

THE HIGH COURT

[2021] IEHC 324
[2017 No. 1171 S]

BETWEEN

ULSTER BANK IRELAND DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

DERMOT BRENNAN

DEFENDANT

RULING of Ms. Justice Creedon on a preliminary issue on privilege delivered on the 16th day of April, 2021

1. This preliminary issue came before the Court by way of Notice of Motion on behalf of the defendant for a determination by way of a preliminary issue in relation to the plaintiff's claim of privilege over an email dated 22nd of October 2019 from the solicitors on record for the plaintiff to Link ASI Ltd.. This preliminary issue related to the substantive proceedings which is the plaintiff's motion for summary judgment against the defendant.
2. The defendant opened the application before the Court by outlining the background to the application, and then opened to the court the affidavit of Mr. Stephen O'Connor, solicitor, who acts for the defendants in the within proceedings dated the 1st day of March 2021.
3. Mr. Stephen O'Connor averred *inter alia* that one of the issues that had been raised by the defendant in the affidavits sworn by him in opposing the plaintiff's motion for summary judgment relates to the role of Promontoria (Aran) Ltd. ("PAL") in giving instructions and directing enforcement in relation to its loans and related securities. The defendant further averred that the plaintiff asserts that there has been no formal assignment of the loans and securities by the plaintiff to PAL, that PAL have acquired a beneficial interest only and that the plaintiff remains the legal owner and contracting party in respect of the loans and related security.
4. Mr. O'Connor averred further that the defendant contended that if that is so, then PAL has no legal or contractual entitlement to direct or instruct any action or enforcement against the defendant and that any action or enforcement that has been taken against the defendant on the instructions or at the direction of PAL including for example, the issuing of demand letters, is unlawful and in breach of contract.
5. Mr. O'Connor avers further that on the 21st October 2020 the solicitors on record for the plaintiff sent a folder of documentation to his office for the purposes of the application for a hearing date on the following day. He avers that the folder contained behind Tab C a number of items of "without prejudice" correspondence between an agent of the defendant and Link ASI Ltd, who the plaintiff describes as its servicer. He avers that the documentation behind Tab C also included emails between the solicitors on record for the plaintiff and Link Asset Services, one of which was dated the 22nd October 2019.
6. He avers further that it is in relation to that email of the 22nd October 2019 that the defendant now seeks a determination of this honourable court in relation to privilege. That email is exhibited to his affidavit.

7. Mr. O' Connor went on to aver that following receipt of the folder of documents his office wrote to the solicitors on record for the plaintiff expressing their concern at the inclusion of the without prejudice communications and related without prejudice documentation between the plaintiff's advisor and Link ASI Ltd. He averred that by email and response, the solicitors on record for the plaintiff apologised and requested that he remove section C from the folder and indicated that a copy of the folder had not been provided to the court.
8. Subsequently, the plaintiff filed a further affidavit sworn by Mr Stephen McKeever of Link ASI Ltd. on the 8th of December, 2020, to which he referred which included the following averments at paras. 35 and 36 under the heading "The position of PAL".

"As at the date of the swearing of this affidavit the position remains as outlined in my second affidavit. In particular, it remains the case that (a) no assignment of the legal interest in the loans to PAL has been agreed or affected (b) the legal interest in the loans continues to be held by the plaintiff and (c) the decisions in relation to the enforcement of the loans are ultimately taken by the plaintiff. In this regard I believe and am advised that there is nothing improper with the plaintiff consulting with PAL in its capacity as the entity holding the beneficial interest in the loans, in relation to decisions concerning the enforcement of the loans. In particular I believe and am advised by the solicitors for the plaintiff that any such engagement between the plaintiff and PAL does not have the effect of assigning the legal interest in the loans to PAL or otherwise disturbing the contractual relationships between the plaintiff and the defendant".

