfied that these extensions of the application of the exemption flow logically and consistently from the principle laid down in Cox's case for the real reason for the introduction of the exemption in the first place, and that the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct, even though it may not be fraud.

Nothing could be more injurious to the administration of justice nor to the interests of justice than that a person should falsely and maliciously bring an action and should abuse for an ulterior or improper purpose the processes of the Court."

26. The extent of the exception was further considered by Macken J. in **McMullen v. Kennedy** [2008] IESC 69 in which she stated:

"The exemption was restricted to conduct which contained an element of fraud, dishonesty or moral turpitude. Here the allegation on its face is clearly a very serious one indeed, made against an officer of the court and allegedly constituting an attempt to persuade a counsel to give evidence, in order to "buy off" a possible or likely claim against that very counsel, falling into the category of moral turpitude, if it were true. It would in my view be injurious to the interest of justice to permit legal professional privilege to be applied in such circumstances, so as to prevent proper disclosure. That said, however, it is only in such unusual circumstances that I am prepared to make an exceptional order, which in ordering course could not be made, having regard to the importance attaching to the principle of legal professional privilege."

<u>The timing of the advice:</u>

27. The Defendant herein has referenced the fact that all of the Schedule One Second Part documents herein post-date the commencement of proceedings. The significance of the timing of the legal advice concerned was considered in **Barclays Bank Plc v. Eustice** [1995] 1 WLR 1238, albeit in a somewhat different context to the present as

the court was there considering whether the dominant purpose of the legal advice concerned was its use in contemplated proceedings. Schiemann LJ referenced the:

> *"... two conflicting desiderata in the background. (1) Discovery of every relevant document is desirable to help the court decide what happened and why. The right answer is more likely to be arrived at by the court if it is in possession of all relevant material. (2) It is desirable that persons should be able to go to their legal advisers knowing that they can talk frankly and receive professional advice knowing that what each party has said to the other will not be revealed to third parties."*

He continued:

> *"..., the court would be reluctant – it is not presently necessary to decide the point – to force a legal adviser to give evidence or produce documents as to what a client had said when seeking advice as to how to respond to a criminal change which had been preferred against him. That, normally at any rate, would be unjustifiably to invade that defendant's rights to silence and would be against the public interest to which Bingham LJ referred in the passage I have cited."*

However, he concluded:

> *"... to me the most important consideration is that we are here engaged not in some semantic exercise to see what adjective most appropriately covers the debtor's course of conduct but in deciding whether public policy requires that the documents in question are left uninspected."*

<u>Invoking the exception:</u>

28. What standard of proof is required in order to invoke the crime-fraud exemption? Finlay CJ in **Murphy v Kirwan** referenced "sufficient evidence of a plausible or viable case to support his claim". He stated:

> *"Quite clearly, in my view, in order for a party to an action to be entitled to discovery, notwithstanding a claim for professional privilege of legal advisers' communications, it cannot be necessary, ..., that he should have to prove as a matter of probability or in accordance with the onus of proof necessary for the*

total hearing of his action, the allegation he makes, for otherwise an order for discovery necessary for the fair trial of the action would become an impossibility. What is required, in my view, is that the allegations he makes should be supported to an extent that they are, in the view of the Court, viable and plausible."

29. The issue of the standard of proof was also addressed by Egan J.:

> *"The rule does not apply merely because fraud is alleged in the action. There must be some prima facie evidence that the allegation has a foundation in fact."*

30. In **Director of Corporate Enforcement v. Cumann Peile na hEireann** [2021] IEHC 651, Reynolds J. stated at Paragraph 58:

> *"It is evident that in determining whether legal professional privilege should be case aside on the basis of the crime/fraud exception, there must be some prima facie evidence that the allegation "has a foundation in fact". Beyond that, it would appear that each case must be judged on its own facts (Derby and Co. v. Weldon (No. 7) [1991] WLR 1156."*

31. In **Gamlen Chemical Co. (UK) Limited v. Rochem Ltd** [1983] RPC 1, Goff LJ also referenced *prima facie* proof.

32. The requisite standard of proof was not addressed by the majority in **McMullen v. Kennedy** [2008] IESC 69 where the exception was applied but it is noteworthy that Fennelly J.'s dissent was based upon the fact that, in his view, the appellant had not produced any evidence to support his underlying contention.

33. Perhaps the most comprehensive statement of the evidential standards required for the invocation of the exception is to be found in the judgment of Viscount Finlay in **O'Rourke v. Darbishire** [1920] AC 581:

> *"This is clear law, and, if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid*

of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of truth to make it right to disallow the privilege of professional communications."

