Neutral Citation No. [2011] NIQB 103 | *Ref:* **WEA8306**

Judgment: approved by the Court for handing down | *Delivered:* **16/9/2011**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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JAMES McKEE

Plaintiff;

-v-

PRUDENTIAL ASSURANCE COMPANY LIMITED

Defendant.

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WEATHERUP J

[1] By Writ of Summons issued on 8 February 2010 the plaintiff claimed damages against the defendant insurance company for loss sustained by the plaintiff by reason of the breach of a contract of insurance by the defendant arising from the non payment of a claim in respect of a break in at the plaintiff's house on 28 May 2006 and the loss of contents of his house to the value of some £30,000. Mr Wolfe appeared for the plaintiff and Mr Humphries for the defendant.

[2] This is an application by the plaintiff for discovery of documents. The plaintiff seeks all documentation passing between the defendant and Cunningham and Lindsay, a firm of Loss Adjusters retained by the defendant to investigate the plaintiff's insurance claim, "being documents relating to the subject matter of the plaintiff's insurance claim to include letters of instruction, suggested lines of enquiry or questions, answers given or conclusions reached, updates and reports and relevant correspondence." The defendant in response claims litigation privilege.

[3] By its Defence the defendant relied on certain conditions in the insurance policy. Condition 5 required the insured to provide reasonable evidence of value or age for all items involved in a claim and required the insured to tell the police

immediately of any loss, theft or malicious damage. Section 8 required the insured not to make false claims and if a claim was made knowing it to be false or exaggerated in any way or if the insured deliberately caused loss or damage the insurer would not pay the claim and would cancel the policy.

[4] On 20 June 2006 the plaintiff received a letter from the defendant indicating that Cunningham Lindsay had been instructed to contact the plaintiff to deal with the claim on the defendant's behalf. The letter also stated that the defendant reserved any rights to avoid the policy or to take any action from the date of the claim or from any other date. Cunningham and Lindsay visited the plaintiff's home on 29 June 2006 and by letter dated 5 July 2006 indicated that they were proceeding with enquiries to validate the information provided by the plaintiff and awaited further information to assist proof of loss. Further correspondence followed and on 24 October 2006 Cunningham and Lindsay were confirming that they had now reported to insurers in relation to the matter. The cover of that report stated – "This report is prepared in strict confidence for consideration by you and your legal advisers in anticipation of litigation".

[5] There was further correspondence and on 27 November 2006 it was stated by Cunningham and Lindsay that anomalies had arisen during the course of their enquiries and that the insurers had asked that certain inconsistencies be explained and that further information was required. The correspondence continued and a letter of claim was sent by solicitors on behalf of the plaintiff on 24 August 2007. Eventually a letter of offer was made to the plaintiff on behalf of the defendant on 31 October 2008 in the sum of £9,000. Discussions continued and this Writ of Summons of 8 February 2010 was issued.

[6] An affidavit filed by James Turner, a partner in O'Reilly Stewart, solicitors for the defendant, states that he was instructed and believes that Cunningham and Lindsay were engaged by the defendant as specialist investigators in cases where an insurance claim was one in which the defendant suspected that there was 'leakage', (which seems to be an insurance word for there being reasons to make further enquiries) or an over inflation of the amount of the claim being made. It is stated that it is very often the case that after these types of claims are fully investigated the claim will be refused and very often thereafter the claimant will seek to issue legal proceedings. Accordingly the affidavit asserts that it is with that background and experience in mind that the defendant, when instructing Cunningham and Lindsay, does so in anticipation of the claim ultimately ending in litigation, as has occurred in this action.

[7] The plaintiff objects to this claim for litigation privilege on the basis that it is not stated that, in this particular case, litigation was reasonably anticipated and further that there is no evidence of the dominant purpose in generating the documents produced by Cunningham and Lindsay and further that it is not stated that the documents were provided to solicitors for advice. On the other hand the

defendant emphasises its reliance on litigation privilege rather than legal advice privilege and refers to the White Book (1999) at paragraph 24/5/16 and the proposition that a document brought into existence, where the dominant purpose is the use of the contents in the conduct of litigation in reasonable prospect, is privileged.

[8] In Andrews v Northern Ireland Railways [1992] NI 1 the plaintiff suffered serious personal injuries when she fell out of the open door of the defendant's railway carriage as it was approaching Holywood station. Five days later the defendant forwarded to its insurers two reports of the accident compiled by the conductor and the driver of the train. Four months later the plaintiff sent a letter of claim to the defendant and then issued proceedings claiming damages. Carswell J held that the two reports from the conductor and the driver of the train were covered by legal professional privilege and should not be disclosed. It was the defendant's case that from the time of the accident it was extremely likely that a claim would be made and litigation would follow so that the insurers needed to have the information contained in the two documents as soon as possible to allow them to commence their enquiries when the evidence was fresh. Counsel for the defendant submitted accordingly that this was not only the dominant but the sole purpose of sending the documents to the brokers. The plaintiff on the other hand submitted that the privilege had not ripened because the decision had not been taken at the time of preparation of the documents to refer the matter to solicitors for their advice or to instruct them to defend any proceedings.

[9] Carswell J reviewed the authorities and stated –

> "There is ample authority for the proposition that if litigation is in reasonable prospect documents brought into existence for the purposes of obtaining legal advice or in connection with the conduct of such litigation are privileged. In my opinion it is not in principle necessary for the possessor of the document who advances the claim to privilege to establish that the document is designed for the immediate purpose of obtaining legal advice whether to defend the expected claim. Nor it is a necessary condition for the attraction of the privilege that the communication must be directly made between the prospective defendant and his legal advisers. It is sufficient if its purpose is to report the accident to insurers, where it is probable that litigation will ensue, in order to allow them to assess the strength of the case of the insured and to advance their investigations, with the object of preparing to arrange for the conduct of the defence of the insured if the anticipated litigation materialises."

[10] The issue was then assessed in terms of a reasonable prospect of litigation or of probable litigation. In Three Rivers District Council v Bank of England [2004] UKHL 48 Lord Carswell reviewed the authorities on litigation privilege and concluded at paragraph 102 that –

> "…. communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
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> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial."

[11] Cunningham and Lindsay were instructed by the defendant to examine the plaintiff's claim and both liability and quantum were in issue. Notice was given to the plaintiff that liability under the policy was in question and the nature of the enquiries referred to in the correspondence confirms that liability was in question.

[12] There is nothing in the present case to suggest that the purpose of producing the reports was other than to examine the liability of the defendant under the policy. I am satisfied that the dominant purpose of generating the documents was for the examination of the plaintiff's claim. Was litigation then a reasonable prospect? If the Cunningham and Lindsay report had rejected the plaintiff's claim or a substantial part of the claim then it seems to me that litigation was likely. I am satisfied that when liability under the policy was in question with the appointment of Cunningham and Lindsay and they produced their report on the plaintiff's claim, litigation was reasonably anticipated. The documents sought have the benefit of litigation privilege. Therefore the plaintiff is not entitled to discovery of the documents specified in the Summons.

[13] The report from Cunningham and Lindsay purported to state that the document was privileged but that cannot be sufficient to establish the privilege. It is necessary to apply the test for litigation privilege and not rely on whether the party producing the document claims the privilege.

[14] The plaintiff's application for discovery of the Cunningham and Lindsay documents is dismissed.