9. Mr. O' Connor further averred that by letter dated the 15th of February 2021 his office wrote to the solicitors on record for the plaintiff seeking an explanation for the apparent contradiction between the contents of the email of the 22nd October 2019 and the evidence adduced by the plaintiff on affidavit. He avers that by letter dated the 16th February 2021 the solicitors on record for the plaintiff inter alia asserted privilege over the email of the 22nd of October 2019 and that further correspondence was exchanged on the 18th February and 24th February 2021 ultimately leading to this application to have the question of privilege determined by the court as a preliminary issue.
10. Mr. O'Connor averred that the email of the 22nd of October 2019 is relevant to a central issue in the plaintiff's application for summary judgment that is currently before the court and it is not a document in respect of which privilege can be claimed.
11. The defendant also opened the affidavit of Ms Sinead Power, solicitor and partner in the firm of Mason Hayes and Curran, the firm acting for the plaintiff in the above entitled proceedings which she makes for the purposes of resisting the application of the defendant and by way of reply to the affidavit of Mr. Stephen O'Connor.
12. She averred *inter alia* that the folder of documentation behind Tab C was in fact intended to be a booklet of papers for use by the High Court but the booklet inadvertently included a Section C. She averred that Section C had originally formed part of a brief to counsel

and would never have formed part of a booklet of papers for court containing as it did communications which are subject variously to "without prejudice" privilege and legal professional privilege. She averred that it is apparent from the solicitors for the defendants' letter dated the 21st October 2020 that that firm reviewed the documentation in Section C on receipt as they noted it contained "without prejudice communications and related without prejudice documentation".

13. She averred further that the matter rested there until the 15th of February 2021 nearly four months later, when her firm received a letter from the plaintiff's solicitors seeking to place reliance upon the contents of the email. She said the email had been contained within the aforementioned Section C which was inadvertently disclosed and is now the subject of this application.
14. She further averred that the plaintiff's position can be summarised as follows:-
 - (a) The email was sent by a former partner of her office to an employee of the Link ASI Ltd., a firm which was providing loan management services in respect of the loans forming the subject matter of the proceedings;
 - (b) The email was sent;
 - (i) In the context of and for the exclusive purpose of active litigation specifically these proceedings.
 - (ii) As part of a larger email thread between Link ASI Ltd. and her firm; and
 - (iii) With the clear dominant purpose of providing legal advice during the course of active litigation specifically these proceedings.
15. She went on to aver that it was clear from the correspondence exhibited to the affidavit of Mr. O'Connor that on receipt of the documents within Section C the solicitors for the defendant realised that (a) their disclosure had been inadvertent and (b) that they were the subject of without prejudice and/or legal professional privilege. She averred that even were it the case that the solicitors for the defendant had not alighted upon these points, she believes and is advised that any qualified solicitor receiving the documents at issue would have done so and that she believes and is advised by counsel that in the circumstances at issue the documents contained within Section C remain privileged in their entirety and that there is no basis in fact or in law upon which their disclosure should be ordered by the High Court.
16. The defendant opened a further affidavit of Mr. John O'Leary dated the 11th March 2021 who is a former partner in the firm representing the plaintiff and who sent the email the subject matter of this application of the 22nd October 2019 in which he avers *inter alia* that as of the date on which the email was sent Link ASI Ltd. had been engaged to provide certain loan management services in relation to the loans forming the subject matter of the proceedings and that as of that date he was a partner in the firm representing the plaintiff.
17. He averred that the email was sent: -