34. It is clear that there are two elements involved in the proofs necessary to establish the exception. The clear and succinct statement of the circumstances of moral turpitude asserted as arising and prima facie proof of same. The Defendant in this regard referred me specifically to **London Borough of Brent v. Kane** [2014] EWHC 4564 (Ch) as regards the first requirement and in particular to Paragraphs 43 and 44 of the Judgment of Deputy Judge Monty QC which, in turn, refers to **O'Rourke v Darbishire** and the dictum of Viscount Finley referenced at Paragraph 33 above, requiring a statement in clear and definite terms. In relation to the second requirement, the Defendant referred me to **Barrowfen Properties v. Patel** [2020] EWHC 2536 (Ch) and, in particular, Paragraphs 36 and 37 of the Judgment of Tom Leech QC as to the standard of proof. This decision refers to a "strong prima facie case".

35. Having regard to all of the authorities, it appears that a clear and definite statement of the grounds upon which the exception is invoked is required together with prima facie evidence in support of this.

Application of the exception:

36. The manner in which the exception should be applied was considered by Macken J. in **McMullen v. Kennedy** [2008] IESC 69. Having referenced a number of authorities on the matter, she stated:

> *"…, I am of the view that the correct approach is for the court, having inspected the documents in question, to review their contents and to come to a decision as to whether or not they include any relevant material which should be disclosed. If any of them fall into that category, of course, it will be necessary then to consider the appropriate steps to be taken at that stage so as to permit Kent Carty and Co., in whom the privilege may vest, to be heard. Having regard to the approach I adopt; it is in my view premature to consider that firms position until the court has reviewed the documents in question."*

<u>The relevance of the state of knowledge of the lawyers involved:</u>

37. There has been much focus in the Affidavits filed herein on the behaviour and attitudes of lawyers involved in this case on behalf of the Respondent. I have found this focus to be a considerable distraction. The issue arising herein is whether, based upon the allegations being made by the Plaintiff in her pleadings and the evidence adduced, albeit at a preliminary stage, whether the crime/fraud exception arises and ought to be applied, having regard to the requirements of the administration of justice. The relevance of the role of lawyers concerned is succinctly addressed in Abrahamson and Others, '*Discovery and Disclosure'* (2019, 3rd Edn) at Paragraph 40-107:

> *"In order for the crime-fraud exception to apply, the lawyer need not be aware that the client intends to use his or her advice for a criminal or fraudulent purpose. In R v. Cox, for example, the court found that the defendants' communications with their solicitor were for the purpose of committing a criminal offence, namely conspiracy to defraud their business partner. It was held that such communications were not privileged, notwithstanding that "the conduct of … the solicitor, appears to have been unobjectionable. He was consulted in the common course of business and gave a proper opinion in good faith."*

FACTUAL BASIS FOR PRESENT APPLICATION

38. This application is grounded upon the Affidavit of the Plaintiff sworn on the 31st day of January 2023. This is an affidavit which considers many aspects of the within litigation and not only the matters raised in this motion. The Plaintiff also makes reference to an earlier Affidavit sworn by her. In Paragraph 8 of the Grounding Affidavit (31st January 2023), the Plaintiff avers: *"To concise and compress matters, avoid repetition and to comprehensively address matters and update the court I filed an affidavit date 14 October 2022."* This Affidavit was also referred to by the Plaintiff in both her oral and written submissions to me. Of particular relevance to this application are the following paragraphs of the grounding Affidavit:
    1. Paragraph 7 references the Plaintiff's Notice to Admit Documents and the letter from the solicitors for the Defendant of the 1st February 2022 in relation thereto. The Plaintiff avers *"Mr. Tuohy also notes that his client admits the fact of the documents in the Notice to Admit Documents but without any admission as to their relevance or admissibility."* It should be noted that this averment is made in the context of matters arising relating to discovery by the Plaintiff, a matter which is not pertinent to the present application.
    2. In support of the within application, the Plaintiff (at Paragraph 12 of the Affidavit aforementioned) seeks to rely upon Paragraphs 12, 24, 25, 32, 54 and 75 (the cross-referenced paragraphs) of her Affidavit of the 14th October 2022. Paragraph 12 further avers to spoliation which the Plaintiff asserts has occurred. These are matters which were extensively considered by the Court of Appeal in the judgment of Collins J. referenced above, albeit without the benefit of the Plaintiff's subsequent affidavits (in this regard, I would refer, in particular, to Paragraph 77 of the Judgment of Collins J.). I do not believe that it is necessary or appropriate that I would re-open these matters in the within application.
    3. The cross-referenced paragraphs have been fully considered.
        (a) Paragraph 12 – this paragraph recites Paragraphs 61 – 74 of the Judgement of Collins J. considering the legal principles applicable to the preservation of documents in the context of envisaged or commenced litigation;
        (b) Paragraph 24 – this refers to the *dictum* in the judgement of Collins J. referencing the absence of a litigation hold being put in place by the Defendant. The Plaintiff avers to this as a *"culpable failure"* having regard to the factual

