

Dispute Resolution

Litigation Privilege and Post Incident Reports

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The issue of whether correspondence and internal investigations or reports, that pre-date the commencement of legal proceedings, can benefit from litigation privilege has been clarified by a recent High Court decision of *Rhatigan v Eagle Star Life Assurance Company of Ireland Ltd* [2013].

This decision makes it clear that post-incident reports that are drafted not merely to investigate an incident, but with a view to defending any litigation that may arise from the incident, will benefit from litigation privilege even in circumstances where they pre-date the issue of any letter of claim.

Litigation Privilege

In the normal course of litigation, any document relating to the issues in dispute between the parties is open to capture by an Order for Discovery and thus disclosure to the opposing party may be required. However, if privilege is asserted over such a document, disclosure can be refused.

A document can be protected by two categories of privilege: legal advice privilege or litigation privilege. While legal advice privilege will usually only attach to documents drafted by or for a lawyer, litigation privilege can protect documents irrespective of their author - provided that the document came into existence for the dominant purpose of being used in aid of pending or contemplated litigation. It is into this latter category that many post incident reports may fall.

The Facts of the Case

This application concerned correspondence between an insurance company and its re-insurers relating to the repudiation of a life assurance policy on the grounds of misrepresentation and non-disclosure of material facts.

The Plaintiff claimed that such documents could not benefit from litigation privilege because they were created before any such litigation could be contemplated.

The Defendant gave evidence that the documents were created in contemplation of litigation irrespective of the fact that such litigation had not yet commenced. It asserted that litigation was contemplated from the point at which its staff became aware of the insured's poor prognosis because of his apparent good health less than three months earlier at the inception of the policy.

Case Law

This judgment quotes with approval the Supreme Court decision in *Fyffes v. DCC* [2005] in which it was observed that the principle of litigation privilege requires "that a litigant must be in a position to communicate freely ... not only in the preparation of the case, but in the assessment as to whether there is any case to be made."

Decision

The Court upheld the Defendant's claim to privilege over these documents accepting that the investigation of possible grounds for repudiation of a contract will be bound with an assessment of the company's ability to defend such repudiation in the event of litigation.

For further information on this topic please contact Suzann Dundon, Solicitor, or any member of the Dispute Resolution team, E: lawyer@efc.ie