- (a) In the context of and for the exclusive purpose of active litigation specifically these proceedings.
 - (b) As part of a larger email thread between Mr. Tracey and his former firm.
 - (c) With the clear dominant purpose of providing legal advice during the course of active litigation specifically these proceedings.
18. He expressed his own personal and professional disappointment and surprise that the solicitors for the defendant would attempt to introduce into evidence a communication which he believes and is advised by counsel is clearly privileged. He also expressed surprise that the solicitors for the defendant have attempted to adopt their current position having regard to the specific terms of the email which apart from being patently privileged also contains sensitive information about a member of the Law Library.
19. He went on to aver that at the time at which the email was sent, the position was that the plaintiff held the legal interest in the loans forming the subject matter of the proceedings while Promontoria Aran Ltd. held the beneficial interest and that he believes and is advised that this remains the position. He averred that the use of a colloquial shorthand expression in a privileged communication does not alter these fundamental facts. He avers that the email remains privileged and that there is no basis in fact or in law upon which its disclosure should be ordered by the High Court.
20. The defendant at hearing argued that the question of whether the identity of the solicitor's client can be the subject of a claim to legal professional privilege was considered by the High Court in the decision of *Miley v. Flood* [2001] 2 IR 50 by Kelly J. The defendant argued that in his judgment, Kelly J. undertook a comprehensive analysis of the relevant case law from most major common law jurisdictions and concluded that the solicitor applicant in the case before him was not entitled as a matter of Irish law to maintain a claim of privilege over the identity of persons who provided him with his instructions.
21. In that case, the applicant's solicitor appeared as a witness before the Planning Tribunal of which the respondent was the sole member. The respondent made an order seeking information from the applicant regarding the identity of parties who were suspected of being beneficial owners and/or principals of a company under investigation by the Tribunal for whom the applicant had acted as solicitor. The applicant refused to comply with the order and claimed that the matter of client identity was covered by legal professional privilege and the parties in question had refused to waive same. The respondent ruled that legal professional privilege did not apply and directed the applicant to furnish the information. The applicant brought judicial review proceedings seeking to quash the respondent's ruling which proceedings were heard by Kelly J.
22. The defendant drew the Court's attention to a number of extracts from this judgment. Firstly, the court's attention was drawn to p. 73 of Kelly J.'s judgment where he

considered the English case of *in re: Cathcart Ex parte Campbell* (1870) L.R. 5 Ch App. 703 where he quoted p. 705 of James LJ's judgment where he said: -

"What a solicitor is privileged from disclosing is that which is communicated to him sub sigillo confessionis -that is to say, some fact which the client communicates to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance; the principle being, that such communications ought to be privileged, because otherwise a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. But a solicitor's knowledge of his client's residence, even though he knows it simply in consequence of the professional business in which he has been acting for him, is not on that ground alone a matter of confession, so as to be in the nature of a privileged or confidential communication...The client's place of residence in such a case is a mere collateral fact, which the solicitor knows without anything like professional confidence;"

23. Kelly J. stated that if a client's residence is a mere collateral fact, then it seems to him that a client's identity cannot be anything other than a collateral fact and in that regard quoted from the case of *Bursill v. Tanner* [1885] 16 QBD 1 at p. 5 where Cotton L.J. said: -

"It is not everything that solicitors learn in the course of their dealings with clients that is privileged from disclosure. This matter was much discussed in the case of Lyell-v-Kennedy 23 Ch. D. 387. The privilege extends only to confidential communications. It is not necessary for me to go through all the cases that have been decided on the question of what constitutes a confidential communication. In my opinion, the names of the trustees did not constitute such a communication. The mere fact who the trustees are cannot be said to be a matter communicated to the solicitor confidentially for the purpose of obtaining his professional advice, or at any rate, it is highly improbable that it should be so. There is also another ground for compelling the disclosure of their names. The solicitor claims this privilege as that of his client. He must then state the names of persons for whom he claims the privilege".