background to this case, described by the Plaintiff as "a major financial fraud". However, as referenced above, this was a matter addressed by the Court of Appeal in its judgment and determined not to attract such a degree of blameworthiness.

(c) Paragraph 25 – this paragraph is directed at the alleged discovery failures of the Defendant. These are matters which the Court of Appeal has addressed. At this point I believe it appropriate to state that the Court of Appeal did not direct Ms. Kelly, solicitor, to swear an Affidavit as the Plaintiff avers. The Order of the Court of Appeal states that Ms. Kelly should do so if "available". The Defendant, in accordance with the Order, filed an Affidavit sworn by Irene Gleeson, a solicitor of long standing in the legal department of the Defendant. It is to be assumed, as the Court of Appeal judgment envisages, this Deponent is available for cross-examination, if required. It is obviously also open to the Plaintiff to call such witnesses at the substantive hearing as she deems necessary and appropriate. It is for the trial judge to determine the manner in which any such witness or their evidence is to be treated at trial. The Plaintiff avers *"Adverse inferences should be drawn from Ms. Kelly's unavailability. The court must determine that her absence is wilful and deliberate. The option to summon Ms. Kelly as a material witness has now been removed. The prospect of potentially impeaching the credibility of this deponent before the court is now gone and all is expected to be excused without sufficient explanation being provided by the Defendant."* I do not believe that this averment accurately reflects the position which arises. I do not believe that adverse inferences may be drawn *simpliciter* from Ms. Kelly's unavailability in circumstances in which the Order of the Court of Appeal envisaged that this might arise and made provision if it did. No evidence was adduced to me which indicated that Ms. Kelly could not be called as a witness if the Plaintiff so desired. It would, of course, have been preferable had the Affidavit filed in compliance with the Order of the Court of Appeal deposed to the circumstances of an alternate deponent being required.

(d) Paragraph 32 – this references the change in the Deponent for the Affidavits of Discovery from Mr. Colin Kingston for the first Affidavit to Mr. David Coleman thereafter. There would not appear to be any evidential basis for the averments relating to Ms. Kelly's role and, indeed, motivation in this regard. There is no

evidential basis for stating that Mr. Kingston requested to be substituted and this averment contradicts that relating to Ms. Kelly (one states that Mr. Kelly sought to have Mr. Kingston "replaced and relieved" while the later averment states that this was based upon Mr. Kingston's "request"). In the Composite Affidavit sworn by David Coleman, at Paragraph 4 thereof, he deposes that Mr Kingston is no longer employed by the Defendant. Additionally, whatever the motivation or reason, clearly this does not impact upon the entitlement to cross-examine Mr. Kingston on the affidavit sworn by him nor upon the entitlement of the Plaintiff to call such witnesses at hearing as she wishes. I cannot conclude that there are negative inferences to be made from the change in deponent.

(e) Paragraph 54 – the Plaintiff avers that she informed key senior personnel within the Defendant organisation of the financial irregularities within the Foreign Exchange Bureau in Dublin Airport. She avers *"Concealment and denial of a financial fraud against the DAA, a semi state body, has arisen. No investigation or enquiry has been undertaken by the Defendant. The loss and destruction of records has been admitted to. Spoliation has occurred."* I find this averment to be most relevant in the context of the present application.

(f) In Paragraph 75 the Plaintiff references spoilation and avers that this *"was a deliberate act to conceal material facts"*. It should be stated that this would appear to be entirely at odds with the determinations of the Court of Appeal at the appeal hearing in respect of the motions referenced above. The Plaintiff references the delays which have occurred in the discovery process and the evidence which has been destroyed and the failure to preserve such evidence. Once again, these are matters which have been fully and comprehensively addressed by the Court of Appeal.

