

Investigatory privilege confirmed by Commercial Court

The Commercial Court delivered judgment in the case of Quinn -v- Irish Bank Resolution Corporation Limited and Kieran Wallace¹ on 19 May 2015, confirming that the scope of litigation privilege extends not only to documents created for the dominant purpose of anticipated litigation, but also to documents created in contemplation of a criminal or regulatory investigation.



¹ [2015] IEHC 315

This case concerned an application for further and better discovery; the defendants asserted privilege over a number of disputed documents and sought to establish that the dominant purpose for the creation of the documents was the contemplation of further litigation or for the purpose of two investigations, one by the Financial Regulator and one by the Director of Corporate Enforcement.

Previous case law has confirmed that privilege can be claimed by a person whose conduct is under examination by a tribunal of inquiry, on the basis that although such a tribunal may not be involved in the administration of justice, it does have an adjudicatory function and any report it may produce has the potential to have serious and damaging effects for the persons called before it. In the case of *Ahern -v- Mahon*², the plaintiff was held to be entitled to claim litigation privilege in respect of communications between him and his legal advisers and experts retained by him for the purposes of the inquiry proceedings. As a person whose conduct was under examination by the tribunal of inquiry, the plaintiff was held to be entitled to certain fundamental constitutional rights, including the right to one's good name, the right to fair procedures and the right to natural and constitutional justice.

“Judge McGovern in the Quinn judgment accepted the first defendant’s submission that it was entitled to assert investigatory privilege or regulatory privilege in respect of any documents created for the dominant purpose of engaging with the regulatory and investigative processes in question.”

Judge McGovern in the Quinn judgment accepted the first defendant’s submission that it was entitled to assert investigatory privilege or regulatory privilege in respect of any documents created for the dominant purpose of engaging with the regulatory and investigative processes in question. Judge McGovern cautioned that the privilege did not extend to all documents created after the date on which the defendant became aware of the investigations, but only those documents created for the dominant purpose of engaging with those investigation processes.

The logic behind the application of privilege is the principle that a person must be able to consult his lawyer in confidence and be sure that what he tells his lawyer in confidence will never be revealed without his consent. It has been described as “much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests”³. This judgment provides further clarity on the scope of documents that will attract privilege in the context of inquiries and investigations, and clearly establishes the principle of investigatory/regulatory privilege.

For further information, please contact your usual Eversheds contact or:



Seána Glennon
Solicitor

+353 1 6644 947
SeánaGlennon@eversheds.ie

² [2008] IEHC 119

³ Lord Taylor in *R. v. Derby Magistrates Court Ex parte B* [1996] 1 A.C. 487, cited with approval in *Duncan v. Governor of Mountjoy Prison* [1997] 1 I.R. 558