24. In his judgment, Kelly J. observed that this decision makes it clear that the name of the client will never be communicated for the purposes of obtaining the solicitor's advice save in the truly exceptional circumstance in which the client is seeking to determine whether he will seek advice from the solicitor.
25. The defendant went on to open further in the judgment of *Miley v. Flood* the Australian authority considered by Kelly J. of *R. v. Bell; Ex - parte Lees* [1980] 146 C.L.R 141 where Gibbons J. explained at p. 144 the general principle applicable in that jurisdiction as follows: -

"It is a well settled principle, based on public policy, that communications made confidentially between a client and his legal advisor for the purpose of obtaining or giving legal advice or assistance are privileged from disclosure"

26. Kelly J. noted this and the judgment of Stephen J. in the same case where he said at p. 155: -

"Where, as here, it is a client's address for which privilege is claimed special considerations may sometimes arise. In a number of cases it has been said that the identity of a client is not something to which the privilege applies, and this because the litigant is entitled to know who in truth is his opponent, "who is the real defendant"."

27. The court was also referred to a further part of Kelly J.'s judgment where he considered the Australian case of *Federal Commissioner of Taxation v. Coombs* [1999] F.C.A 842 where the court stated: -

"Privilege attaches to communications, and not to facts which a lawyer observes while acting in the course of a retainer. Privilege does not attach to everything a client says to the lawyer, but only to communications made by the client for the purpose of obtaining the lawyers professional assistance.

It does not attach to "mere collateral facts". The address and identity of a client will usually be "collateral facts.

*Privilege attaches to communications only if they are confidential. In almost all cases the clients name and address will not have been communicated confidentially
...*

As a general rule, the identity of a client will not be privileged as the privilege belongs to the client, and the retainer between the lawyer and the client must be demonstrated in order to establish the privilege. This requires disclosure of the client's identity.

Disclosure of the client's identity is necessary before the privilege could arise even if the client's name was given in confidence, and it was a condition of the lawyer's retainer that the clients identity be kept confidential. The client cannot by contract extend the area of privilege".

28. Kelly J. in his judgment also considered some Canadian authorities which were opened to this Court. The first authority referred to was *Re United States of America v. Mammoth Oil Company* (1925) 2DLR 966, and the statement from the judgment of Hodgkins J.A. where he said at p. 970: -

"As to the name of the client, I am quite unable to see that a solicitor and his client can make that confidential which is not so in fact. The appellant admits that his client was known to him before he was consulted by him. That client's name,

therefore, was a fact of which he acquired knowledge before professional relations began and not as a part thereof. The solicitor and client cannot make a convention by which what is already known to the solicitor will form part of the confidential matters between them, if in fact that is not so. To permit this would extend the privilege far beyond what has hitherto been recognised in our Courts".

29. In *Ontario Securities Commission v. Greymac Credit Corporation* [1983] 146 DLR (3d) 73, the Ontario High Court stated at p. 84: -

"The general rule is that whenever a solicitor asserts that a communication is protected by the solicitor and client privilege, he cannot refuse to identify the client on whose behalf the privilege is asserted, because the identity of his client is not the subject of professional confidence... A solicitor cannot withhold as privileged the name of a client on whose behalf he receives, pays, or holds money if the identity of the person paying, receiving, or holding such money becomes relevant in legal proceedings".

30. In his conclusion, Kelly J. stated that having considered all of the authorities that he had come to the conclusion that the applicant is not entitled as a matter of Irish law to maintain a claim of privilege over the identity of persons who provided him with his instructions on behalf of the company. He said any such claim of privilege would be inconsistent with the views of the Supreme Court in *Smurfit Paribas Bank Ltd. v. AAB Export Finance Ltd.* (No. 1) [1990] 1 IR 469, which he said were binding on him. He noted that a dilution of this general principle arises where: -

- (a) The naming of the client would incriminate;
- (b) Where the identity is so bound up with the nature of the advice sought that to reveal the client's identity would be in fact to reveal that advice.

31. The defendant argued that those circumstances do not arise in the present case.

32. The defendant argued that the email does not in fact record any communication or information from the client to the solicitor but rather it is the solicitor who communicates the identity of the client to a third party, being Link ASI Ltd. The defendant says that it has not been contended that the solicitor in this case became aware of his client's identity in circumstances of confidentiality.