(g) In her submissions to me, the Plaintiff further made reference to Paragraphs 21, 22 and 23 of the Affidavit of the 14th October 2022. I am of the view that these averments are of particular significance herein and I therefore recite them herein:

> *"**Stor System Inspection and Double Accounting System.***
>
> *21. I say that I am in a position to confirm to the court that from my observations of the Stor System Data I am able to positively identify that credit entries on the Buy Back Forde Electronic Machine represent sales*

of foreign currency. I say a specifically dedicated Forde Electronic Currency machine was exclusively set aside for all Buy Back currency transactions and kept at the rear of the cash box. Buy Back was a special facility that offered our customers an opportunity to return their surplus unused currency at the original exchange rate and without commission. Uniquely this machine should therefore only include debit entries which represent purchases i.e.. the Buy Back of the foreign currency. An inspection of the Stor System has confirmed that credit entries i.e.. sales of currency, are also attributed to this buy back machine. I say that this inspection provides irrefutable proof to verify and corroborate the existence of the duplicate accounting system.

22. On examination of the narrative on the Stor System Data as provided by the Defendant the initial B/B appears. From my first-hand knowledge and experience I can immediately recognise the relate entries as deriving from the buy back machine. I was able to verify an actual sales transaction by calling up a PICN number and a copy/screen shot of that actual entry was shown to me. I can confirm conclusively and with full certainty to the satisfaction of this court that some sales entries are recorded separately and are traceable to the secondary accounting system which operated at Dublin Airport.

23. On further examination of the Stor System Data as provided by the Defendant I am in a position to identify and clarify the following accounts:

Foreign Note Sales Account Shift A-	*99940755*
Foreign Note Sales Account Shift B-	*99944035*
Foreign Note Sales Account Shift C-	*99940675*
Foreign Note Sales Account Reserve-	*99947973*

While admittedly the Stor System is not analogous to the Bank Accounts, and it lacks daily opening and closing balances, it nonetheless represents all of trading entries on a daily basis. While this raw data is posted in batch format and not in real time it still constitutes historical

data of evidential value. All of this data is within the defendant's possession and within their own peculiar knowledge. I say that if proper due diligence was exercised and enquires made by the appropriate individuals at relevant levels of responsibilities within the Defendant company, even at this late stage, an internal audit and forensic examination of the Stor System should uncover the irregularity and duplicity to defraud their landlord, Dublin Airport Authority.'

39. I was also provided with a copy of the Order of the Court of Appeal of the 29th June 2021. Included therein was the following direction:

> *"IT IS DIRECTED that the data from the Stor System be retained by the Defendant and, on request, made available for inspection by or on behalf of Plaintiff, subject to any reasonable conditions that the Bank consider appropriate."*

40. It is clear that the Plaintiff did avail of such inspection and, furthermore, a printout from the Stor System was exhibited in the Second Supplemental Affidavit of Discovery of David Coleman of the 1st October 2019. I was also provided with a booklet entitled "Book", the title page of which had the name of the Defendant's solicitors as a heading. I am unclear as to the provenance of this Book and its contents. It was referenced by the Plaintiff in her submissions and it would appear from the averments in the Affidavit of the Plaintiff of the 14th October 2023 that these are screenshots of actual entries shown to the Plaintiff obtained through cross-referencing with a PIC number. In terms of the PIC Numbers attaching to the documents in the Book, cross-referencing with the Stor System print out did demonstrate an overlap of the accounts documented in the Book and those in the Stor System. The documents in the Book, elicited it would appear from the Stor System and the inspection thereof subsequent to the Judgment of the Court of Appeal, did tend to support the averments of the Plaintiff at Paragraphs 21 to 23 of her Affidavit of the 14th October 2023.

41. The Defendant's reply to the within motion is contained in the Replying Affidavit of Comhnall Tuohy sworn on the 6th June 2023. The bulk of this Affidavit is directed at

the Deponent taking issue with averments made by the Plaintiff in relation to legal professionals who have been involved in the litigation. At paragraph 7 of this Affidavit, it is averred that there is *"no basis whatsoever for suggesting that such a coverup of fraud, dishonesty and/or wrongdoing has taken place*". It avers that the Plaintiff has advanced *"no basis for suggesting that a coverup has, in fact, happened or that the crime fraud exception is engaged"*. It is averred that the Plaintiff's allegation is advanced *"in a wild, non-specific and wholly unsubstantiated fashion".*