33. Further, the defendant argued that when the defendant's solicitors wrote seeking an explanation for the apparent contradiction between the contents of the email of the 22nd October 2019 and certain averments in the affidavit evidence submitted on behalf of the plaintiff in the summary judgment application rather than providing an explanation the solicitors on record for the plaintiff asserted privilege over the email.

34. The defendant said that the plaintiff sought to rely in this regard on the decision of the High Court in *Tir na nOg Projects Ireland Ltd. v. Kerry County Council* [2008] IEHC 48 which sets out the test to be applied to determine whether privilege has been waived in

circumstances of mistaken or inadvertent disclosure. The defendant said that it is not disputing that the disclosure of the document was mistaken and inadvertent but submitted that reliance on that authority is misconceived in circumstances where as is clear from *Miley v. Flood*, that the contents of the email are neither privileged or confidential and as such the issue of whether privilege is lost or waived by reason of its inadvertent or mistaken disclosure does not arise for consideration.

35. Addressing the fact that the email is part of a chain of correspondence, the defendant says that the fact that the email was printed as part of a chain does not mean that the email cannot be considered separately from the other emails in that chain. They argue that it is a separate item of correspondence and is not an attachment to any of the other emails and as such that it is possible for the court to rule that this email is not privileged without disturbing or affecting any claim to privilege that might exist in respect of any other documents that were contained in the same section of the folder.
36. Finally, the defendant reminded the Court that this application is being brought within the context of a motion for summary judgment and as such the defendant does not have available the remedies and procedural steps that might otherwise be available in plenary proceedings. The defendant confirmed that the option of discovery is not available in order to seek other documents which might indicate an involvement of PAL in instructing enforcement against him and that similarly it is not open to the defendant in summary proceedings to subpoena a witness to establish the identity of the client. In that regard, the defendant said that it has proceeded appropriately and reasonably and that in the context of summary proceedings the defendant's only option was to seek an explanation in correspondence. The defendant said that it has not received such an explanation but has instead been met with a claim of privilege which the defendant submitted is untenable and that in those circumstances the defendant has had no choice but to ask the Court to determine the question of privilege as a preliminary issue.

Plaintiff's reply

37. The plaintiff opened its reply by asserting that the application is fundamentally misconceived for two reasons, namely: -
 - (1) That there has been a misconception of legal professional privilege by the defendant.
 - (2) That even if the defendant were successful in this application it wouldn't progress the defendant's case.
38. Turning to the issue of privilege, the plaintiff asserted that it is claiming litigation privilege rather than legal advice privilege and that the facts of *Miley v. Flood* are distinguishable and do not assist the defendant. The plaintiff argued that that case dealt with an investigative tribunal of inquiry where an order requiring the identification of a client was made and the identity of that client became a collateral fact. The plaintiff says that this case is concerned with an adversarial proceeding where no order has been made against the plaintiff to supply any information and that privilege is being claimed over a document

which is not a collateral fact. That document was prepared in contemplation of litigation. In those circumstances the plaintiff argues that this case does not assist the defendant.

39. The plaintiff turns to para. 5 of the defendant's submissions, which state as follows: -

"The only information contained in the email is the identity of the client and the identity of counsel. While the defendant is only concerned with the former, it is submitted that neither of these pieces of factual information is confidential or privileged. As such, there is no basis on which privilege can be claimed in respect of the document".

40. The plaintiff argued that the email does not merely contain the identity of counsel but concerns the selection process of counsel. The plaintiff put before the court, a hypothetical example of a similar email where it might be indicated in the body of the email that one counsel was being selected over the other on the basis of competence. The plaintiff argues that the selection of counsel is a tactical decision and that in those circumstances would attract privilege. The plaintiff argued that the email before the Court is similarly concerned with a tactical decision taken in the course of litigation and as such attracts privilege.

41. Turning to the plaintiff's second point, that if successful this application would not progress the defendant's case, the plaintiff said that the reason for opposition to this application is on grounds of principle that nobody should be allowed to capitalise on innocent mistakes made by solicitors. The plaintiff referred to para. 9 of Mr. John O'Leary's affidavit where he avers *inter alia* that at the time at which the email was sent the position was that the plaintiff held the legal interest in the loans forming the subject matter of the proceedings while Promontoria Aran Ltd. held the beneficial interest therein and the plaintiff argued that there is nothing wrong with this structure and that the authorities established beyond doubt that in a case such as this where one party holds the legal interest and another party holds the beneficial interest, it is the party who holds the legal interest who should take the proceedings.

42. In that regard the plaintiff opened the case of *Pepper Finance v. Windmill*, a High Court decision of Binchy J. and in particular, para. 16 and 17 of that judgment which references *inter alia* the case of *Wellstead v. Judge Michael White and Featherstonehaugh* [2011] IEHC 438 in which Peart J. held in a passage approved by subsequent authorities, as follows: -

"But there is another obstacle which faces the applicant, and which he has not addressed, and it is that there is nothing unusual or mysterious about a securitisation scheme. It happens all the time so that a bank can give itself added liquidity. It is typical of such securitisation schemes that the original lender will retain under the scheme, by agreement with the transferee, the obligation to enforce the security and account to the transferee in due course upon recovery from the mortgagors".

43. In his conclusion at para. 30 of that judgment, Binchy J. stated *inter alia*: -

"Windmill has very deliberately structured its arrangements with the plaintiff so as to enable the plaintiff to receive repayments from the defendants, and to take such enforcement proceedings arising from non-repayment of the debt as the plaintiff considers appropriate. More importantly, both the plaintiff and Windmill have chosen not to give notice of the assignment or securitisation of the debt to the defendants. This is knowledge that they have gleaned from other sources. Although the decisions of the courts in this jurisdiction as regards the effects of securitisation of debt, to which I have referred above, do not enter upon a consideration as to the rights and entitlements of an assignor and an assignee of a chose in action, they give effect to the manner in which the securitisation was intended to operate by the parties thereto which, it must be said, is in no way prejudicial to the rights of the borrowers. Furthermore, unless borrowers are specifically put on notice of such an assignment I consider that the risk that a borrower could be subjected to more than one suit in respect of the same debt is more illusory than real and I do not believe that the courts would countenance such a proposition. For all of these reasons, I consider that the plaintiff was not obliged either to join Windmill to the proceedings or to declare its status as trustee of Windmill in the proceedings".

44. The plaintiff then referred back to p. 4 of the defendant's submissions where it is stated: -

"In short the defendant contends that it is Promontoria Aran Ltd. (PAL) and not the plaintiff that is in fact giving instructions and directing enforcement in relation to the defendant's loans and related securities. The plaintiff asserts that there has been no formal assignment of the loans and securities by the plaintiff to PAL, that PAL has acquired a beneficial interest only and that the plaintiff remains the legal owner and contracting party in respect of the loans and related security. The defendant contends that if that is so, then PAL has no legal or contractual entitlement to direct or instruct any action or enforcement against the defendant and that any action or enforcement that has been taken against the defendant on the instructions or at the direction of PAL including the issuing of demand letters and the institution of these proceedings is unlawful and in breach of contract".

45. The plaintiff argued that there is no basis for the proposition that this would amount to breach of contract and in that regard returns again to the case of *Pepper Finance Corporation Ireland DAC v. Jenkins* and the judgment of Binchy J. in particular para. 28 where he refers to the judgment of Pennycuik LJ in the case of *Warner Bros. Records Inc. v. Rollgreen Ltd.* [1976] QB 430 where he said at p. 445: -

"Where there is a contract between A and B, and A makes an equitable but not a legal assignment of the benefit of that contract to C, this equitable assignment does not put C into a contractual relation with B, and, consequently, C is not in a position to exercise directly against B any right conferred by the contract on A. The equitable assignment may be converted into a legal assignment by notice to B: ...

but, so long as the assignment remains equitable only, C has no more than a right in equity to require A to protect the interest which A has assigned....”