42. A schedule of documents over which legal professional privilege is being claimed has been provided. It is remarkable that seven years after the terms of Discovery to be made by the Defendant herein was ordered (which Order was made by consent) and with four Affidavits of Discovery having been made, I am being asked to consider yet further efforts to properly complete the discovery process. It is difficult not to reflect with perplexity upon Paragraph 16 of the Affidavit of Mr. Tuohy of the 6th June 2023 in this context. I note that all of the documents over which legal professional privilege is now claimed post-date the commencement of the litigation.[2] As is unremarkable given the longevity of the within proceedings, the Schedule of Privileged Documents is extensive. Mr Tuohy avers that the allegations which the Plaintiff makes against the legal professionals involved in the case on behalf of the Defendant are *"baseless and harmful suggestions"* and that no *prima facie* case for the reliefs sought has been established and that, in addition, such matters have been considered by the Court of Appeal in the context of the motions referenced above and have been *"rightly"* rejected in refusing the application to strike out the Defendant's Defence. However, it must be remembered that the Court of Appeal was being asked to determine was whether the manner in which discovery had been addressed by the Defendant was such as to meet the high standard required as established in the judgment of Baker J. in **Go2Capeverde Limited v Paradise Beach Aldemento Turistico** [2014] IEHC 531. An entirely different application is being considered by me.

[2] It is, yet again, unsatisfactory that, at Paragraph 17 of the Affidavit of Comhnall Tuohy, it is stated that it had been established that one further document which had been designated as being privileged in the Composite (4th) Affidavit of Discovery had been incorrectly so designated. This was a document pre-dating the litigation and the Affidavit avers that a copy of such document was provided to the Plaintiff.

CONCLUSIONS:

43. Having fully considered the pleadings, affidavits and written and oral submissions of the parties herein I have determined that:
    a. The Defendant has proved that the documents in the Schedule of Privileged Documents referenced and exhibited at "CT3" in the Affidavit of Comhnall Tuohy of the 6th June 2023 are documents to which legal professional privilege attaches.
    b. The present case comes within the category of cases in which the crime/fraud exception is engaged. The Plaintiff contends that the termination of her employment was linked to duplicitous practices which she was obliged to be engaged in the context of her work. This is denied by the Defendant and therefore is a matter significantly at issue in these proceedings. This is in a similar category of case (albeit with a reversal of employer/employee roles) as in **Gamlen Chemcial Company (UK) v. Rochem Limited and Others** [1983] RPC 1. It is my view that the principles set out in **Murphy v. Kirwan** are engaged. The proceedings involve circumstances of *"moral turpitude or of dishonest conduct even though it may not be fraud"* such that the application of legal professional privilege may be *"injurious to the administration of justice"*.
    c. There is *prima facie* evidence which has been adduced by the Plaintiff as detailed by me at Paragraph 40 above that the proceedings herein involve circumstances of "moral turpitude" such that it would be injurious to the interests of justice and to those in the administration of justice not to invoke the well-established exception to the privilege referenced at subparagraph (a) above. Additionally, the Plaintiff has made such allegation in clear and definite terms. She has done so in her Amended Summons, in her Replies to Particulars and in her Affidavit of the 14th October 2022. In so determining, I wish to be clear that I am in no manner focussing on the less than helpful allegations and counter allegations made in relation to legal professionals and/or the Plaintiff herein. While the trajectory of discovery herein has been sub-optimal, my focus is on the case being advanced by the Plaintiff in her pleadings herein and the evidence (admittedly at a *prima facie* level only) derived from the Stor System and the inspection thereof by the Plaintiff (by direction of the Court of Appeal Order of the 29th June 2021) and the averments of the Plaintiff in this regard.

d. While the documents listed in the Schedule of Privileged Documents are all post-proceedings, this does not preclude the application of the crime/fraud exception. I have been significantly persuaded in this regard by the very late emergence of information through the Stor system which information would appear to have been further supplemented in the context of inspection by the Plaintiff consequent upon the direction of the Court of Appeal.

e. In accordance with the judgment of Macken J. in **McMullen v. Kennedy**, I will inspect the documents in question, review their contents and come to a decision as to whether or not they include any relevant material which should be disclosed.

f. This litigation requires to be progressed and finalised. This was strongly canvassed by Senior Counsel for the Defendant at the conclusion of his oral submissions and I entirely agree with him. With this in mind, I will list this matter on the 15th April 2024 at 11.15 am in respect of any issues arising from this judgment.

g. Subject to any issues which may arise, I direct that the documents in question should be furnished to me within 14 days of the 15th April 2024 and I would propose a decision thereon no later than the 29th May 2024 but a more accurate timeline will not be possible until the documentation has been provided.