46. Finally, the plaintiff outlined to the Court the sequence of events which led to this motion and argued that this motion has been brought for tactical reasons to delay matters and to obfuscate the issues and invites the court to refuse the application.

Defendant’s final reply

47. In his final reply to the plaintiff’s arguments the defendant states as follows: -

- (1) While the plaintiff argued that there is no controversy as to who his client is and that it is entirely plain the defendant says that the email contradicts what is said in the affidavit evidence and that there is a complete lack of clarity as to who the client is in these substantive proceedings.
- (2) With regard to the argument that the defendant has raised a sensitive matter re: a colleague in the Law Library, the defendant asserts that the plaintiff has made reference to matters in this oral hearing that were not referred to in the email or by the defendant and that argument is refuted.
- (3) The defendant asserted the fact that it is for the party asserting the privilege to establish it and that the plaintiff has not done this. The defendant said that while the plaintiff has addressed some of the substantive issues through the case of Wellstead what is before the Court is an issue of privilege and the defendant asserted that this has not been adequately addressed by the defendant.

48. With regard to the issue of delay the defendant said that it opposed the hearing date as only two affidavits had been exchanged and they have not deployed this document to delay proceedings. Further, that in the context of summary judgment proceedings the defendant has limited options and in this regard the case of *Miley v. Flood* is clear and does not draw a distinction between different types of legal professional privilege.

Discussion and decision

49. This is a motion seeking a determination by way of preliminary issue the plaintiff’s claim of privilege over an email dated the 22nd of October 2019 from the solicitors on record for the plaintiff to Link ASI Ltd

50. It arises in the context of substantive summary judgment proceedings.

51. The email in question is from Mr. John O’Leary, solicitor for the plaintiff, to Mr. Thomas Tracey, an employee of Link ASI Ltd., who were appointed by the plaintiff to manage its loan portfolio, it is dated the 22nd of October 2019. It states as follows: -

”Tomás,

Just following up on Aobhinn’s email.

Separately PAL's barrister in this case has informed us that he has to take a short leave of absence for a number of months from work and has asked that we instruct another barrister. We propose instructing Stephen Byrne who has confirmed he has capacity. Can you please confirm that we can instruct Stephen today?

Kind regards,

John".

52. The defendant seeks disclosure of this email alone and no other document, and disputed the plaintiff's claim of privilege over it.
53. The defendant asserted that this email suggests that Promontoria Aran Ltd. is in fact the client in these proceedings which the defendant said is centrally relevant to one of the issues that has been raised by way of defence in the affidavits sworn by the defendant in relation to the substantive summary judgment application. The defendant said that the email suggests that Promontoria Aran Ltd. is in fact giving instructions and directing enforcement in relation to the defendant's loans and related securities and in circumstances where the plaintiff asserts that there has been no formal assignment of the loans and securities by the plaintiff to PAL. They said that if PAL has acquired a beneficial interest only and that the plaintiff remains the legal owner and contracting party in respect of the loans and related security, then PAL has no legal or contractual entitlement to direct or instruct any action or enforcement against the defendant. They said that any action or enforcement that has been taken against the defendant on the instructions of or at the direction of PAL, including the issue of demand letters and the institution of these proceedings, is unlawful and in breach of contract.
54. The case of *Miley v. Flood* [2001] 2 IR 50 remains the seminal High Court decision on the question of whether the identity of a solicitor's client can be the subject of a claim to legal professional privilege. That decision has been referred to extensively earlier in this ruling and the court will not traverse those references again here.
55. The plaintiff sought to distinguish the case of *Miley v. Flood* both on its facts and on its scope. It was argued that the facts of that case, dealing as it did with a tribunal of investigation in which there was an order of that tribunal to disclose such information distinguished it from the present case and further that what was at issue in *Miley v. Flood* was legal advice privilege and not litigation privilege and for that reason could be distinguished from the present case.
56. The Court is satisfied that what was under consideration by the court in *Miley v. Flood* was the concept of legal professional privilege, and while ultimately the decision was made based on the facts of that particular case it is clear that the court in that case fully considered all general legal principles, the full scope of legal professional privilege as it relates to client identity privilege and did not confine its consideration of that issue as it applies to tribunals of investigation only. Further, no distinction was made by that court as between documents generated in in contemplation of litigation and legal advice

privilege, and accordingly the court is satisfied that the principles and findings set out in *Miley v. Flood* are applicable to the present case.

57. In that regard, the Court notes the long line of cases considered by the Court in that case from a variety of common law jurisdictions as quoted above, and in particular the conclusion of Kelly J. when he stated at p.80 as follows: -

"Having considered all of these authorities, I have come to the conclusion that the applicant is not entitled as a matter of Irish law to maintain a claim of privilege over the identity of persons who provided him with his instructions on behalf of the company. Any such claim of privilege would be inconsistent with the views of the Supreme Court in the Smurfit Paribas Bank Ltd. v. AAB Expert Finance Ltd (no. 1) [1990] 1 IR 469 case which he found were binding on the court".

58. He stated further at p.81: -

"A dilution of this general principle arises where (a) the naming of the client would incriminate or (b) where the identity of the client is so bound up with the nature of the advice sought, that to reveal the client's identity would be in fact to reveal that advice".

59. The plaintiff in this case has not argued that he comes within either of those categories such that a dilution of this general principle would be warranted.
60. The facts and parameters of the substantive issue were not opened before this Court. It was contended by the plaintiff however in referring to the case of *Pepper Finance Corporation Ireland DAC v. Jenkins* that there is nothing unusual about securitisation schemes and that such schemes are in no way prejudicial to borrowers. On this basis they argue that no benefit can derive from the defendant's success in this application.
61. The issue which is before this court for determination by way of a preliminary issue is in relation to the plaintiff's claim of privilege over an email dated 22nd of October 2019 from the solicitors on record for the plaintiff to Link ASI Ltd..
62. The defendant has averred and confirmed that they entered into correspondence with the plaintiff seeking an explanation as to the identity of the client in this case, but were met with a claim for privilege. In those circumstances, the defendants have not been furnished with an explanation or with any information as to the nature of the relationship between Ulster Bank and PAL other than the averment by Mr. McKeever which is at odds with the contents of the email.
63. The Court is satisfied that the email that is the subject matter of this application, is a standalone document which can be considered by the Court in isolation of the thread of emails in which it is found. The Court is further satisfied that the email raises a question as to the identity of the client in this case.

64. The Court is satisfied that in accordance with the authority of *Miley v. Flood* that the information contained in the email is what is termed as a collateral fact and is in the nature of information passing for the purposes of securing legal assistance and is not a communication made for the purposes of obtaining legal advice during the course of active litigation. This aligns with the finding of Kelly J. that Irish law does not recognise the concept of client identity privilege as the question of a client's identity is nothing more than a collateral fact and not relevant in general to the matter of legal advice being sought.
65. The chronology of events does not substantiate the claim that this application is brought in order to obfuscate true issues or for the purposes only of delay, and it is clear that the plaintiff had the opportunity to respond to the defendant's correspondence in a manner which would have avoided the necessity of this application.
66. The Court is further conscious of the confined nature of summary judgment proceedings and accepts the defendant's arguments that it proceeded appropriately and reasonably and that in the context of summary proceedings the defendant's only option was to seek an explanation in correspondence.
67. The Court therefore determines the preliminary issue by finding that the email does not attract legal professional privilege and is discoverable.
68. The defendant's costs in respect of this application should be reserved to the hearing of the action.